cases, the mere accumulation of interest in the books of the creditor will not affect the debtor; and will only do so where an account rendered and acquiesced in will raise a case of implied contract. The present is the ordinary case of a law agent's unrendered account, to which no exceptional privilege belongs.

3. The last point involved was that of commission on cash advances, which fell peculiarly within the province of the Auditor to check and determine. He has dealt with this part of the case, with special reference to the exclusion of a trustee from professional profits, and has limited the charge to "costs out of pocket." I see no ground whatever on which to interfere with his report.

In arithmetical result, therefore, I think the Lord Ordinary right. But he has gone wrong, in point of form, in decerning against Mr Carter for the reduced sum of £492, 1s. as in an ordinary action. The question was tried in a suspension of a threatened charge; and the proper form of interlocutor is to find the letters and charge orderly proceeded to the extent of the reduced sum of £492, 1s., with interest from 31st July 1851, and the sum of expenses in the decree, and *quoad ultra* to suspend the same. The decree will then remain in full effect for the limited sum against Mr Hugh Munro's trustees, and as such, Mr Carter, the judicial factor, will be bound to satisfy it.

The other Judges concurred generally.

The Court adhered, in substance, to the interlocutor of the Lord Ordinary, finding the charge orderly proceeded as regards the sum of £492, 1s., and the sums of £19, 6s. 10d. and 13s. 10d., and *quoad ultra* suspending the same.

Agents for the Suspenders—Macnaughton & Finlay, S.S.C.

Agent for the Respondents—Thomas H. Ferrier, W.S.

Friday, December 22.

SPECIAL CASE—HENRY M'CALL & OTHERS

Succession—Conditio si sine liberis decesserit. A testator directed his trustees, after the death of his widow, to whom he bequeathed a liferent of his whole estate, *inter alia*, to pay to each of the children of his late sister H. W. who should be alive at the death of his widow the sum of £1000. One of the daughters of H. W. survived the testator, but predeceased the widow, leaving a son. The sum of £1000, which would have been payable to her had she been alive at the death of the widow, was claimed by her son, and also by the residuary legatees of the testator. *Held*, on a consideration of the trust-deed, that the *conditio si sine liberis decesserit* did not apply, and that the residuary legatees were entitled to the sum.

The late John M'Call, merchant in Glasgow, died on the 18th October 1833, leaving a trust-disposition and settlement, dated 27th October 1823, with codicils thereto, dated respectively 29th January 1829, 1st December 1830, and 24th October 1831.

The trust-deed provides a liferent of Mr M'Call's whole estate to his widow. It then proceeds—"In the *fourth* place, after the decease of the said Isabella Smith, or upon my own decease in case of my surviving her, my said trustees shall dispose of and divide my estate and effects as follows:—They shall pay to each of the children of my late brother Samuel M'Call who shall be alive at the period of my said wife's decease, or of my decease in case of my surviving her, the sum of £1000 sterling, which sums (and also the sums provided to the children of my sisters Helen Wallis and Mary M'Kerrell), in the case of such of them as shall be minors or unmarried at the above period, shall be paid on their respectively attaining majority, or (if daughters) on majority or marriage, which ever shall first happen; to each of the children of my late sister Helen Wallis, by Henry Wallis, Esquire, of Maryborough Lodge, in the county of Cork, who shall be alive at the respective periods foresaid, the sum of £1000 sterling, to be paid as above mentioned; to each of the children of my sister Mary M'Kerrell, by Fulton M'Kerrell, Esquire, of Paisley, who shall be alive at the respective periods above mentioned, the sum of £1000 sterling, to be paid as aforesaid; to my sister, Sarah M'Call the sum of £1000 sterling, and to my sister Margaret M'Call the sum of £1000 sterling, which sums shall be paid to my said sisters at the first term of Whitsunday or Martinmas occurring after the decease of the said Isabella Smith, or my decease if I shall survive her, or as soon thereafter as conveniently may be, with the legal interest thereof from said terms of payment, and the sums payable as aforesaid to the children of my deceased brother and sisters shall also bear interest from the death of my said wife, or my death, as aforesaid; and further, my said trustees shall pay the sum of £500 sterling to Sarah Crawford, wife of James Crawford, lately of Port-Glasgow, with interest as aforesaid: And *lastly*, my said trustees shall account for and pay the residue and remainder of my said estate, after making good the provisions herein contained, to the said Thomas M'Call and James M'Call, my brothers, equally between them, and to the heirs of the body of them, or of either of them, in place of the deceaser or deceasers, *per stirpes*, and in case of the decease of either of them without heirs of his body, or failing such heirs, then to the survivor of them and the heirs of the survivor."

