dying before the period when the testament takes effect, what is the result? I cannot doubt that in that case the words "lawful issue of those who may be deceased" mean this, that the lawful issue take the shares that their parent would have taken. I do not think we have to stretch the words to reach this result; it is the only meaning they could have. The ground upon which it is contended that the testator had not in view the issue as a class coming in place of their parent is that one brother had died leaving issue at the date of the settlement, and the word "surviving" gives a colour to this view. If that had been the whole question there might have been something to say for that view; if the bequest had been direct to "the issue of my deceased brother," that would have brought it within the rule of division *per capita*. But when we find that the provision is to the "lawful issue of those who may be deceased," it is the same as if there had been no predeceasing brother at that time, and as if the bequest had been general to the brothers and sisters, in which case if any of them died leaving children then their issue would take the share of their parents. The division is share and share alike between the brothers and sisters who survived and the lawful issue of those who predeceased. That is the result.

In the opposite view it might happen that the share of one of the sisters or of the brother, which if they had all survived would have been of considerable amount, would be reduced to a mere illusory bequest by the fact that others had deceased leaving large families. I do not think that was in the mind of the testator, and I find nothing to justify it. On these grounds I think we must answer the first question to the effect that the residue of the deceased's estate fell to be divided *per stirpes*.

Lord Ormidale—I entirely agree with your Lordship. I could understand perfectly that a single word left out or a single word inserted in this bequest might make all the difference in the world. But we must take the bequest exactly as we have it. It appears to me the clear English of what the testator meant was that the issue of any of his brothers and sisters who might be dead at the date of his death were to take *per stirpes*—to come into the place of the deceased parent and to take that parent's share and nothing more. In the bequest itself the brothers and sisters are the only parties to whom direct provisions are made, and it is clearly indicated that it is only failing these that the lawful issue of those who predecease take. It is not "the issue of my deceased brother," but "the issue of those who may be deceased." It puts in the same category brothers and sisters whether predeceasing or not. The point of time is the testator's own death, and then the issue of those predeceasers come into the place of their parents and take their parent's share. The plain intention must be given effect to. The present case is plainly distinguishable from *M'Courtie* and *M'Dougall's* cases. I adopt every word your Lordship has said.

Lord Gifford—I am of the same opinion. A great deal depends on the very words used. I look to the words used in the present case and take that as the subject-matter of interpretation. As I read them, the testator intended to refer to the period of his death. A testament is of no effect while the testator lives. It gives his last words. In the present case the testator directs his "surplus estate to be divided between his surviving brother and sisters"—a natural expression, one brother having died leaving issue, the other having died without issue—"and the lawful issue of those who may be deceased." The latter clause applies not only to the surviving brother but to the brother who had died before, and "may be" is a peculiar expression, the effect of which could not be determined till the testator's death, and that enables me to read the "and" as "whom failing." It is a bequest to those who are fit objects of the testator's benefit. He has so much favour for them (his brothers and sisters) that it shall go to their issue if they fail. He was just declaring what the Intestate Succession Act provides, that if any person who would have taken had he survived the testator, shall predecease, his children shall take his share —*i.e.*, *per stirpes*—substituting issue for the person who has died, providing that it does not go further than descendants of brothers and sisters. The meaning of the words is quite consistent without going to the testator's intention. He did not mean to give to his deceased brother's children eight times the share which he gave to his own brother and sisters. I concur with your Lordships.

The Court therefore answered the first question in the affirmative.

Counsel for First and Third Parties—Asher—Guthrie. Agents—Auld & Macdonald, W.S.
Counsel for Second Parties—Kinnear—Wallace. Agents—Macandrew & Wright, W.S.

Saturday, November 22.

SECOND DIVISION.

[Lord Adam, Ordinary.

MACKENZIE *v.* NORTH BRITISH RAILWAY COMPANY.

Process—Sheriff Court—Right to Suspend Sheriff Court Decree where Appeal held to be Abandoned through Failure to Print.

The Court of Session Act of 1868, section 71, enacts that an appellant failing to print within fourteen days shall be held to have abandoned his appeal. The Act of Sederunt of 10th March 1870 provides that on the expiry of eight days after the appeal has been held to be so abandoned, if the appellant has not been reponed, or the respondent does not insist in the appeal, the judgment shall become final and be treated as if no appeal had been taken, and the process forthwith retransmitted to the Inferior Court. Where a process had been so retransmitted, *held* (following the case of *Watt Brothers & Co.* v. *Suead Foyn and Mandatories*, Nov. 1, 1879, *ante*, p. 54) that it was incompetent to bring the case under review by way of suspension.

Counsel for Complainers (Reclaimers)—Rhind. Agent—W. Officer, S.S.C.
Counsel for Respondents — Asher — Wallace. Agent—Adam Johnston, Solicitor.