clusion of similar items in the counter account. It will not do to examine into an account between two parties and separate the sums below £8, 6s. 8d. from other items with which they are naturally and legitimately connected.

Lord Deas — I should perhaps explain that I hold this case to be quite well decided without reference to the case of *Haldane* v. *Spiers*, to which Lord Ardmillan has alluded.

Lord Mure concurred.

The appeal was dismissed.

Counsel for Roxburgh & Co. (Appellants) — Scott—Maclaren. Agents — Morison & Keith, S.S.C.

Counsel for Barlas (Young & Armstrong's Trustee)—Balfour. Agents—Frasers, Stodart, & Mackenzie, W.S.

TEIND COURT.

Monday, January 17.

WADDELL *v.* HERITORS OF BORTHWICK.

Teinds—Augmentation—Sisting of Process.

Where the minister satisfies the Court that there is free teind, they will grant an augmentation, although the sufficiency of the free teind to meet it depends upon the result of a question of *decimæ inclusæ* right.

Mr Waddell, minister of Borthwick, raised a process of augmentation against the heritors, in the course of which he was appointed to condescend upon the free teinds which he alleged to exist in the parish of Borthwick. He accordingly lodged a condescendence, in which he set forth certain lands lying within the parish, the free teinds of which he averred amounted to £107, 17s. 8$\frac{4}{12}$d. To this condescendence answers were lodged for Mr Dundas of Arniston, who objected, *inter alia*, to an article of the condescendence, in which the minister set forth that the teinds of the lands of Shank, belonging to Mr Dundas, were unvalued. The teinds of these lands, according to the minister, amounted to £40. The answers for Mr Dundas stated that the lands of Shank formed part of the mains of Arniston, and were held under a title *cum decimis inclucis et nunquam antea separatis*, that they had been so dealt with by the sub-commissioners in their valuation in 1629, and that in the last process of locality decree had been pronounced on the footing that these lands were teind free. It appeared, however, that setting aside these lands, there was a certain amount of undoubted free teind in the parish.

When the augmentation was called for debate, it was argued for Mr Dundas that, following the rule laid down in the case of *Frood* v. *The Earl of Stair*, the process should be sisted in order that the minister might bring a declarator to try the validity of this *decimæ inclusæ* right now claimed.

Authority—*Frood, Minister of Glenluce* v. *Earl of Stair*, Nov. 9, 1874, 2 Rettie 76.

At advising—

Lord President—My Lords, I think this is a Special Case, and not governed by the rule which we laid down in the case of the minister of Glenluce. There the only hope of the minister of obtaining an augmentation lay in establishing that the heritors had no *decimæ inclusæ* right to their lands, and as that was a doubtful point, he was put to the necessity of bringing a declarator to have it established.

But we cannot adopt that course here, because the minister has satisfied us that there is free teind to a considerable extent in this parish, and there is therefore material for an augmentation to some extent at least.

No doubt the minister, if it is proved that Mr Dundas of Arniston has no *decimæ inclusæ* right, will obtain a further amount of free teind. But are we to stop the augmentation until this has been settled?

If Mr Dundas' right is as clear as his counsel say it is, one of the first steps in the locality to follow will be to have it established. I am of opinion that we ought now to give an augmentation to the full amount asked by the minister, on the ground that there is free teind, although it may afterwards turn out upon inquiry that he cannot obtain that amount.

The other Judges concurred.

The Court granted an augmentation of six chalders.

Counsel for the Minister—Asher. Agents—Adamson & Gulland, W.S.

Counsel for the Heritor—Lee—Dundas. Agents—J. & F. Anderson, W.S.

COURT OF SESSION.

Tuesday, January 18.

SECOND DIVISION.

SPECIAL CASE—BLAIR'S EXECUTORS AND OTHERS.

Succession — Implied Bequest — Conditio si sine liberis.

A testator gave and bequeathed all the estate and effects which should belong to him at the time of his death to his father, whom failing by death to his brothers and sisters *nominatim*, share and share alike. The testator's father and two of his brothers predeceased him, one of the brothers leaving issue.—*Held* (*diss.* Lord Gifford), in a Special Case submitted by the issue of the predeceasing brother and the surviving brothers and sisters of the testator, that the former were not entitled to any share of the estate, as the *conditio si sine liberis* did not, apart from special circumstances, extend to the case of collaterals.

