

should take. It was clear, then, that the heirs of the survivor were only to take if the children died without issue, so that I do not feel at all pressed by these decisions. On the whole, I concur with your Lordship.

LORD MURE—Unless there are very strong equitable grounds for departing from the meaning of words used in a settlement, I think that the natural meaning should be adhered to. In this case the testator limited the gift, in the event which has happened, to the survivors in liferent and to their children in fee, excluding the children of those who had predeceased. Those who were to take the accreting share were the survivors and their children, and upon the ordinary construction of these words it cannot be said that they mean that children of persons who did not survive were to take any part of the accreting share.

The only difficulty is as regards the case of *Ramsay's Trustees* (the English cases I do not enter into), but I think that it was in order to avoid creating intestacy that the Second Division adopted the construction of survivors as meaning others. In this case there is no speciality like that, and I cannot read others into the deed. I therefore agree that the second alternative should be answered in the affirmative.

The Court pronounced this interlocutor:—

“Find and declare that on a sound construction of the trust-disposition and settlement of William Forrest designed in the Special Case, the share of his trust-estate liferented by Mrs Ann Middleton or Younger, designed in the Special Case, now deceased, accretes and belongs in four equal shares to the parties of the third part respectively, to the exclusion of the parties of the second part, and that in liferent and fee, all in the same manner as the proper shares of these parties themselves, and subject in the same restrictions and declarations as are imposed upon the original shares: Find that the expenses of all the parties, as the same may be taxed by the Auditor, shall be paid out of the trust-estate, and decern.”

Counsel for First Parties—Fraser. Agent—
F. J. Martin, W.S.

Counsel for Second Parties—H. Johnston.
Agents—Henderson & Clark, W.S.

Counsel for Third Parties—Lorimer. Agent—
F. J. Martin, W.S.

Tuesday, November 4.

OUTER HOUSE.

[Junior Lord Ordinary,
Lord Kinnear.

JOHNSTONE, PETITIONER.

Entail—Process—Expenses—Expenses Incurred by Curator ad litem to Minor Heir.

A petitioner for warrant to disentail is liable to the curator *ad litem* appointed to a minor heir, for his fee and the expenses necessarily incurred by him in attending to the interest of his ward, and such expenses

may, according to the circumstances of the case, include the employment by the curator *ad litem* of an actuary to value his ward's expectancy.

William Johnstone of Harthope, institute of entail in possession of the entailed lands and estate of Harthope and others, in the county of Lanark, presented a petition for the disentail of the said lands and estate under the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), and subsequent entail statutes. The three next heirs of entail were John Anderson Johnstone and his two sons, the youngest of whom, William Gillespie Johnstone, was a minor, and had no legal guardian except his father. A curator *ad litem* was therefore appointed to him. A remit was made in the usual form to an actuary to ascertain the value of the expectant interest of these three next heirs, and he duly reported thereon.

The curator *ad litem* to the minor heir, however, was not satisfied with the value which the actuary to whom the Court had remitted put upon his ward's expectancy, and took the opinion of another actuary as to the value.

The Lord Ordinary, after discussion, approved of the valuation of the actuary to whom his Lordship had remitted the case.

The petitioner refused to pay the curator's charges and the expenses incurred by him. The curator moved the Lord Ordinary to find the petitioner liable to pay these expenses.

The petitioner argued that he was not liable for the curator's expenses, and further that part of the expenses incurred in the particular case were unnecessary and improper, and that the demand was contrary to practice.

The Lord Ordinary pronounced the following interlocutor:—“The Lord Ordinary having heard counsel, finds the curator *ad litem* to the respondent William Gillespie Johnstone entitled to expenses, allows an account thereof to be lodged, and remits the same to the Auditor to tax and to report.

“*Opinion.*—I do not find that there is any established rule of practice in this matter, but I have no doubt as to what the rule ought to be. It is necessary to distinguish between the case of a pupil or minor respondent and that of a respondent who is *sui juris*. A respondent who is *sui juris* may determine for himself whether he ought to appear in the process; and if he does not think fit to appear, his non-appearance is a fact in the case upon which the Court will proceed. It is not conclusive of the merits of the petition, but it fixes conclusively that the respondent's interests may safely be left in the hands of the men of business or men of skill to whom the Court may remit, because he himself has been content so to leave them. But the Court cannot proceed upon the same assumption in the case of a pupil or a minor. It is indispensable that his interest should be protected by the appointment of a curator *ad litem*. The expense of that appointment must necessarily be incurred in order to the success of the proceeding; and it ought therefore to fall, not upon the respondent, whose interests are brought into question by no act of his own, but upon the petitioner, who requires that they shall be determined in order to enable him to take the benefit of the Entail Amendment Acts.