The codicils were as follows:—

"*Ibroxhill, 29th January* 1829.—I hereby bind and oblige my trustees and executors under this settlement, after the decease of my wife Isabella Smith, or upon my own decease in case of my surviving her, to pay to my niece Eliza M'Call, wife of Archibald Smith, £1000; to my niece Sarah M'Call, daughter of my brother Thomas, £1000; and to my nephews James and John Wallis, £3000 each, in addition to what I have already left them.

JOHN M'CALL."

"*Ibroxhill, 1st December* 1830.—In consequence of the death of my brother Thomas M'Call, I hereby require my trustees and executors under this settlement, after paying the several bequests already stated, or which may still be added, to pay over the whole residue and remainder of my estate to my brother James M'Call, and to the heirs of his body; and to withdraw my late brother Thomas and his heirs from any share of the residue of my estate; and in place thereof, I hereby direct my trustees, after the decease of my wife Isabella Smith, or upon my own decease in case of my surviving her, to pay to each of the children of my late brother Thomas who shall be then alive the sum of £1000, with the exception of Sarah and Eliza, who are mentioned in the codicil above;

my nephew John Wallis being dead, I desire that my bequest to him in the above codicil should be divided thus—£2000 of it to his brother James Wallis, and £1000 of it to his sister Margaret Wallis. JOHN M'CALL."

"*Ibroxhill, 24th October* 1831.—I hereby revoke the legacies left by the foregoing will to my sisters Sarah and Margaret M'Call of £1000 each, and to Mrs Sarah Crawford of £500, and in lieu thereof I desire my trustees and executors to pay to my sisters Sarah M'Call and Margaret M'Call an annuity of £100 each, and to Mrs Sarah Crawford an annuity of £50, and these annuities to be payable from the first term after my decease, and to continue all the years of their respective lives. . . . . I hereby nominate and appoint my nephew Thomas M'Call of Craighead an executor to this my last deed and settlement; and I leave and bequeath to him, in addition to what I have already left him, £3000, and to his brother John M'Call, £1000, payable at the decease of my wife, or at my decease if I survive her.

JOHN M'CALL."

Mr M'Call left no children. He was survived by his widow, who enjoyed the liferent of his whole estate till her death on 8th February 1871.

Mrs Helen Wallis, a sister of the truster, died before the date of the trust-deed. She left seven children, four of whom predeceased the testator without issue; two still survive; the other, Mrs Margaret Wallis, afterwards wife of George Dennistoun, survived the testator, but predeceased his widow, leaving an only child, James Wallace Dennistoun, the party of the *second* part, who claimed the legacy of £1000 which would have been payable to his mother had she survived the truster's widow. The sum was also claimed by the truster's residuary legatees.

A precisely similar question was raised in the case of one of the children of the truster's brother Thomas M'Call. Mrs Helen M'Call or Dunlop, a daughter of Thomas M'Call, survived the truster, but predeceased the widow, leaving issue, George Dunlop and Colin Dunlop junior, the parties of the *third* part.

A Special Case was presented, the parties being —(1) Henry M'Call and others, the residuary legatees of the truster; (2) J. W. Dennistoun; (3) Colin Dunlop and George Dunlop junior.