The late Charles Cunningham, sometime merchant in Smyrna, afterwards H. M. Consul at Galatz, and who died at Galatz on or about 26th November 1860, left a will dated 17th January 1825, in the following terms: — "I, Charles Cunningham, son of James Cunningham,

of Bonnington Mills, in the county of Edinburgh, in North Britain, now about to settle as a merchant at Smyrna, in the Turkish dominions, do hereby, in the event of my death, give and bequeath all my estate and effects of every description, and wherever situated, which shall belong to me, or to which I shall be entitled at the time of my death, unto the said James Cunningham, my father, and failing him by death before me, unto Archibald Cunningham, John Cunningham, George Cunningham, Margaret Cunningham, Janet Cunningham, Andrew Cunningham, and Mary Cunningham, my brothers and sisters, equally among them, share and share alike."

The parties named in this will were the whole brothers and sisters of the deceased.

The testator was predeceased by his father James Cunningham and his brothers Archibald and John, the latter of whom died leaving children. Between these children and the surviving brothers of the testator a dispute arose as to the division of his personal estate—the former maintaining that they were entitled to take their father's share by virtue of the condition *si sine liberis*, and to share in the proportion of the estate which would have fallen to their uncle Archibald had he survived the testator.

This Special Case was accordingly brought, and the following questions were submitted for the opinion and judgment of the Court:—"(1) Whether the shares of the estate of the late Charles Cunningham provided by him to his brothers Archibald and John, who predeceased him, or either of these shares, have lapsed into intestacy? (2) Whether the brothers and sisters of Charles Cunningham who survived him have right to these shares to the exclusion of the children of the said deceased John Cunningham? Or (3) Whether the children of John Cunningham have right to the share of the testator's estate provided to their father? And (4) Whether they have right to a proportional part of the share provided to their deceased uncle Archibald Cunningham?"

Argued for the children—The application of the *conditio si sine liberis* has been upon equitable grounds extended beyond the case of direct descendant. The bequest here is not of the nature of a legacy, but of a family provision, and there is a strong presumption that the testator intended to benefit the children of predeceasing brothers and sisters.

Argued for the brothers and sisters of the testator—The *conditio si sine liberis* has only been extended to those to whom the testator was *in loco parentis*. The party claiming the benefit of this legal presumption must either be a descendant or in the place of a descendant. The extension contended for here is not warranted by the authorities.

Cases cited—*Chancellor* v. *Mossman*, July 19, 1872, 10 Macph. 995; *Hamilton* v. *Hamilton*, Feb. 8, 1838, 16 Shaw, 478; *Christie* v. *Patersons*, July 5, 1822, F.C., 1 Shaw, N.E. 498; *Rhind's Trustees* v. *Leith and Others*, Dec. 5, 1866, 5 Macph. 104; *M'Call* v. *Dennistoun*, Dec. 22, 1871, 10 Macph. 281; *Macgown's Trustees* v. *Robertson*, Dec. 17, 1869, 8 Macph. 356; *Wallaces* v. *Wallaces*, Jan. 28, 1807, M. *voce* "Clause," Appendix, No. 6; *Dixon* v. *Dixon*, 9 Feb. 1841, 2 Rob. App. 1; *Rattray* v. *Blair*, Dec. 8, 1790, Hume 526; *Thomson* v. *Scougalls*, 31 Aug. 1835, 2 Shaw and M'Lean, 305; Erskine, iii. 8, 46; Bell's Principles, 1882; M'Laren on Wills, i. 682, Digest 35, i. 102; Code vi. 42, 30.

At advising—

Lord Justice-Clerk—In this Special Case the main question is whether the settlement of the late Mr Cunningham is subject in its construction to the *conditio si sine liberis*. Before leaving the country as a young man, he executed a will, of date 17th January 1825, in the following terms:—(*His Lordship read the will*). His father and two brothers, Archibald and John, predeceased him. We are now asked whether the issue of the predeceasing brother John are entitled to a share of the estate of their uncle. This raises a question which has never, at all events *in terminis*, been settled, viz., whether the *conditio si sine* applies where the beneficiary is neither a descendant in fact nor one to whom the testator stood *in loco parentis*, but a collateral relative.

The *conditio* has been held to apply when the settlement is universal—when the provision is of the nature of a family provision, and when the testator is at least *in loco parentis*. The effect of these elements rests upon two principles—First, the *delectus personæ* implied in a *nominatim* bequest is excluded when the bequest is to a class; and secondly, when of the nature of a family provision there is a presumption that the testator prefers the children of the beneficiaries to any substitute or conditional institute that may be named.

