Sailcloth Company, and by the previous case of *Brand* v. *The Arrowsmith Railway Company*. And I agree with your Lordship's statement of the law, which is also correctly stated by the Sheriff-Substitute.

It follows, I think, that there is a relevant case upon the negligent driving of the defenders' engine in the particular circumstances here; but then I agree also that the pursuer cannot be allowed to sue for one lump sum in respect of six separate injuries to six different people. The question of the injury done to each child is a separate and distinct question from the injury done to the other children. And the pursuer makes that clear enough when he says that in one case he is suing for damages for personal injuries done, and in the other cases for damages for shock sustained to the system. Whatever the meaning of that may be, it is clear enough that each child has a separate case for separate injury done to itself, and the fact that the father, as administrator-in-law, is entitled to recover the damages for each of his children does not make the six children into one pursuer. Therefore the separation which I think the learned counsel admitted to be necessary will require to be made before the case goes further.

LORD JOHNSTON—I quite agree, and have nothing to add.

LORD MACKENZIE was absent.

The Court pronounced this interlocutor—

". . . Recal the interlocutor of the Sheriff-Substitute of 20th November 1911: Repel said objections" [to the relevancy] "except in so far as they relate to the construction of the engine: Find that there is no relevant averment of improper construction of the engine: *Quoad ultra* remit the case back to the Sheriff for proof, and instruct him to allow the pursuer to amend the record to show the amount sought to be recovered for each child, and to proceed with the cause."

Counsel for the Pursuer and Appellant—D. P. Fleming. Agent—Hugh Fraser, Solicitor.

Counsel for the Defenders and Respondents—Hon. W. Watson—Wark. Agents—Hope, Todd, & Kirk, W.S.

Thursday, December 21.

SECOND DIVISION.

SWAN'S TRUSTEES *v.* SWAN AND OTHERS.

Process — Special Case — Insane Party — Curator ad litem.

The Court appointed a *curator ad litem* to an insane party in a special case, and *held* that the case might competently proceed without the appointment of a *curator bonis*.

Succession — Settlement — Provision as to Accrescing Shares — Construction.

A testator by his will directed his trustees to divide the residue of his estate into equal shares, and to hold one share for each child and spouse in liferent and their issue in fee. He further provided that the share of any child dying without issue should "fall and accresce to my other children then surviving in liferent and to their respective issue in fee." One of his daughters, J., survived him and died unmarried. Three of her sisters had predeceased her leaving issue.

Held that the issue of those children of the testator who predeceased J. were not entitled to participate in the share that accresced on her death.

Succession — Vesting — Time of Payment — Express Clause as to Vesting.

A testator gave the liferent of his whole estate to his widow. He, moreover, directed his trustees to divide the residue of his estate into equal shares, and to hold one share for each child and spouse in liferent and their children in fee. He provided that the fee of his estates should not be paid to any of the fiars until they attained the age of twenty-five years. He further provided that the fee of his estates should not vest in any of his beneficiaries until the period of payment had arrived.

Held that vesting was postponed until the liferents of the respective shares had terminated, and until the respective fiars had attained the age of twenty-five years.

Matthew Swan died on 23rd November 1890 leaving a trust-disposition and settlement dated 9th March 1886, and codicil thereto dated 8th November 1888. The testator was survived by his wife Mrs Jean M'Intyre or Swan, who died on 2nd May 1910. He had eight children, viz., Robert, Jessie, Maggie, Agnes, Jeanie, Mary, John, and Matthew. Maggie and Jeanie predeceased the testator leaving issue. Agnes survived the testator and died leaving issue. Jessie survived Agnes and died unmarried. Robert, Mary, John, and Matthew were still alive and had issue.

Questions having arisen with regard to the construction of the settlement, a Special Case was brought for their determination. The first parties were the trustees acting under the trust-disposition and settlement and codicil. The second parties were the children of the testator who survived Jessie and their issue. The third parties were the surviving husbands and descendants of the deceased daughters Maggie, Agnes, and Jeanie. The fourth parties were the heirs *in mobilibus* of Jessie. The fifth parties were the whole children and grandchildren under twenty-five years of age of the testator's children. The sixth parties were the surviving children of Robert, Mary, John, and Matthew, and the children of Mary's deceased children. The seventh parties were the issue of Agnes and Jeanie. The eighth parties were the immediate issue of

Robert, Mary, John, and Matthew, as at Jessie's death, and the children of such immediate issue as predeceased Jessie. The ninth parties were the husband of Jeanie and his two daughters.

