that the fee of the residue of Mr Rattray's estate vested in his daughter and his grandchildren at the death of the testator's widow in the proportions specified; that being so, and if your Lordships agree with me, it follows that the first, second, fifth, and sixth questions will be answered in the affirmative, and then I think it will be unnecessary to answer the third and fourth questions, which are put upon the hypothesis that there is no fee given.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court answered the first, second, fifth, and sixth questions in the affirmative.

Counsel for the First Parties—D. Anderson. Counsel for the Second and Third Parties—A. M. Anderson. Agents for all Parties—Macpherson & Mackay, S.S.C.

Friday, February 3.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

STILL'S TRUSTEES *v.* HALL.

Succession—Division per capita or per stirpes—"Nephews and Nieces."

A testator directed his trustees to pay the liferent of the residue of his trust-estate to his widow, and on her death to convey and make over one-half of the residue "to and in favour of my nephews and nieces, Mrs Catherine Stewart Morison or Sinclair, Alexander Simpson, Peter or Patrick Simpson (a niece and two nephews), the children of the now deceased William Simpson (a nephew), the children of the also now deceased Charles Still Simpson (a nephew), Major Simon Simpson, Captain James Simpson, George Simpson, Catherine Stewart Simpson or Matheson (nephews and niece), James Oughterson (only) son of the deceased Charlotte Still Simpson or Oughterson (a niece), Alan Matheson (only) son of the deceased Rachel Ellinor Simpson or Matheson (a niece), and Helen Anne Simpson or Stewart (a niece), and to the lawful issue of such of my said nephews and nieces as may have died leaving lawful issue, their deceased parent's share equally among them, and failing any of my said nephews and nieces without leaving lawful issue, to the survivors of them equally, whom also failing, to their nearest lawful heirs whomsoever."

The testator died survived by the liferentrix and all the beneficiaries called by him. Between his death and the death of the liferentrix three of the beneficiaries died, viz., Peter or Patrick Simpson, without leaving issue, and James Simpson and Mrs Stewart, who both left issue.

On the death of the liferentrix, *held* (1) (*rev.* judgment of Lord Ordinary) that the words of the primary clause imported a division *per stirpes* among nephews and nieces who had survived the liferentrix and the issue of those who had predeceased, and (2) that the share which would have fallen to Peter or Patrick Simpson if he had survived the liferentrix fell to be divided *per stirpes* among the nephews and nieces of the testator and those grand-nephews and grandnieces named or instituted as primary legatees in the settlement who had survived the liferentrix.

Charles Stewart Still, of Burgar and Smoogrow, died on 11th April 1879, leaving a trust-disposition and settlement dated 30th May 1878, in which he left his whole estates, heritable and moveable, to trustees for, *inter alia*, the following purposes:—Secondly, that his wife Mrs Anne Thomson Low, otherwise Still, should have the liferent of his whole estate; "Thirdly, that on the decease of my said spouse should she survive me, or on my own decease should she predecease me, the said whole remainder of my estates, heritable and moveable, real and personal, shall be divided into two equal parts," the one of which should be conveyed to certain persons, "and the other of which two equal parts shall be conveyed and made over . . . to and in favour of my nephews and nieces, Mrs Catherine Stewart Morison or Sinclair, residing at Durban, Natal, the said Alexander Simpson, advocate and Procurator-Fiscal of Aberdeenshire, Peter or Patrick Simpson, master mariner, the children of the now deceased William Simpson, New Zealand, the children of the also now deceased Charles Still Simpson, engineer in the East Indies, the said Major Simon Simpson, Royal Artillery, Captain James Simpson, Royal Engineers, George Simpson, sheep farmer in New Zealand, Catherine Stewart Simpson or Matheson, wife of Reverend John Matheson of the Presbyterian Church, Hampstead, James Oughterson, lieutenant, Eighteenth Royal Irish Regiment, son of deceased Charlotte Still Simpson or Oughterson, Alan Matheson, son of deceased Rachael Ellinor Simpson or Matheson, and Helen Anne Simpson or Stewart, wife of Dr Robert Stewart, Glasslough, Ireland, and to the lawful issue of such of my said nephews and nieces as may have died leaving lawful issue their deceased parent's share equally among them, and failing any of my said nephews and nieces without leaving lawful issue, to the survivors of them equally, whom also failing, to their nearest lawful heirs whomsoever." James Oughterson and Alan Matheson were both only children of their respective parents.

With reference to the second equal part or share of the residue, the truster was survived by his wife Mrs Anne Thomson Low or Still, the liferentrix, and by all the beneficiaries named by him.