The question submitted to the Court was—"(1) Is James Wallis Dennistoun, the only child of Mrs Margaret Wallis or Dennistoun and the party hereto of the *second* part, entitled to payment of the legacy of £1000, which, under the trust-dispostion and settlement of the said John M'Call would have been payable, at the death of the truster's widow, to the said Mrs Margaret Wallis or Dennistoun, as one of the children of the truster's sister the deceased Helen Wallis, if the said Mrs Dennistoun had been then alive?" With a similar question as regards the Messrs Dunlop.

SHAND and BALFOUR for the parties of the *first* part.

SOLICITOR-GENERAL and MARSHALL for Mr Dennistoun and the Messrs Dunlop.

For the *second* and *third* parties it was maintained that the *conditio si sine liberis decesserit* applied, or, in any view, that it was the implied will of the testator that they should take the provisions which their respective mothers would have taken, had they survived the liferentrix.

The following cases were examined:—*Mackenzie* v. *Holt*, Feb. 2, 1781, M. 6602; *Wallace*, Jan. 28, 1807, M. "Clause," App. No. 6; *Hamilton*, Feb. 8, 1838, 16 S. 478; *Thomson's Trs.* v. *Robb*, July 10, 1851, 13 D. 1326; *Grant's Trs.* v. *Grant*, July 2, 1862, 24 D. 1211; *Rhind's Trs.*, Dec. 5, 1866, 5 Macph. 104; *Macgown's Trs.*, Dec. 17, 1867, 8 Macph. 356.

At advising—

LORD PRESIDENT—This case involves the construction of certain clauses in the settlement of the late John M'Call. By this deed he gives his entire estate in liferent to his widow. There was to be no payment of any legacies or provisions till after her death. She in fact survived till the present year, and it was only at that time that the interests of the parties to this case emerged. The deed, after providing for the widow's liferent, runs thus—(*reads fourth purpose*). Then come the codicils—(*reads*). The second codicil, in fact, makes the same provisions with regard to the children of his brother Thomas as he has done with regard to the children of his other brothers and sisters. We are immediately concerned only with two of the branches of the family, the children of his sister Helen Wallis, and those of his brother Thomas M'Call. As the question raised in each case is identical, I shall refer only to the provisions in favour of the children of Mr Wallis.

Helen Wallis died before the deed was executed. She left seven children, four of whom predeceased the testator. Another child, Margaret Wallis, married George Dennistoun, and survived the testator, but predeceased the liferentrix. Mrs Dennistoun left an only child, James Wallis Dennistoun, the party of the *second* part. There are two other surviving children of Mrs Helen Wallis. The question is, Whether Mr J. W. Dennistoun is entitled to the sum of £1000, as coming in right of his deceased mother, in virtue of that clause of the settlement? The opposing parties are the residuary legatees.

The terms of the bequest are rather peculiar. This is not the case of a fund dividable among the children of the person named in the settlement. It is a provision or bequest, whichever it be called, in favour of each one of the children generally described in the deed. Of course, if any one of these separate bequests fail from any cause, that failure ensues to the benefit of the residuary legatees, as it would have done to the next of kin, had there been no bequest of residue. The question is, Whether this provision is of such a nature as to admit the *conditio si sine liberis decesserit?* I am of opinion that it is not. The bequest, by the terms of the deed, seems to be made conditional on the children surviving the term of payment. Each bequest is subject to that condition. It is not a bequest to each of the children who may be born of Helen Wallis, or who may be alive at the death of the testator, but to each who shall survive the term of payment. Unless they survive the term of payment, it appears to me that there is no legacy at all. There is no room for the application of the *conditio*. I am therefore of opinion that the claim of Mr J. W. Dennistoun is not well founded, and so with regard to the parallel case.