The trust-disposition and settlement provided, *inter alia*—"Second, my trustees . . . shall pay to my wife during all the days and years of her life the whole rents, interests, and profits arising from my estate, heritable and moveable . . .; Third, on the decease of my wife my trustees shall dispone and convey my heritable property, known as No. 77 Causeyside Street, Paisley, to my daughter Jessie Swan in liferent use allenarly and to the issue of her body equally in fee . . .; and Lastly, I direct my trustees to divide the residue of my estate, heritable and moveable, into seven equal shares, and (First) to invest and hold one share thereof for the liferent use allenarly of my son Robert Swan, and thereafter for the liferent use allenarly of any wife he may marry, but that so long only as she remains his widow, and to his children equally, share and share alike, in fee." The settlement then made similar provisions in favour of the testator's children other than his son Matthew, and by the codicil a share was provided to Matthew.

The settlement further provided—"In the event of any of my said sons and daughters who are beneficiaries under these presents, dying without leaving lawful issue, the fee of their shares shall fall and accresce to my other children then surviving in liferent and to their respective issue in fee, providing and declaring also that the fee of my estates shall not be paid to any of the fiars until they attain the age of twenty-five years, but my trustees may apply the annual income arising from any fiar's share, after the liferents thereof are satisfied, for the maintenance and education of any such fiar until they arrive at that age; and further, providing and declaring that the fee of my estates shall not vest in any of my beneficiaries until the period of payment has arrived."

The following *questions of law* were, *inter alia*, submitted to the Court—"(1) Does the whole residue fall to be divided into seven shares, to be held and applied in terms of the trust-disposition and settlement and codicil. Or (2) Does the share of the residue, originally destined for Miss Jessie Swan in liferent, fall to be divided amongst the immediate children of the testator who were in life at Jessie Swan's death in liferent and their issue in fee, so as to exclude the surviving issue of any child of the testator who predeceased the said Jessie Swan. Or (3) Does said share fall to be distributed as intestate succession of the testator. . . . (8) Is vesting in the issue of the testator's children postponed until (*a*) they respectively attain the age of twenty-five years, (*b*) the death of their respective parents, who are liferenters and who are children of the testator, (*c*) the death of all liferenters of their respective shares, whether children of the testator or not, or until which of said events. (9) Does the answer to the previous question apply to accrescing as well as to original shares. (10) Are the issue of the testator's deceased child Jeanie Swan or Begg, in respect that they have attained the age of twenty-five years, entitled to immediate payment of their shares in the event of their father discharging his liferent."

The case having been sent to the roll, a note was thereafter presented by the first parties to the Lord Justice-Clerk, in which it was stated that Jeanie Begg, one of the parties of the third, fourth, seventh, and ninth parts, was insane, and was confined in an asylum. It was further stated that she had not been cognosced and had no *curator bonis*, and the Court was craved to appoint a *curator ad litem* to her. Mr E. R. Boase, advocate, was thereupon appointed *curator ad litem* to Jeanie Begg.

The *curator ad litem* lodged a minute, in which he drew the attention of the Court to the fact that a *curator ad litem* had never, so far as he could ascertain, been appointed to an insane party to a special case. He referred to the following cases—*Christie, &c.*, November 27, 1873, 1 R. 237; *Ross* v. *Tennant's Trustees*, November 20, 1877, 5 R. 182, 15 S.L.R. 109; *Wallace*, November 20, 1830, 9 S. 40; *Mitchell* v. *Whitelock*, December 10, 1864, 3 Macph. 229; *Walker* v. *Jones*, February 12, 1867, 5 Macph. 358; *Anderson* v. *Skinner*, January 25, 1871, 8 S.L.R. 325; *Mackenzie*, January 21, 1845, 7 D. 283; *Rossie* v. *Rossie*, March 9, 1899, 6 S.L.T. 357.

At the hearing of the case, counsel for the first parties and counsel for the third, fifth, seventh, and ninth parties maintained that it was competent to appoint a *curator ad litem* to an insane party in a special case, and that it was not necessary to have a *curator bonis* appointed. A *curator ad litem*, an officer of the Court, was appointed to take charge of the interests in this particular *lis* of a person who had no *locus standi in judicio*, and an unchallengeable decree could thereby be obtained. They referred to the following cases—*Ross* v. *Tennant's Trustees* (*sup. cit.*), Lord Shand at 5 R. 182; *Christie, &c.*, November 27, 1873 (*sup. cit.*); *Rossie* v. *Rossie* (*sup. cit.*); *Scott* v. *Scott*, 1908 S.C. 1124, 45 S.L.R. 839; *Crum Ewing's Trustees* v. *Bayly's Trustees*, 1910 S.C. 994, 47 S.L.R. 876.

The Court intimated that they did not think it necessary that a *curator bonis* should be appointed.

The *curator ad litem* then put in a minute approving of and adopting the Special Case, and the case then proceeded.

On the merits it was argued for the first parties (on question 8)—Vesting was postponed until the expiry of all the liferents, and until each beneficiary had respectively attained the age of twenty-five years. It was expressly declared that vesting should not take place until the period of payment, and payment could not be made until both these events had occurred — *Carruthers' Trustees* v. *Eeles*, February 1, 1894, 21 R. 492, 31 S.L.R. 352.

