affecting his status and civil rights as a member of the Society, without notice, and without giving him an opportunity of clearing himself, and making such explanations as he may be advised."

Argued for Petitioners—The words in section 29 covered everything affecting professional character, and not merely professional conduct. The Society could deal with any offence in a member which would have entitled them to have excluded him from becoming a member. The application was competent and the prayer of the petition should be granted—*Solicitors of Elgin* v. *Shepherd*, February 16, 1881, 18 S.L.R. 303.

Replied for respondent—The application was unwarranted, for the basis of the petition was a report by the Society's fiscal, and there was no averment that such a report was ever prepared; besides, all the proceedings of the Council took place behind the respondent's back. In an application of this kind the Court had a discretionary power, and this was not a case in which it should be exercised against the respondent. "Conduct" in the statute meant exclusively professional conduct. The Society had nothing to do with the moral character of any of its members. The petition should therefore be dismissed, or alternatively there should be a remit for further inquiry.

At advising—

LORD PRESIDENT—The fact upon which the Society proceeded in presenting this petition was, that the respondent was convicted under section 11 of the Criminal Law Amendment Act. Now, it is not necessary that I should enter into a construction of that section or make any reference to the charge against the respondent in the Sheriff Court. The only fact before us, and the only fact upon which we are asked to pronounce judgment, is that the respondent has been convicted of such an offence, and the question which we have to determine is, whether the commission of such an offence is conduct affecting the professional character of a member of the Society? If that conduct is such as to affect his professional character, then it is within the scope of section 29 of the statute. I do not think it requires, under the statute, to be professional conduct; the statute does not say so. I think it is any conduct which can have the effect of injuriously affecting the member's professional character. I do not entertain any doubt that the offence committed was such a very serious one as to affect professional character—the character of any member of the legal profession. But it was argued for the respondent that the procedure in connection with the presentation of this petition had been irregular and that he had not had fair play. In ordinary cases no doubt, where the inquiry is commenced before the Council of the Society, the procedure would require to be regular, and a fair opportunity would need to be given to the party charged to meet the accusations made against him. Here, however, there was no occasion for any inquiry whatever. The fiscal made his report that the respondent had been convicted of this offence, and therefore the Society presented the present petition. If we think the evidence of this conviction sufficient, then I am satisfied that the procedure has been quite regular. I think that evidence is sufficient, and I also think the offence of which the respondent was convicted was a very serious offence in a moral point of view, and therefore was not only calculated to affect, but most certainly did affect, his professional reputation.

I am therefore for granting the prayer of the petition.

LORDS MURE, SHAND, and ADAM concurred.

The Court granted the prayer of the petition.

Counsel for Petitioners—D.-F. Mackintosh, Q.C.—J. A. Reid. Agent—David Philip, S.S.C., Fiscal of the S.S.C. Society.

Counsel for Respondent — Pearson — Hay. Agent—Party.

Friday, July 16.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Kinnear, Ordinary.

PAXTON'S TRUSTEES *v.* PAXTON.

Succession—Accretion—Joint or Several Gift—Legacy—Residue—Resulting Intestacy.

It is a settled rule of construction of settlements (subject to being controlled by the evident intention of the testator) that when a gift, whether of a legacy or of residue or of corporeal moveables, is given to several persons in language importing a severance of their shares, each is entitled to his share only, and in no event to more, and therefore there is in the event of one of them predeceasing the testator no room for accretion.

Therefore where a testator divided one portion of his estate by leaving a special legacy to a legatee, the remaining portion "to be equally divided between my late wife's sisters J. A. and M. S., my late wife's brother R. S., and my late wife's niece J. S.," and R. S. predeceased the testator—*held* that his share was undisposed of and fell to the testator's heirs *in mobilibus*.

James Paxton, Kilmarnock, died in January 1884 leaving a settlement executed in 1878, whereby he conveyed his whole property to trustees. By the second purpose thereof he there provided—"My trustees shall, as soon after my decease as they shall find convenient and practicable, divide the whole of my estate into two equal parts, and shall divide the one part among my brothers John and William, and my whole sisters and their respective families, share and share alike, the families of a deceased brother or sister taking their parent's share, whether such brother or sister shall have predeceased me or not; and shall divide the other part of my said estate as follows—£200 to my late wife's sister, Margaret Smith or Crabbie, in the event of her predeceasing me said sum of £200 to be paid to my sister Jane Paxton or Cowie, the remaining portion to be equally divided between my late wife's sisters, Jane Brown Smith or Aikman, Mary Ann Smith or Swanston, my late wife's brother Robert Smith, and my late wife's niece Jeannie Aikman Swanston; in the event of said Mary Ann Smith or Swanston predeceasing me, her portion to be equally divided amongst her surviving daughters."