But it has also been decided that where the legacy is specific—when the legatees are called not a class but *nominatim*, and when the testator does not stand *in loco parentis*—the *conditio* will not apply, upon the manifest principle that a bequest to A, whom failing to B, without mention of A's heirs, goes to B in the event of A's death before the testator.

In this case there are three circumstances unfavourable to the application of the *conditio*. In the first place, the brothers and sisters are themselves conditional institutes, the father being the original beneficiary. It is not likely that when one conditional institution is expressed another should be implied. In the second place, the legatees are called by name. In one sense they may be said to be a class, because they were all the children of the marriage, but still they are legatees *nominatim*. And in the case of *Hamilton* v. *Hamilton* that was considered an element of sufficient importance to render the *conditio* inapplicable. I would refer to the remark of Lord Glenlee upon this point in that case. In the third place, this is not a provision to children in any sense. It cannot come under that category. It is quite different even from the bequest to the children of a stranger, which may be of the nature of a family provision.

This leads me to the question, whether in the case before us the testator may be said to be *in loco parentis*, and if not, whether the *conditio* applies to the case of collaterals, and if so, whether it is of universal application? It may be that we do not follow the civil law in all particulars. If we did, the question would be settled by that law and the commentators upon it. I may specially

refer to Voet, in whose work (36, 1, 15, 19) will be found all the learning that is to be had in this branch of the law.

I am not aware of any system of law in which the *conditio* would be held applicable to a bequest by a brother to a brother. The present affords a strong instance of how remote the case of a brother is to that *conjectura pietatis* on which the *conditio* applies. Is it to be assumed that the testator's affection for his brothers and sisters was less than his affection for their possible issue, whom he might never see? The probable inference is that he intended his surviving brothers and sisters to take the bequest.

The case of *Fleming* v. *Martin*, M. 8111, comes very close to the present. The Court in that case refused to give effect to the *conditio* in favour of the children of a predeceasing sister. It is quite true that a bequest to a nephew may imply the *conditio si sine*. That was decided in the case of *Wallace* and in the recent case of *Macgown's Trustees*. In that latter case Lord Benholme makes some important observations upon this matter. He says:—"The inclination of our law is to extend the maxim *si sine liberis*, but the limits within which it is applicable are not very distinctly fixed. In the case of nephews and nieces called collectively it has been held to apply; but it is not so clearly applicable to the case of individuals of a class called *nominatim*. A distinction has been taken between persons chosen out of a class and a whole class called collectively."

There are several cases, however, in which the application of the *conditio* has been refused in the case of nephews and nieces. There is the case of *Wishart* v. *Grant* (June 16, 1763, M. 2310), and of *Sturrock* v. *Binney* (Nov. 29, 1843, 6 D. 117), which turned on the fact that the mother of the children who claimed was not alive at the date of the execution of the settlement. The Court held, although Lord Moncreiff differed, that, as it was impossible to hold that the mother, who had predeceased the execution of the settlement, had been instituted, there was no room for conditional institution. Then came the case of *Rhind's Trustees* v. *Leith and Others*, which turned upon the fact that the mother of those who claimed under the *conditio* had never been instituted, she having been dead at the date of the settlement, but in which the present Lord President expressed a doubt whether the *conditio* could be applied to cousins of the testators under any circumstances.

If, however, the case of *Christie* v. *Patersons* is to be held as settling the law, it would raise a difficulty in the way of our judgment. There the Court by a majority applied the *conditio* to the case of cousins of the testator—Lord Balgray and Lord Succoth dissenting. Both these Judges were of opinion that the *conditio* never applied to collaterals, but the majority of the Court held the case to be ruled by that of *Wallace*. Lord Balgray observed:—"There is nothing in the case of *Wallace* like to this. There it was a family settlement—all the children survived the testator, and the day of payment only was suspended." That last observation is quite correct. It is not clear that that judgment did not proceed upon the ground that the provision had vested rather than on the application of the *conditio*. Lord Balgray continues—"The case of *Holt* v. *Mackenzie* (Feb. 2, 1781, M. 6602) is more similar. These principles of equity are only extended to cases of ascendants and descendants, and where *ex pietate* one of the parties is *in loco parentis*." Lord Succoth says:—"The presumption *si sine liberis* is confined to ascendants and descendants both in the civil law and in ours. There is a legacy to a collateral, who is in law a stranger, and is regulated by a different principle."