Argued for the second, fourth, sixth, and eighth parties (on question 2)—The

clause of accretion must be construed according to its literal and grammatical meaning—*Richardson and Others* v. *Macdougall and Others*, March 26, 1868, 6 Macph. (H.L.) 18, 5 S.L.R. 454. If it were so construed, there could be no question as to its meaning. It plainly stated that only those children surviving at Jessie's death, and their issue, were to benefit by the accrescing share.

Argued for the third, fifth, seventh, and ninth parties (on question 2)—By the accretion clause the liferent of Jessie's share was undoubtedly given to the children surviving her, but the words "their respective issue," meant the issue of the testator's other children, whether these were or were not alive at the time of Jessie's death. The clause properly read did not exclude the issue of predeceasing children, and their exclusion would be a palpably unreasonable result. (On question 8)—Vesting took place in each beneficiary as he attained the age of 25. The only period of payment mentioned in the deed was the attainment of that age. There was no destination-over and no trust purpose to be served by the postponement of vesting—*M'Kay's Trustees* v. *Gray*, July 10, 1903, 5 F. 1086, 40 S.L.R. 770; *Chalmers' Trustees*, March 16, 1882, 9 R. 743, 19 S.L.R. 493; *M'Ewan's Trustees* v. *Macdonald's Trustees and Others*, November 4, 1908, 46 S.L.R. 31.

At advising—

LORD SKERRINGTON—This is a Special Case in which the parties interested ask the Court to answer ten questions relative to the construction of the trust-disposition and settlement and codicil of the deceased Matthew Swan. The interpretation of these two writings does not present any serious difficulty, but some of the ten questions above referred to are so framed that I have found it a little difficult to answer them.

The material facts and dates are as follows:—The testator died on 23rd November 1890. His widow, upon whom he conferred a universal liferent, died on 2nd May 1910. He had eight children, two of whom (daughters) predeceased him leaving issue. Of the six remaining children four are still alive; one (a daughter) predeceased her mother, leaving issue, while another daughter, Jessie, died unmarried and intestate in 1909, thus also predeceasing her mother. The scheme of the will is as follows:—On the death of the widow the trustees were by the third purpose directed to dispone the heritable property, No. 77 Causeyside Street, Paisley, to the testator's daughter Jessie in liferent use allenarly, and to the issue of her body in fee. It is unnecessary to refer to the testator's directions relating to some other heritable properties. By the last purpose he directed his trustees to divide the residue of his estate, heritable and moveable, into seven (by the codicil, eight) equal shares, and to invest and hold one share for the liferent use allenarly of each child, and thereafter of such child's husband or wife, and for his or her children in fee.

The first query in the Special Case falls to be answered in the negative. The second query refers to the share of residue which the trustees were directed to invest and hold for the liferent use allenarly of the testator's daughter Jessie and her children in fee. Seeing that Jessie died unmarried the direction applies that the fee of her share "shall fall and accresce to my other children then surviving in liferent and to their respective issue in fee." The question to be determined is whether this clause makes it a condition that no grandchild of the testator shall take any interest in the fee of Jessie's share unless the parent of such grandchild (being a child of the testator) was alive at the date of Jessie's death. Such a provision may be capricious and unreasonable, but I see no doubt as to the meaning of the words used by the testator. It is, of course, possible to read the expression "their respective issue" as meaning the issue of the testator's "other children," whether these latter were or were not alive at the time of Jessie's death. A court of construction is not, however, entitled to reject the plain and primary meaning of a testator's words merely in order to avoid a result which may appear to be capricious and unreasonable. The answer to any such contention is to be found in the opinion of Lord Kinnear in *Ward* v. *Lang*, 1893, 20 R. 949—a case which, though very similar to the present one, was not cited at the debate. The House of Lords case of *Richardson and Others* v. *Macdougall and Others*, 1868, 6 Macph. (H.L.) 18, was cited at the debate, and supports the view that the clause should be construed according to its literal and grammatical meaning. I am therefore of opinion that the second query should be answered in the affirmative. [*His Lordship then dealt with certain questions arising on the special terms of the settlement with which this report does not deal.*]

The eighth query raises the question as to the date when the bequests contained in the will vest in the testator's grandchildren. The testator declared towards the end of his will that "the fee of my estate shall not vest in any of my beneficiaries until the period of payment has arrived." Seeing that the testator's widow enjoyed the liferent of his whole undivided estate, and that as regards the eight shares of residue, liferents were created in favour of the testator's children and their spouses, the period of payment could not arrive until (to quote the language of the will) all these liferents had been satisfied. But the testator further expressly directed that the fee of his estates should "not be paid to any of the fiars until they attain the age of 25 years." Accordingly the period of payment of each share of residue is postponed as regards each beneficiary until he has attained the age of 25 years, and until all the liferents have come to their natural termination. It was argued with what seems to me to be perverse ingenuity that the phrase "period of payment" does not mean what it says, but that the date when each fiar attains the age of 25 is the