Between the date of the testator's death and the date of the death of Mrs Still, the liferentrix, three of the beneficiaries died, viz., Peter or Patrick Still Simpson, who

had no issue, James Simpson, who left two children, and Mrs Helen Anne Simpson or Stewart, who was survived by a large family.

On Mrs Still's death a question arose with reference to the persons entitled to a share of the second part of the residue destined to Peter or Patrick Still Simpson.

For the settlement of this question an action of multiplepoinding and exoneration was brought by Harvey Hall, assignee of Alexander Simpson, in the name of the trustees of Charles Stewart Still, the testator, against the survivors of the beneficiaries named in Mr Still's trust-disposition and the legal representatives or heirs of those who had since died.

Claims were lodged on behalf of (1) Mrs Sinclair, (2) the assignee of Alexander Simpson, (3) George Simpson, (4) Mrs Matheson, and (5) Colonel Simon Simpson. These claimants contended that the fund *in medio* should be divided into five shares, and that one share should be given to Mrs Sinclair, Alexander Simpson, Simon Simpson, George Simpson, and Mrs Matheson, the presently surviving nephews and nieces of the truster named in the settlement, to the exclusion of the children of those nephews and nieces who predeceased either the liferentrix or the testator.

Claims were also lodged on behalf of Helen Simpson, the only surviving child of William Simpson, Major James Oughterson, and the Reverend Alan Matheson. These claimants contended that they were entitled to a share in the distribution of the fund *in medio* along with the surviving nephews and nieces of the testator, and that the fund *in medio* should be divided into nine shares, and that one share should be given to each of Mrs Sinclair, Alexander Simpson, the surviving child of William Simpson, the children of Charles S. Simpson, Simon Simpson, George Simpson, Mrs Matheson, James Oughterson, and Alan Matheson.

A claim was also lodged for the children of the late Captain James Simpson, in which they maintained that they were entitled to such part of the fund *in medio* as would have fallen to their parent had he survived and claimed in the present competition.

On 24th August 1898 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that the fund *in medio* consists of the share of residue left by the truster to his nephew Patrick Still Simpson, in the event of the said Patrick Still Simpson surviving the truster's widow: Finds that the said Patrick Still Simpson predeceased the said widow without issue, and that, in terms of a clause of devolution contained in the settlement, his share falls to be divided as a devolved share among the survivors of the persons described in the settlement as the truster's nephews and nieces: Finds that, upon the just construction of the settlement and of the said clause of devolution, the expression 'nephews and nieces' includes not only the primary legatees named in the settlement, who were nephews and nieces proper of the truster, but also the other primary legatees named or described in the settlement, who were his grandnephews or grandnieces: Finds in particular that the said expression covers the claimants Alan Matheson and James Charles Oughterson, who are grand-nephews of the truster, and are named in the settlement, and take each a primary share of residue: Finds that it covers also the children of the truster's nephew William Simpson, deceased, and also the children of the truster's nephew Charles Still Simpson, deceased, both of said nephews having predeceased the truster, and their children being instituted by the settlement as primary legatees: Finds, on the other hand, that although the settlement contains a clause providing for the issue of primary legatees taking, in the event of their parent's predecease, their said parent's share, such issue do not, on the just construction of the settlement and of the said clause of devolution, participate in the division of any devolved share, and, in particular, of the devolved share of Patrick Still Simpson now in question: Therefore to that extent and effect sustains the claims of the various claimants other than that for the children of Captain James Simpson; repels the said last-mentioned claim, and decerns; and in respect that it does not appear that the parties are agreed as to the exact number of shares into which the fund *in medio* falls to be divided on the principles above expressed, appoints the cause to be enrolled for further procedure."

Thereafter a claim was lodged by William Gordon Simpson, Mrs Margaret Catherine Simpson or Maclure, and Miss Helen Mary Simpson, children of the deceased Charles Still Simpson, in which they maintained that the fund *in medio* fell to be divided equally among those of the primary legatees named and designed in the third purpose who had survived the testator. They further maintained that they were entitled to share *per capita* and not *per stirpes* along with the said primary legatees. They therefore claimed to be ranked and preferred each to a one-eleventh share of the fund *in medio*, or alternatively, each to one-third share of one-ninth of said fund.

They pleaded—"(1) On a sound construction of the said trust-deed these claimants ought to be ranked and preferred *per capita*, together with the other primary legatees, to the fund *in medio*."

On 4th November 1898 the Lord Ordinary pronounced the following interlocutor:—"Opens up the record: Allows claim for W. G. Simpson and others to be received, and the same to be added to the record, and this being done, of new closes the record, reserving all questions of expenses: And having further heard counsel with special reference to said claim, sustains the first plea-in-law for said claimants, and continues the cause: Grants leave to reclaim."