The opinion delivered by Lord Gillies in this case is well worthy of attention, for if it be sound it is quite sufficient for the determination of that case. He is reported to have said—"I cannot admit that there is any distinction in principle between the parties being first and second cousins or more distant collaterals. The same principle applies to all. In *Wallace's* case the argument of the successful party was founded on the presumed intention of the testator. That is truly the principle—if there be one—which was affirmed by that somewhat remarkable decision. If it does not require any specific relationship between the testator and the beneficiary, we may discard the *conjectura pietatis* altogether." I am rather surprised at the decision in *Christie* v. *Patersons*, because in the case of *Neilson* v. *Baillie* (June 4, 1822, 1 Shaw, N.E. 428), decided a month before, the same Judges are reported to have delivered opinions not easily reconcileable with their opinions in the case of *Christie* v. *Patersons*. Lord Hermand, who was of the majority in the latter case, said in that of *Neilson*—"The presumption of the existence of the condition *si sine liberis* is founded upon the *pietas paterna*, and extends to grandchildren as well as children." The Lord President said—"I am not so clear that the presumed *pietas* extends to the case of grandchildren; and as to them, I think that it is carried too far by Papinian, particularly in the case of grandchildren by a daughter who is of another house, and there is no obligation on the grandfather to provide for them. The duty falls on their own father."

The case of *Christie* had elements in it which are not in the present case. It was truly a provision to children. The whole question has been reconsidered in the case of *Rhind's Trustees*. Following that case, I am of opinion that the *conditio* does not apply to collaterals. It may be implied from the words of the deed, but that is a different matter. As far as the presumption is concerned, it does not apply unless the testator be *in loco parentis* and the provision a family one, and this not the case when the beneficiaries are brothers and sisters.

Lord Neaves—I have arrived at the same opinion. The *conditio si sine* was introduced by Papinian, who laid down the proposition that in certain cases he would imply a condition by which it was to be held that the express terms of a bequest were not to be carried out in the event of the legatee dying and leaving issue. But that implied condition was founded on the *paterna pietas*—the presumption that a man who favours his son is also disposed to favour his grandson. It was accordingly limited to cases in which this paternal relation existed. It was so held in the Roman law, and in those countries which have adopted that system. It has been so recognised here, with the exception or apparent exception mentioned by your Lordship.

It may have been extended beyond its original limits, but never so far as to make it a matter of no importance whether the legatee be a descendant or a stranger. And if we are to stop further extension we should stop it now. There are no elements in the present case which warrant the application of the *conditio*. This is neither a case of ascendants nor descendants, nor of nephews who are in the position of the children of their uncle. I see no reason therefore why we should extend this presumption to the present case.

Lord Ormidale—The question to be determined in this case arises in peculiar circumstances, and has reference to the construction and effect of the testamentary settlement, not of a father in favour of his children, but of a son in favour of his father, whom failing by death before the testator in favour of his brothers and sisters, whom he individually calls and names, equally among them share and share alike.

The father, the institute in this settlement, and also two of the brothers, John and Archibald, the former leaving issue, having predeceased the testator, the question which has been submitted to the Court, and very fully and ably debated, is, whether the share of the testator's estate which would have gone to his brother John, had he survived him, now belongs to the issue of John in virtue of the implied condition *si institutus sine liberis decesserit*, or to the surviving brothers and sisters.

In dealing with this question it is necessary to keep in view that the principle which underlies the Roman law maxim referred to, and which has been recognised as of force in our own law, is the implied or presumed will of the testator. But, for obvious reasons, the implied will of a testator ought not to be superinduced upon what he has expressed, except in circumstances making it clear that his true intention is not thereby violated and a settlement made for him which he would not have made for himself. Accordingly the authorities — the institutional writers as well as the decisions of the Court— shew that it is only within certain limits and subject to certain qualifications that the will or settlement of a party can be dealt with except in accordance with its express terms, in order that other terms not expressed should be held as implied and given effect to. I think, however, it is difficult to say on the authorities what are the limits or qualifications appertaining to this matter, or whether they can with certainty and precision be defined.