"period of payment" within the meaning of this will, although admittedly the issue of the testator's children had no right to demand payment until all the liferents had expired, and although they could not accelerate payment by procuring a renunciation of the liferents forming a burden on their respective shares. The argument of the learned counsel proceeded upon an assumption which is absolutely erroneous, viz., that the testator directed payment to be made upon the respective beneficiaries attaining the age of 25, whereas he merely declared that payment should not be made until they attained that age. Counsel also cited the Second Division case of *M'Kay's Trustees* v. *Gray*, 1903, 5 F. 1086, but I cannot regard that decision as an authority, seeing that no argument was (so far as appears from the report) offered in favour of what seems to me to have been the natural meaning of the will. The Judges were asked to elect between the views that vesting took place at the beneficiary's majority, or alternatively at the death of the widow. It does not appear to have been argued that the period of payment could not arrive without the concurrence of both events. In a later case, *M'Ewan's Trustees* v. *Macdonald's Trustees*, 46 S.L.R. 631, the same Division decided that the period of payment, and consequently of vesting, did not arrive until the death of the surviving spouse. It was unnecessary to decide whether vesting was still further postponed. There is a later decision of the same Division—*Gray's Trustees* v. *Gray*, 1907 S.C. 54—which was not cited at the debate, in which the "period of payment" was held to depend upon the concurrence of both events, viz., the lapse of the widow's liferent and the majority of the beneficiary. I have dealt with these authorities as being more or less in point; but, after all, the present case, like all others of its kind, must be decided upon the best construction one can put upon the language of the particular instrument under consideration. So viewing the matter, I think that the proper answer to the eighth query is that vesting was postponed until the occurrence of all the events therein mentioned. The ninth query must be answered in the affirmative, and the tenth in the negative.

LORD JUSTICE-CLERK—That is the opinion of the Court. [The Court consisted of the LORD JUSTICE-CLERK, LORD DUNDAS, and LORD SKERRINGTON.]

LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court pronounced this interlocutor—

"Answer the second . . . and ninth questions of law . . . in the affirmative: Answer the first, third, and tenth questions of law . . . in the negative: Find in answer to the eighth question of law . . . that vesting is postponed until the whole of the events therein mentioned have taken place. . . ."

Counsel for the First Parties—J. M. Hunter. Agents—Pringle & Clay, W.S.

Counsel for the Second, Fourth, Sixth, and Eighth Parties—MacRobert. Agents—Fyfe, Ireland, & Company, W.S.

Counsel for the Third, Fifth, Seventh, and Ninth Parties — Chree — Macmillan. Agent—Peter Macnaughton, S.S.C.

Tuesday, December 5.

FIRST DIVISION.

[Lord Cullen, Ordinary.

SMITH *v.* WALKER.

Reparation—Slander—Innuendo—Failure to Aver Facts and Circumstances Justifying Innuendo—Relevancy.

W. wrote to E., a bookmaker, a letter in the course of which he said—"As regards your friends L. and D., neither of whom I have had the distinguished—I may say the very distinguished—pleasure of meeting, and as I always bet with the ready only on the race-course, I think it rather out of place for them to send alleged accounts to me." In an action of damages for slander by D. against W., the pursuer sought to innuendo these words as representing that he (the pursuer) had attempted to obtain money from the defender by presenting fraudulent accounts to him showing a balance due by the defender on certain betting transactions. *Held* that the words were not capable of reasonably sustaining the innuendo, and that, in the absence of any averment of facts and circumstances capable of supporting the alleged sinister meaning, the action must be dismissed as irrelevant.

Capital and Counties Bank v. *Henty*, (1882) L.R., 7 A.C. 741, *followed*.

George William Smith, turf commission agent, Leeds, carrying on business under the name of George Drake, brought an action of damages for slander against James Walker, publican, Aberdeen.

The pursuer averred, *inter alia*—"(Cond. 2) On or about 2nd June 1911 the defender was introduced personally to the pursuer by Robert Evans, turf commission agent, at Epsom races, where the pursuer was carrying on business under his trade name. The said introduction was for the purpose of enabling the defender to bet with the pursuer on credit, and the pursuer, relying on the recommendation of the said Robert Evans, did enter into certain betting transactions on credit with the defender, as a result of which the defender became indebted to the pursuer to the amount of £95. The pursuer subsequently rendered to the defender an account for the said transactions, a copy of which is herewith produced and referred to. (Cond. 3) In a letter dated 12th June 1911, and addressed