The claimants Mrs Sinclair, the assignee of Alexander Simpson, George Simpson, Mrs Matheson, and Simon Simpson reclaimed, and argued—(1) The division in the primary clause was *per stirpes* and not

per capita. The deed was practically a family settlement, and if in such a settlement a fund was left to A, B, and the children of C, the division was *per stirpes.* No grandnephew or grandniece was called by name except the Rev. Alan Matheson and Major Oughterson, each of whom was the only child of his parents. This showed the intention of the testator that the division should be *per stirpes — Cunningham's Trustees* v. *Cunningham*, January 13, 1891, 18 R. 380; *Inglis* v. *M'Neils*, June 23, 1892, 19 R. 924; *Galloway's Trustees* v. *Galloway*, October 27, 1897, 25 R. 28. The cases quoted on the other side were quite distinct from the present. In *M'Courtie, subter*, the bequest was not a family one. In *Macdougall, subter*, the destination of the fee was quite specific "to the issue of my grandchildren equally." (2) By the clause of devolution the share of nephews and nieces dying without leaving lawful issue was given "to the survivors of them equally." This meant survivors of nephews and nieces, and did not include grandnephews or grandnieces. The claimants were therefore entitled each to one-fifth of the share that would have fallen to Peter or Patrick Simpson if he had survived.

Argued for claimants Helen Simpson, James Oughterson, and Alan Matheson—(1) As regards the primary legacy, they maintained it must be divided *per stirpes*, and adopted the argument on that point of the prior claimants. (2) As to the devolved share, they maintained that it must be divided *per stirpes* among those mentioned in the primary clause who had survived the death of the liferentrix. The testator had made his own vocabulary, and grandnephews and grandnieces must be held to be included in the term "nephews and nieces"—*Weeds* v. *Bristow*, 1866, L.R., 2 Eq. 333.

Argued for claimants W. G. Simpson and others, the children of Charles Still Simpson—(1) The division in the primary clause was *per capita* among all the parties called. The presumption in law was that when a testator makes a bequest to certain persons *nominatim* and certain persons as a class, the division was to be *per capita—M'Courtie* v. *Blackie's Children*, January 15, 1812, Hume 270; *Macdougall* v. *Macdougall*, February 6, 1866, 4 Macph. 372; opinion of Lord Justice-Clerk Moncreiff in *Laing's Trustees* v. *Simson*, November 18, 1879, 7 R. 245. The cases quoted on the other side failed to rule the present because of this distinction, that in the present case two of the grandnephews were called *nominatim* and the rest were called as a class. (2) As to the devolved share, they adopted the argument of the other grandnephews and grandnieces, with this exception, that they maintained the division of the devolved share should be *per capita.*

At advising—

LORD YOUNG—An interesting argument as to the true meaning of the testator's language in this settlement has been stated to us. I am of opinion that looking to the terms of the whole clause on which that argument has turned, the testator's meaning is not really doubtful.

He directed that half the residue of his estate should be divided at the expiry of his wife's liferent of the whole estate among his wife's nephews and nieces. With regard to the other equal part, it was to be conveyed "to and in favour of my nephews and nieces." He first named three nephews and nieces, then "the children of the now deceased William Simpson," a nephew (who predeceased him leaving an only child), then the children of the also now deceased Charles Still Simpson (who also left an only child), then three nephews and nieces, naming them, then the son of a niece, then the son of another niece, naming him, and then a niece. And then follows what have been called in the argument the devolution clauses, "and to the lawful issue of such of my said nephews as nieces as may have died leaving lawful issue their deceased parent's share equally among them, and failing any of my said nephews and nieces without leaving lawful issue, to the survivors of them equally, whom also failing to their nearest lawful heirs whomsoever."

I am of opinion that the child of the deceased nephew William Simpson, grandnephew of the testator, and the children of the deceased Charles Still Simpson, also grandnephews and grandnieces, are referred to as in the category of "nephews and nieces," and that the true construction of the will is that they are to take the share which the testator would have given to their respective fathers had they not died before he made the will—that they are entitled to that and no more. He meant to put the child in the position in which he would have put the parent.

Now, that is contrary to the view of the Lord Ordinary.

I think, further, with regard to the devolution clause that the two named grandnephews and the unnamed grandnephews and grandnieces, designed as children of deceased nephews, are entitled to participate under that clause, being referred to as "my said nephews and nieces." They will take under this clause also exactly as they take under the primary clause the share which their respective parents would have taken if he or she had lived.