It has been stated that the implied condition can only be given effect to in circumstances which denote the *pietas paterna*, as in destinations by a parent to children or descendants in the direct line. But the cases shew that the implied condition has been applied to questions arising between parties standing in other relations—for example, in the collateral degree of relationship of uncles and nephews, where the granter of the deed has been held to stand *in loco parentis* to the beneficiaries, and also in some cases where it is called *conjectura pietatis* it has been held to operate as when the distination is expressly to children as a class, although the granter of the deed is not their father, and cannot properly be said to stand to them *in loco parentis*. But in the present case it is obvious that *pietas paterna* does not apply, and also that the granter of the deed does not stand *in loco parentis* to the beneficiaries whom he has named and called. And as to the principle of *conjectura pietatis*, I have not been able to discover any instance where it has been held to apply in circumstances similar to those which occur in the present case, where the difficulty arises from the circumstance of the will or testament being not by a father but by a brother, and not in favour of children or descendants, but an ascendant, the testator's father, whom failing by his predeceasing the testator, to his brothers and sisters, who are individually called and named. None of the precedents—and they were very numerous — cited at the debate were, I think, precisely of this nature. Some of them, however, show that the principle of implied condition has been given effect to in favour of nephews and nieces of the testator, and that is the position of the claimants in the present case, arising in consequence of their father, as well as the father of the testator, having predeceased him. That the second parties claiming stand in this position, and are not direct descendants of the testator, would not of itself be sufficient to exclude their right in virtue of the implied condition *si sine liberis decesserit*, I consider to be now clear on the authorities, whatever doubt may have been entertained at one time on the subject, even although it may have been, as I think it was, an extension of the doctrine as it was at first understood. But I am not aware, and am unable to hold, that this extension of the doctrine to collaterals is applicable, or can on authority or principle be sustained, under such a destination as that in question—a destination not to children as a class, or to children at all, or even to nephews or nieces, but to brothers and sisters individually named and called. It was indeed conceded in argument that there was no decided case exactly in point, unless it be that of *Christie and Others* v. *Patersons*, 5th July 1822, 1 Shaw 543. The circumstances, however, of that case were materially different from those of the present. There the institutes called were the children generally as a class of the testator's mother, there being no *delectus personarum* indicated, except such as might be inferred to have very naturally existed in regard to the descendants of the testator's brothers and sisters, to whom generally and as a class he expressly destined his estate. And that children may in such and similar destinations be held, according to circumstances, to include grandchildren is shown in the case of *Rankine and Others*, 17th June 1870, 8 Macph. 278, and of *Houston*, noticed in foot-note to *Wemyss* v. *Gray and Others*, 23d November 1810, F. C. But in the present case the *delectus* of the testator is shown by his having left his estate not generally to his brothers and sisters as a class, or to the children of the father generally and as a class, but to five brothers and sisters individually called and named by him. It may be true, as was stated in the course of the debate, that the individuals so called and named were all the brothers and sisters of the testator, but the father might, although he had not, have again married, and had other children subsequent to the date of the testator's will. I think therefore, for these reasons, that the case of *Christie* v. *Patersons* is distinguishable from the present, and

cannot be appealed to as a precedent in point. Besides, even if it had been more directly in point than it is, I doubt whether it is an authority to be safely relied on, for (1) the decision was carried by the narrowest majority—that of one out of the five judges present; (2) all of the majority seemed to think the question fell to be governed by the two previous cases of *Mackenzie* v. *The Legatees of Holt*, 2d February 1781, Mor. 6602, and *Wallace* v. *Wallace*, 28th January 1807, Mor. Appx. *voce* "Clause," No. 6, although these cases ought not, I think, to have affected the decision, in respect that in both the testator stood as it were *in loco parentis* to the beneficiaries, and in both the institutes survived the testator, which was not the case in *Christie* v. *Patersons*. Besides, in all these cases, including that of *Christie* v. *Patersons*, the destination was in favour of children generally as a class, and not, as in the present case, in favour of particular persons specially called and named. Independently of these considerations, the decision in the case of *Christie* v. *Patersons* has been seriously questioned as an authority in any view that can be taken of it. It was so questioned by the Lord Justice-Clerk (Inglis) in *Rhind's Trustees* v. *Leith and Others*, 5th December 1866, 5 Macph. 104, who expressly said that he disregarded it as an authority.

For all these reasons, and chiefly for the reason that it makes no mention at all of children, but is simply a destination to the testator's father, whom failing to his brothers and sisters specially called and named, I am unable to find that the children of the testator's brother John who predeceased him are to take the place of their father in the succession which has opened. On the contrary, in my opinion the share intended for John, had he survived the testator, must in consequence of his predecease be held to have lapsed into the general estate, and as such falls to be divided amongst the testator's brothers and sisters who survived him.