LORD DEAS—It is right to distinguish between the case of a person dealing with his own children and the case of a person dealing with his nephews and nieces. In the case of parents and children there is an implied institution of issue to be inferred from the mere relationship. To the case of nephews and nieces there is extended a certain de-

gree of the same presumption of implied will arising from the relationship of the parties, but less strong. In both cases the presumption can be overthrown. It requires a great deal to overcome it in the case of parent and child; but if the will of the parent is clearly expressed it will overcome it. This is a case of nephews and nieces. I look to the terms of the deed to see whether the testator intended to exclude the presumption arising from relationship, and I am of opinion that he did not intend that the presumption should operate. The deed is peculiar. It is not a case of a person dividing his estate among his nephews and nieces. Brothers and sisters are also dealt with. The testator deals with different members in different ways. After giving £1000 to each of a number of nephews and nieces, he gives only the same sum to his sisters. In fact, there are great differences even in the original settlement; and when we come to the codicils, still greater variety is introduced. The distribution is of a mixed and unequal character. I do not think it necessary to go beyond the terms of the deed to show that any presumption arising from relationship is overcome. This is sufficient for the determination of the case, without attempting to lay down general rules.

Lord Ardmillan—I am much disposed to deal with this case as depending rather on the construction of the deed of Mr John M'Call, now before us, than on the ascertainment of the origin or of the principles of the well known presumption or implication, termed the *conditio si sine liberis decesserit*. Accordingly, though I have very carefully considered the subject, and consulted all the authorities which have been quoted, or which I have been able to discover, I shall not attempt any general exposition of the historical origin or the abstract principle of this condition. I shall only explain in a sentence the view which I entertain, so far as it relates to this question. I think that the doctrine has two aspects; in the one of which it is presented in a case where the settlement is by a father or grandfather, and in the other of which it is presented where the settlement is not by a father or grandfather, but by a collateral—for instance, by an uncle, as in the present case. In the first of these cases the presumption on which the condition rests appears to me to spring from the recognition of the *pietas paterna*. There are several cases in our books in which the issue of predeceasing children have been found entitled to the share which their parent could have claimed, but in which the presumed intention from the paternal relation was the true ground of decision, and in which no special reference is made to the rule in the Roman law, known as the *conditio si sine liberis*. I may mention the case of *Binning* v. *Binning*, Jan. 21, 1767, M. 13,047; and the cases of *Wood* v. *Aitchison*, June 26, 1789, M. 13,043; *Dixon* v. *Dixon*, June 10, 1836, 14 S. and D. 938. In these and other cases the presumption or implication in favour of the issue of a predeceasing child received effect mainly on the ground of presumed will arising from relationship. Even in the case of a settlement by a father, the presumption may be overcome by the words of the deed, but if not so overcome, it receives effect as the implied will of one presumed to act *ex pietate paterna*.

In the second class of cases, where the deed is not by a father, and where the *pietas paterna* is not applicable, the *conditio si sine liberis* has indeed repeatedly received effect. The extension of the rule is now settled, and it is too late to question it. But in these cases, since the presumption does not derive aid from the *pietas paterna*, its support must be found within the words of the deed. It is, in such a case, a presumption of implied will, arising partly, it may be, from the real evidence of affectionate relations, but mainly from the construction of the words of the deed; and when I add, that the true meaning of the doctrine of implied will in these cases is, that the issue are preferred to the substitutes on the ground of an implied condition in the substitution, *si sine liberis institutus decesserit*, I use the words of Lord Kilkerran and of Lord Corehouse, on whose authority—remaining, as I think, unshaken to this day—I may safely leave this point.

In the present case the deed of settlement is not by a father. Mr John M'Call, the testator, died without children on 18th October 1833. By his trust-deed he directs his trustees to pay the whole annual proceeds of his estate to his wife for her life, and after her death he directs his trustees to pay "to each of the children of my late brother Samuel M'Call, who shall be alive at the period of my wife's decease or my decease, in case of my surviving her, the sum of £1000." Under this particular bequest there is no claim at present, but I have read it to explain the deed more completely. We next come to a bequest under which a claim is made. The testator directs his trustees to pay "to each of the children of my late sister Helen Wallis, by Henry Wallis, Esq., who shall be alive at the respective periods foresaid, the sum of £1000 sterling." Then, by codicil of 1st December 1830, the testator directs his trustees, in exactly similar terms, to pay to each of the children of his late brother Thomas M'Call, who shall be alive at the death of Mrs M'Call, £1000, with the exception of two of Thomas' children, to whom separate bequests had been previously made.