"It is a different question whether a curator is entitled to charge the petitioner with the expense of consulting an actuary, and I am not disposed to lay down any general rule more absolute than this, that I think all the expenses which are necessary to enable a curator to discharge his duty are proper expenses to be charged against the petitioner. It must be remembered that the office of a curator *ad litem* is not a merely nominal but a highly responsible office, and if a curator finds that he cannot form a satisfactory judgment as to the value of his ward's interest, either for himself or with the assistance of the reporter to whom the Court may have remitted, it is plainly in accordance with his duty that he should inform his mind by advising with persons of skill. It does not follow that in every case a curator *ad litem* should be entitled to charge the petitioner with the expense of a separate actuary. Experience shows that, in general, curators have little difficulty in determining for themselves, with such explanations as they may receive from the actuary appointed by the Court, whether his report should be accepted or not. It is a question of circumstances, and I should not suppose that curators, who are generally persons of experience in business, will have any difficulty in practice in deciding whether it is necessary and proper to take farther advice. If they have incurred expense unnecessarily and improperly, the petitioner may object upon the audit of the account. But I think he must pay the expenses which have been properly incurred."

Counsel for Petitioner—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Curator *ad litem*—R. Johnstone. Agents—J. C. & A. Stenart, W.S.

Thursday, December 11.

OUTER HOUSE.

[Lord Fraser.

CAMPBELL v. STUARTS.

Superior and Vassal—Entry—Untaxed Entry—Casualty—Year of which Rent to be Taken in Estimating Casualty—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 4.

Held that the year the rent of which is to be taken as the amount of the casualty due in respect of an implied entry under the Conveyancing (Scotland) Act 1874, is the year of the implied entry, and not the year in which the casualty may be demanded.

At the date at which the casualty due in respect of an entry fell to be estimated, the lands were under a lease and the tenant had sublet them at an increased rental. *Held* that the rent payable under the lease, and not that under the sublease, was to be taken as the measure of the casualty.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 4, provides—"When lands have been feued, whether before or after the commencement of this Act, (1) It shall not, notwithstanding any provision, declaration, or condition to the contrary in any statute in force at the passing of this Act, or in any deed, instru-

ment, or writing, whether dated before or after the passing of this Act, be necessary in order to the completion of the title of any person having a right to the lands in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, receipt, or other writ by progress" . . .

Sub-section (2) provides that infetment shall imply entry with the superior. (3) "Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry . . . but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering."

Sub-section (4) provides that "No lands shall after the commencement of this Act be held to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infet or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action . . . and the summons in such action may be in or as nearly as may be in the form of Schedule B hereto annexed." In Schedule B the pursuer (superior) and the defender (vassal) are respectively denoted by the letters A and B, and the last vassal by the letter C. The first conclusion is for declarator that "in consequence of the death of C (*or otherwise as the case may be*), who was the vassal last vest and seised in All and Whole the lands of X (*describe or refer to the lands, and if the casualty due is a taxed composition or an heir's relief-duty, say*) the casualty of £ (*or if a singular successor's untaxed composition be due, say*) a casualty, being one year's rent of the lands, became due to the said A as superior of the said lands upon the day of being the date of the death of the said C (*or*) the date of the infetment of the said B in the said lands (*or otherwise as the case may be*) and that the said casualty is still unpaid" . . .

The last vassal infet and entered with the superior in the lands of Dalness, in the county of Argyll, under the law as it stood prior to the Conveyancing Act of 1874, was Coll Macdonald, W.S. He died in 1837. By his settlement Coll Macdonald conveyed the lands in trust for certain purposes to his eldest son James Macdonald, whom failing to Charles Neaves, afterwards Lord Neaves, and Duncan Macdonald. After all other purposes of the trust were satisfied, the trust directed that the lands should be conveyed to his son and his heirs.

In 1845, by the son's death, the trust devolved on Lord Neaves, the other trustee named along with him, Duncan Macdonald, having previously died.

Lord Neaves, as trustee, held the *dominium utile* of the lands at the date of the passing of the Act of 1874. He had not entered with the superior. By the Act of 1874 he was impliedly