There is another ground upon which, in the special circumstances of the present case I should be disposed to hold that the issue of John Cunningham who predeceased his brother, the testator, is excluded from the succession. The presumption upon which the implied condition involved in the maxim *si sine liberis decesserit* is raised, is not absolute, but may be rebutted by, and must yield to, other and stronger presumptions. That such is the law is stated by Mr Erskine in his Institutes, book iii. tit. 8, sec. 46, and by Mr Bell in his Principles (sec. 1778), and is illustrated by decided cases. Thus, in *Yule* v. *Yule*, 20th December 1758, Mor. 6400, it was ruled that the condition *si sine liberis* did not take effect where a father who while unmarried, and after he had taken certain bonds payable to himself, whom failing in favour of his brother, married and had children, and yet did not alter the bonds, although he survived their date three years and the birth of his oldest child two years. It is true that there the bequest was of a special legacy and not of the *universitas* of the testator's estate; and it is not to be disputed on the authorities that this is an important element militating against the admission of the implied condition. But in the case of *Watt* v. *Jervie*, 30th July 1760, Mor. 6401, which occurred soon after that of *Yule*, it was held that a settlement by a man of his whole effects on his wife was not voided by the birth of a child five weeks after his death, although the father had disposed of the *universitas* of his estate to the prejudice of his child, for the reason, so far as can be collected from the report, that he must have known of the pregnancy of his wife, and had an opportunity of altering his settlement, but did not do so. Now, the circumstances of the present case are still more favourable for the operation of the same principle of decision. Here the testator's settlement was executed in 1825, and he lived thereafter till November 1860, a period of thirty-five years. John, the testator's brother, died in September 1838, about twenty-two years prior to the death of the testator. But the testator made no alteration on his settlement. In this state of matters the presumption is much stronger than in the cases referred to, that the testator did not intend that the issue of his brother John should take the place of their father. Indeed, it is more probable that he should prefer the surviving brothers of John, whom he personally knew, and in family with whom he must for some time have lived, to the children of John, to whom he was under no obligation, and for anything that appears for whom he could have had no particular regard. I am disposed to hold, therefore, that the presumption involved in the maxim *si sine liberis decesserit* must, even if it had otherwise applied, be held to be overcome and excluded by what I think the stronger presumption afforded by the special circumstances of the case; and I do not see how any other conclusion could be come to consistently with the decisions in the cases of *Yule* v. *Yule* and *Watt* v. *Jervie*, to which I have referred.

The result is that, in my opinion, the second question in the Special Case ought to be answered in the affirmative, and this, I think, renders any answer to the other questions unnecessary.

Lord Gifford—The main, and indeed the only, question raised in this Special Case is whether the children of John Cunningham, one of the brothers and residuary legatees of the testator, are entitled, in virtue of the implied condition *si sine liberis*, to the share which their father, the deceased John Cunningham, would have taken had he survived the testator. I do not think the other questions in the case are attended with any difficulty, and on these other questions I concur in the result at which your Lordships have arrived.

On the question of the condition *si sine liberis*, however, I have felt very great difficulty indeed, and although it is with great hesitation and doubt that I venture to differ from your Lordships, I feel myself unable to concur in laying down the rule or principle which I understand to be indicated in the opinions which have just been expressed, that in general, and apart from special circumstances, the condition *si sine liberis* will not be held as implied where a testator names his brothers and sisters as his residuary or universal legatees. I hesitate to adopt a rule which, whatever its convenience, I scarcely think warranted either in itself or with reference to the authorities and decisions which have been pronounced. In the present case I incline to think that, looking to the whole circumstances—the terms of the testament in question, the position

in which the testator stood, and his relation to the legatees named, the testator must have intended, in the event of any of his brothers and sisters predeceasing him leaving issue, that such issue should take their parent's share. I do not feel compelled by any of the decisions which have been pronounced to hold that children are excluded, and I cannot help feeling that it is more in accordance with the probable intentions of the testator to let in the claim of John Cunningham's children than to exclude them altogether.

Two cases seem to be clear upon the authorities. When legacies or shares of residue are bequeathed by a testator to strangers in blood, or even to distant relatives *nominatim*, without any mention of children or issue, such legacies lapse by the legatee predeceasing the testator, and cannot be claimed by the children or heirs of the legatee. The bequest is held to be personal to the legatee himself, to have been given from personal affection or upon personal grounds, and it does not go to the legatee's children when the legatee himself predeceases the testator, unless the will expressly so provides. The general rule holds that legacies lapse by the predecease of the legatee.