In regard to these sums, payment is directed to be made in the case of such of the children as shall be minors or unmarried at Mrs M'Call's death, or his own death if he survive her, on their respectively attaining majority or marriage.

In construing this deed I have to observe that there is no vesting till the death of Mrs M'Call, who died in February 1871, having long survived her husband, and having enjoyed the liferent of the whole estate. In the next place, there is no sum for division into shares—no sum given to a class of children or grandchildren of the brother and sister of the testator. Each separate child of Helen Wallis is separately bequeathed £1000, if he or she be alive at the date of Mrs M'Call's death. Each child of Thomas M'Call gets the same sum on the same clearly expressed condition of survivance of Mrs M'Call. No child of Thomas M'Call or of Helen Wallis could get more than £1000 under this deed, and no child of either could have any right to the provision unless alive to receive payment on the death of Mrs M'Call. The predecease of one or more children of the brother or of the sister of the testator did not augment the sum to be paid to each of the survivors. There was no accretion of the shares of predeceasers, or, more correctly speaking, the legacies of predeceasers, for there were no shares, since every legacy was separate, and predecease did not operate so as to increase the fund for distribution among survivors. There is no clause of survivorship within a class—there is no substitution or destination over—there is

really no provision to a class at all. The bequest is separate and particular to each child, and the bequest to each child is not a share of a fund, but is a definite sum, and the condition of survivorship is personal, attaching personally to each child, so that no child in either family of Thomas M'Call or of Helen Wallis can have right to the sum bequeathed unless alive at the date of Mrs M'Call's death.

If I am correct in this construction of the deed, the position of the parties claiming in this Special Case is this.

Helen Wallis, sister of John M'Call, died before the date of the trust-deed, and is referred to as "my late sister." Her daughter Margaret Wallis, wife of George Dennistoun, survived the testator, but predeceased his widow. To her, therefore, no bequest of £1000 under this deed did come, or could come. She was not alive at the date of payment or at the date of vesting. Therefore, I think that her child cannot claim the bequest which his mother could never have taken, since she did not fulfill the condition of survivance.

In like manner, Thomas M'Call having died before the date of the codicil of 1st December 1830, his daughter Mrs Helen Wallis M'Call or Dunlop survived the truster, but predeceased his widow. She did not and could not receive a bequest of £1000, for she was not alive at the date of payment or of vesting. Her children George and Colin Dunlop cannot, in my opinion, now claim the bequest which she herself could not have received, since she did not fulfill the condition of survivance.

Bearing in mind that this is not the deed of a father; that there is therefore no presumption *ex pietate paterna*; that there is no provision to a class, and no clause of survivorship within a class; and no destination over; but that personal and individual survivance of the day of payment and of vesting is a condition of the bequest to each child,—I have come to be of opinion, as matter of construction, that from the whole terms and tenor of this deed the *conditio si sine liberis* is not implied.

I therefore think that the questions put in this Special Case should be answered in the negative.

Lord Kinloch—The question now before us regards the application of the *conditio si sine liberis* to the circumstances set forth in the Special Case. The point to be determined is, Whether, in regard to a bequest of £1000 to each of the children of a sister and brother, the bequest is to be understood as passing to the children of these children, in place of lapsing in the residuary disposition.

That the principle known by the name of the *conditio si sine liberis* has received a very extensive application in our law is beyond a doubt. And, kept within proper limits, the principle is a wise and beneficial one. It simply involves the enforcement of an implied will in the testator that the children of the person primarily favoured shall come into his room, in preference to those to whom otherwise the fund would pass. The result is to deny effect to the bare literality of the deed, and to call by implication those who are not called in direct terms. This consideration fairly enforces great caution in the use of the principle. But, soundly used, the result of its application is simply to accomplish the grand aim of effectuating the intention, expressed, or fairly presumable, of the person giving the bequest.