LORD TRAYNER—I concur. It is, I think, a material consideration that in this settlement the testator places himself *in loco parentis* to his nephews and nieces—it is like a family settlement.

In the destination under consideration, which is "to and in favour of my nephews and nieces," the testator includes grandnephews and grandnieces, either by name or by reference to their parents. I think he intended to place them all on one footing in this respect, that where grandnephews or grandnieces are mentioned, they should take—each family of them—the share which (as nephew or niece) their parents would have taken had they survived. The deed does not suggest any reason for think-

ing that the testator intended his grand-nephews (and they might be numerous) of one family to take each as much as a nephew or niece was to get, which would be the result of a division *per capita*. I think the contrary is the plain intention. Each nephew and niece is to share equally, and the children of a predeceasing nephew or niece are to take among them such a share as a nephew or niece would get. That is my view also of the meaning of the clause of devolution.

LORD MONCREIFF—I am of the same opinion. I think it is plain that the intention of the testator was that each family of his nephews and nieces should take an equal share of residue. I do not think that he intended that the children of any of his deceased nephews and nieces should take more than their parent's share. Almost conclusive proof of this is to be found in the words at the close of the clause. The testator leaves the half of the residue of his estate to his nephews and nieces and others named, "and to the lawful issue of such of my said nephews and nieces as may have died leaving lawful issue, their deceased parent's share equally among them." I cannot believe that the testator intended that while the issue of such of the nephews and nieces named as survived him should only take their parent's share, each one of the issue of those who predeceased the making of the will, should have an equal share with the brothers and sisters of their parents.

Mr Blackburn very properly pressed upon us the fact that two of the grand-nephews are called *nominatim*. This would have been important if each of these grandnephews had been one of a family. But we find that each of the grandnephews so called was the only child of his deceased parent. It is therefore to be assumed that the testator gave him one share as representing his parent.

As regards the clause of devolution, I agree that the children of nephews and nieces who predeceased the making of the will, and whose children are expressly called, are entitled *per stirpes* to a share of the portion of the estate which would have fallen to Patrick Simpson if he had survived the period of vesting.

The LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"Recal the Lord Ordinary's interlocutor of 4th November 1898: Vary his Lordship's interlocutor of 24th August 1898 to the extent of finding that the children of the deceased William Simpson and Charles Still Simpson are entitled as primary legatees to equal shares *per stirpes* of the fund *in medio* along with the nephews and nieces and grandnephews of the truster named in the settlement: Therefore sustain the second alternative of the claim of William Gordon Simpson, Mrs Margaret Catherine Simpson or Maclure, and Miss Helen Mary Simpson."

Agents for the Pursuers and Nominal Raisers—Dundas & Wilson, C.S.

Counsel for the Claimants Mrs Sinclair, the Assignee of Alexander Simpson, George Simpson, Mrs Matheson, and Simon Simpson—Guthrie, Q.C.—W. Brown. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Claimants Helen Simpson, James Oughterson, and Alan Matheson—Kennedy. Agents—Pringle & Clay, W.S.

Counsel for the Claimants the Children of Charles Still Simpson—Dundas, Q.C.—Blackburn. Agents — Cadell & Wilson, W.S.

Friday, February 3.

SECOND DIVISION.

[Sheriff Court of Lanarkshire.

M'GREGOR v. DANSKEN.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *secs.* 1 (1) *and* (2), 4, 7 (1) *and* (2), *and Second Schedule*, 14 (c)—"*Workman*"—"*Undertaker*"—*Independent Contractor.*

Held (*diss.* Lord Young) that a claim under the Workmen's Compensation Act 1897 made by an independent contractor against the undertaker of the work which he had contracted to do, was impliedly excluded by the terms of section 4 of the Act.

Opinion per the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff—(1) that an independent contractor, even although he himself works at the work which he has contracted to do, and is injured while so working, is not entitled to the benefits of the Workmen's Compensation Act 1897, and (2) that the benefits of that Act are confined to persons employed under a contract of service.

Opinion per Lord Young *contra.*

Opinion per Lord Trayner—that a person who employs someone to repair a building for him, not having himself undertaken such repair, is not the "undertaker" of the repairs within the meaning of the Workmen's Compensation Act 1897.

Opinion per Lord Young *contra.*

Opinion per Lord Moncreiff — that the 4th section of the Workmen's Compensation Act 1897 does not give any right of compensation to a contractor's servants against an owner of property who employs a contractor to repair his house, but does not himself engage in or undertake the work.

Opinion per Lord Young *contra.*

This was an appeal from the Sheriff Court of Lanarkshire at Glasgow upon a stated case in the matter of an arbitration under the Workmen's Compensation Act 1897