The other case seems equally clearly fixed by the authorities, that when a *father* makes provisions, whether by way of legacy or by share of residue or otherwise, for his child or children or for his grandchild or grandchildren or other descendants, and the children or grandchildren so favoured predecease the testator leaving issue, such issue will take their parent's provision or share unless the testator has expressly excluded them. The *conditio si sine liberis* is always held implied in bequests or provisions to *descendants*, but not in the case of bequests or provisions to strangers. Of course if there is any clause in the deed explaining the testator's intention, that must be given effect to. I am only dealing with cases where the deed is silent.

The cases attended with difficulty are those intermediate between the two classes I have just specified, that is, where the bequest is not to strangers *nominatim* or to children or descendants, but to collateral relatives either called by name or as a class, and here it is very difficult to lay down a satisfactory principle.

It seems to be fixed that in a bequest to nephews and nieces of the testator, if some of them predecease the testator leaving issue, such issue will in general take their parent's share, and this seems to hold not only where they are called simply as a class, as for example, "to all my nephews and nieces," or, "to all the children of my brother," or in such similar way, but also in the case where the nephews and nieces are named, provided that the enumeration embraces the whole nephews and nieces, so as not to raise any indication that some are excluded.

The question now raised is whether the same presumption applies to a bequest in favour of the brothers and sisters of the testator. Does a bequest to "brothers and sisters," without anything else being said, imply a provision that if any of the brothers and sisters predecease the testator, leaving issue, such issue shall take the share which would have belonged to their parent if he or she had survived the testator. Now, on the whole, and though not without great hesitation, —all the greater that I am differing from your Lordships—I incline to hold that it does. I shall come to the specialties of the present case immediately. At present I am taking the case quite generally, as if the residuary or universal bequest had run "to my brothers and sisters equally, share and share alike." Such a bequest, I think, implies that if any of the brothers and sisters predecease, their issue shall take their place.

This is undoubtedly the law in regard to bequests to nephews and nieces. Why should the law be different when the bequest is to brothers and sisters? The only reason given—I think the only reason that can be given—is, that an uncle is in *loco parentis* to his nephews and nieces, but is not so to his brothers and sisters. This may be true in some cases, or perhaps in many cases, but it is certainly not true in all cases. For example, if a man's own brother is alive and at the head of his family, it can hardly be said that he, the uncle, is in *loco parentis* to his brother's children; the *locus* is occupied by the father himself. A man's nephews and nieces, if the children of a much elder brother, may be all older than himself, or in positions which make it unreasonable to say that he is in *loco parentis* to them, and, on the other hand, in the case of an elder brother, he may be so much older than the other children, especially if only consanguinean, as to be far more in *loco parentis* to them than he could ever be to nephews and nieces in other circumstances. It is dangerous to make a legal presumption that one person is in *loco parentis* to another. I rather think that this will always depend upon circumstances apart from the case of direct descendants.

But farther, I scarcely think that even where relationship may raise a presumption of a testator being in *loco paternis* to beneficiaries, that this is the true principle. I rather think the true principle is, does the testator by the terms of his will place himself in *loco parentis*, and can it be gathered from the deed that he assumes the duties or the burdens of a parent, and is in this sense and by his own act *in loco parentis?* If so, and even in the case of strangers in blood, there might be the very strongest reasons for implying the condition *si sine liberis*. For example, if a testator should use such language as this — "As my adopted son, whom I intend to make my heir, has unfortunately predeceased me, I leave the residue of my estate to his children equally among them." In such a case as this I should be very much inclined to hold that grandchildren would take if any of the immediate children failed, and this although there was no tie of blood or relationship whatever with the testator. It is true the word children sometimes includes grandchildren or great-grandchildren, but I do not think in the case I have put it would make any or much difference if the testator, instead of merely calling the children of his adopted son, had named them all and described them as such. But there is express decision that the condition *si sine liberis* applies not only to bequests to nephews and nieces, to whom an uncle may very often be said to be *in loco parentis*, even when his brother or sister, their parent, is alive, but to the case of a bequest or provision to a testator's *cousins*. I allude of course to the case of *Christie* v. *Patersone*, 1 Shaw 543 (1 Shaw, new ed. 498),