The simplest exhibition of the principle is in the case where a childless father has executed a settlement in favour of a third party, and has had a child born to him, but has died before executing a new settlement. The implied will of the father has been held so clear and strong as to warrant the court in setting aside the settlement in favour of the succession of the child. In this case the child interested is the child of the granter of the deed. But the principle has been equally applied in favour of the children of the grantee in a bequest, where the relation of the parties was such as to imply a similar preference to those over the parties who would otherwise take. For a time the doctrine was confined to the case of descendants,—of children and grandchildren only. But by an extension, the soundness of which has been sometimes doubted, but which now must be held to be firmly settled in our law, it has been made also to comprehend the case of collaterals—of brothers and sisters, nephews and nieces. In these cases, as well as the others, the principle has a potential application. In other words—there may occur an enforcement, in the case of collaterals as well as of descendants, of an implied will in the testator to prefer the children of the person primarily favoured to those who would otherwise receive the benefit.

But in all cases whatever, even in that in which children are most favoured, there is at best nothing higher than a presumption, the strength of which will vary with circumstances, and may be wholly overcome by other considerations arising out of the terms of the deed, or the relation of the parties. Of this the case of collaterals affords peculiarly an illustration. The essential character of children is, speaking generally, always the same. But the position of a collateral may vary from that of the closest intimate to that of the merest stranger. A man's niece may have lived with him from infancy, and managed his household, and been to him as a daughter; or she may have resided all throughout in a different quarter of the globe. Hence, it is especially necessary, in the case of collaterals, to consider very carefully the circumstances of the case, and the terms of the settlement, in order rightly to determine whether it shall be held the implied will of the testator that the bequest should go to children, though not named, or the bequest shall be held a simple legacy, personal to the party favoured.

In the present case I am of opinion that there are no sufficient grounds for introducing the *conditio si sine liberis;* and that the bequests brought in question must be considered simple legacies, falling by the predecease by the legatees of the term of vesting.

The settlement was made by a gentleman of the name of M'Call, who left a widow, but no children. He bequeathed to his widow the liferent of his whole estate. On her death he appointed sums of £1000 each to be paid "to each of the children of my late brother Samuel M'Call who shall be alive at the period of my said wife's decease." He appointed similar legacies of £1000 each to be paid to each of the children of his sisters Mrs Helen Wallis, and Mrs Mary M'Kench alive at the same date. He also gave to his sisters Sarah and Margaret M'Call similar legacies of £1000 each. The residue of his estate he provided to "Thomas M'Call and James M'Call, my brothers, equally between them, and to the heirs of the body of them, or of either of them, in place of the deceaser or deceasers, *per stirpes;* and in case of the decease of

either of them without heirs of his body, or failing such heirs, then to the survivor of them, and the heirs of the survivor."

By a codicil annexed to the settlement he appointed a further sum of £1000 to be paid to each of his nieces Eliza and Sarah M'Call, and to two nephews James and John Wallis £3000 each, "in addition to what I have already left them."

By an after codicil, executed after the death of his brother Thomas M'Call, he recalled the bequest of half the residue given to that gentleman and his family, and conferred the whole residue on his brother Samuel M'Call "and the heirs of his body." But he directed a sum of £1000 to be paid to each of Thomas' children alive at his wife's death, except Sarah and Eliza, who had already received that further sum in the first codicil. He also declared this—"My nephew John Wallis being dead, I desire that my bequest to him in the above codicil should be divided thus, £2000 of it to his brother James Wallis, and £1000 of it to his sister Margaret Wallis."

By a third codicil, he substituted for the legacies to his sisters Sarah and Margaret, annuities of £100 each. And he gave to his nephews Thomas and John M'Call additional legacies of £3000 and £1000 respectively.

Having regard to these provisions, I cannot come to the conclusion that the sums of £1000 each, provided to each of the children of his brothers and sisters, are to be held as going to the children of these children, in the event of the children themselves predeceasing the widow, the liferentrix. The testator does not say that they shall so go, although the words used by him in disposing of the residue show that he had distinctly in view the case of his legatees having issue, for he provides for the devolution of the residue on the children of the residuary disponee, failing the father. If he had intended a similar devolution in the case of the £1000 bequests, the probability is that he would have similarly expressed it. Not only so, but he expressly declares that these bequests shall only be payable to the parties favoured in the event of their being alive at the widow's death. This is as nearly as possible an express declaration that if the parties died before the widow these bequests should lapse. He had evidently clearly before him the possibility of their predeceasing the widow; yet he not only does not call their children in that event, but uses words distinctly implying that, unless on their survivance, payment of the bequest shall not be made at all. Doubtless he gives the bequest to his nephews and nieces as such, and therefore it may be fairly held on the ground of relationship; but there is nothing to show that he stood, or considered himself to stand, in any peculiarly parental relation to the tolerably large plurality of objects, to each of whom he bequeaths this £1000 indiscriminately. His deed and codicils, taken together, show conclusively that the arrangements of his settlement partook in no sound sense of the nature of family provisions, but were dictated entirely by personal, if not capricious, selection and preference. The devolution in the second codicil of the bequest to his nephew John Wallis on John's brother and sister in unequal proportions, indicates how careful he was in providing by express directions for every such devolution. To sustain the *conditio si sine liberis* in the two particular cases now in question, would, with any regard to consistency, involve a devolution on children in the case of all the legacies together given to relations in the settlement, for no real difference lies amongst them; and this could scarcely be held. Finally, the residuary disponee was a brother of the testator, whom *in dubio* he will be presumed to favour, rather than a remoter kinsman. On the whole matter, I have come very clearly to the conclusion that these sums of £1000 each must be considered as simple legacies, personal to the parties favoured, and lapsing into the residuary disposition when the parties did not fulfil the condition of surviving the widow.

I am of opinion that the questions put to us should be answered accordingly.

The Court answered the question in the negative.

Agents for the Residuary Legatees—J. & R. D. Ross, W.S.

Agents for J. W. Dennistoun and for George Dunlop and Colin Dunlop junior—J. & F. Anderson, W.S.

Friday, December 22.

SPECIAL CASE FOR JOHN MOINET AND OTHERS (AITKEN'S TRUSTEES) AND OTHERS.

Succession — Vesting — Conditio si sine liberis — *Accretion.*

Where a truster left the residue of his estate to be liferented by his two sisters equally, share and share alike, and, upon the death of either, appointed his trustees to divide annually the produce of the half share of the residue liferented by her "equally among her children, until her youngest child attains the age of twenty-one years," and then to divide "the said half equally among the said children, or survivors of them, then alive—

Held that the *conditio si sine liberis* applied in favour of the issue of children surviving the truster, but predeceasing the liferentrix. But that they were only entitled to the share which their own parent would have taken in his or her own right, and were not entitled to participate in the share of another child, who survived their own parents, but predeceased the time of payment.

The late Samuel Aitken, of the firm of Bell & Bradfute, booksellers and publishers in Edinburgh, whose trustees were the first parties to this Special Case, left a trust-disposition and settlement, dated 14th October 1835, with a codicil attached, dated 8th June 1846, whereby he conveyed his whole estate, heritable and moveable. In the first three purposes of this trust, and in the codicil above mentioned, he bequeathed certain legacies to the parties therein named. The remainder of the trust-deed deals with the residue of the estate, and the clauses important to the present question are as follows:—"*Fourth*, I appoint my said trustees annually to pay to my said aunt Janet Aitken during her lifetime, for the suitable maintenance of herself, my sister Priscilla, aunt Elizabeth Aitken, and my grandmother, residing with her, the just and equal one-third part of the free annual produce of the residue of my said heritable and moveable estate, after deducting all taxes, feu-duties, repairs, insurances, and others exigible, and to pay to my said father annually during his