and although I know that this decision has been doubted, yet I think it has never been either expressly or by implication reversed or overturned, and I hesitate to do so without calling in the Judges of the other Division. *Christie* v. *Patersone* was decided by the First Division, and although there were specialties in it—for example, the cousins were described as "*children of the brothers and sisters of my mother who shall be in life at my death*,"—still the decision is not put upon specialties, such as the meaning of the word "children," but upon the relationship of the legatees, and the judgment bears to be in respect of the cases *Wallace* v. *Wallace*, Mor. "Clause," App. 6, and *Mackenzie* v. *Holt*, Mor. 6602. *Wallace* was the case of nephew's children. In *Mackenzie and Holt* v. *Holt*, it was the children of relatives, but the precise degree of relationship does not exactly appear. I cannot, merely on account of the doubts which have been expressed as to *Christie* v. *Patersone*, absolutely reverse that decision, as I think we are now asked to do. I do not think the doubts expressed in *Rhind's Trs.* v *Leith*, 5 Macph. 104, warrant us, without calling on our brethren, in introducing another rule, especially as I am by no means satisfied that on general principles the rule should be so narrow as is now proposed.

The specialties in the present case seem to me strongly to favour the claim of John Cunningham's children, though here also I may well hesitate when I find myself in opposition to your Lordships. The testator bequeaths his whole estate, first to his father as sole and universal legatory, and it is only in case the father should die before him that he substitutes for his father his whole brothers and sisters. I think this seems to show that this was because they were all descended from the same father that the brothers and sisters were instituted residuary legatees. It was because they would succeed to the father that the testator made them his own successors, and for the same reason the tie of blood would apply to brother's children. They, too, will take not from personal reasons, but because they are the grandchildren of the testator's father. Still farther, there is no express institution of survivors—the brothers and sisters alone are named to take equally—and nothing is said of survivors, and although in a conjunct bequest the effect may be the same as if survivors had been called, it is certainly a stronger case for the issue of predeceasers taking their parent's share.

On the whole, putting myself in the testator's place, as I am bound to do by the true canon of construction, and reading the testator's words as nearly as I can in the sense in which he must have used them — and this is the way to gather the intention of the testator—I cannot help thinking that he did not intend to provide that if any of his brothers and sisters predeceased him leaving children, such children should be excluded from his succession.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the Special Case, are of opinion and find—(1) That the two shares of the estate of the late Charles Cunningham provided by him to his brothers Archibald and John, who predeceased him, have not lapsed into intestacy, nor either of them; (2) That the brothers and sisters of Charles Cunningham who survived him have right to these shares, to the exclusion of the children of the said deceased John Cunningham; (3) That the children of John Cunningham have no right to the share of the testator's estate provided to their father; and (4) That they have no right to a proportional part of the share provided for their deceased uncle Archibald Cunningham; and decern."

Counsel for the First Parties—M'Laren. Agent—John M. Bell, W.S.

Counsel for the Second Parties—Horne—Mellis. Agents—Bruce & Kerr, W.S.

Wednesday, January 19.

FIRST DIVISION.

[Lord Young.

MILNE *v.* MILNE.

Succession—Fee and Liferent—Mutual Settlement.

A husband and wife executed a mutual trust-disposition and settlement, whereby the former disponed his whole property, heritable and moveable, of which he might die possessed, "to and in favour of S. M., my wife, and on her decease to the heirs and successors of me." The wife's disposition was "to and in favour of" her husband "and his heirs and assignees whomsoever." There was a clause of reservation in the following terms:—"Reserving always to us, and each of us, our respective liferents of the means and estates above conveyed, with full power to us at any time during our joint lives to alter, innovate, or revoke these presents, in whole or in part, as we may see proper; but declaring always that the same, in so far as not altered, innovated, or revoked as aforesaid, shall be effectual though found lying by either of us at the time of his or her decease, or in the custody of any other person for our behoof, with the delivery whereof we have dispensed and hereby dispense for ever." The wife survived her husband.—*Held* that she had right to dispose at will of her own estate, but had only a liferent of her husband's estate.

On October 4, 1867, William Stanhope Milne, stationer, of No. 126 Princes Street, Edinburgh, and his wife, the pursuer in this action, executed a mutual disposition and settlement. He was proprietor of the tenement where he carried on his business, and of considerable personal property. The pursuer had succeeded on the death of her father to a villa at Morningside, Edinburgh, and to some personal property. Her husband had greatly improved this villa, although the title stood in the pursuer's name. There was no antenuptial contract of marriage between the pursuer and her husband, and there were no children of the marriage. By the mutual disposition and settlement Mr Milne gave, granted, assigned, and disponed "to and in favour of the