The truster had three brothers, William who survived him, and George and John who both predeceased him and left issue. He had four sisters, Jane (Mrs Cowie), Agnes (Mrs Bunten) who survived him, Isabella (Mrs Stewart) who predeceased him leaving issue, and Mary Ann (Mrs Carswell) who also predeceased him leaving issue.

Robert Smith, who was the brother of the truster's deceased wife, and was mentioned in the settlement as above quoted, predeceased the truster and left no issue.

The trustees, in order to settle whether Robert Smith's share passed by accretion to Mrs Aikman, Mrs Swanston, and Jeannie Aikman Swanston (who had married John Taylor), or whether it had become intestate succession and fell to the truster's heirs *in mobilibus*, raised this multiplepoinding. Mrs Aikman, Mrs Swanston, and Mrs Taylor claimed the fund *in medio*, one-third to go to each, pleading—"The share of the testator's estate bequeathed to the said deceased Robert Smith having passed by accretion to the claimants, they are entitled to be ranked on the fund *in medio* in terms of their claim."

The representatives in moveables of the truster pleaded that Robert Smith having predeceased the truster "the bequest in his favour lapsed, and the claimants, the truster's heirs *in mobilibus*, are entitled to the share of residue provided to the said Robert Smith."

The Lord Ordinary (KINNEAR) sustained the claim for Mrs Aikman and others.

"*Opinion.*—The claimants preferred are in the position of residuary legatees, sharing among them one-half of the residue after payment of two special legacies, and are not special legatees in separate and unconnected bequests. I do not think it doubtful that the testator intended that they should share among them the entire half of the estate bequeathed to them, to the exclusion of his own relations, to whom he had bequeathed the other half. It is equally certain that he did not intend to die intestate as to any portion of his estate. It appears to me to follow that the share which would have gone to Robert Smith had he survived the testator must be divided among the surviving legatees of that portion of the estate. It is admitted that this must have been the case if the testator had not directed that the half in question should be 'equally' divided among the legatees named. But it is said that the direction that the division shall be equal imports a separate legacy of an equal portion to each of the legatees, and not a joint legacy of the whole. But if it is clear that the testator intended his wife's relations whom he has named to take one-half of the estate to the exclusion of his own next-of-kin, it does not appear to me to affect the inference which must otherwise have been drawn from that intention, that he has expressed in words his desire to favour these legatees equally, instead of leaving that to be implied in the general direction to divide. The counsel for the other claimants founded on *Torrie* v. *Munsie*, and the cases of *Rose* and *Paterson* there cited, and maintained that these decisions established a rule of law by which accretion as among legatees of residue who are called *nominatim* is excluded by a direction to divide equally or proportionally. The only general rule that these cases appear to me to establish is, that where a testator intends a number of legatees who are conjoined in words, but not in the matter of their legacies, to take each a separate and distinct share of a fund as special legatees, one of such legatees can take no benefit from the death of another, and any share that may have lapsed must fall into residue or to the next-of-kin as the case may be. But whether in any particular case the legacies are separate and distinct so as to exclude accretion, is a question of intention to be determined according to the ordinary rules of construction. The case of *Torrie* is no authority for the construction of a will expressed in different terms. The cases of *Robertson* (Hume 273), *Bannerman* v. *Bannerman* (6 D. 1173), and *Moir* v. *Moir* (9 Macph.), shew that there is no rule of construction by which a direction for equal division must be held in itself to exclude accretion."

The heirs *in mobilibus* of the truster reclaimed, and argued—The question arose not with regard to the pecuniary division of the estate into two equal parts, but with regard to a lapsed share of the shares into which one of these parts was divided, viz., Robert Smith's share. The Lord Ordinary had held that there was no canon to be applied but the intention of the particular testator, but the decisions had established a subcanon, to the effect that words importing severance in the division exclude joint taking of the gift, and therefore exclude accretion among the donees, and therefore that such words must be held to import the testator's intention that there must be no accretion, because each legatee was given a separate subject. The words "share and share alike" were synonymous with "equally between," the words in this case, and both implied severance. The particular deed and state of the family was in favour of the reclaimer's contention, but the rule contended for was truly settled by authority, and the cases decided that where the shares were given "equally between" or share and share alike among the legatees, or in any words importing severance (in whatever proportions), there was no room for saying that the right of one donee was a burden on that of another and therefore no accretion—Stair, iii. 8, 27; *Paterson*, June 4, 1741, M. 8070 (also rep. in Elch. *voce* Legacy, 9); *Rose*, M. 8101; *Wauchope*, December 22, 1882, 10 R. 441. The case of *Robertson* v. *M'Bean*, Hume 273, was not quite consistent with the others, and would be founded on on the other side, but if capable of being used as an adverse authority it was inconsistent with those already quoted and with *Torrie* v. *Munsie*, 10 Sh. 597, which carried the doctrine beyond legacies and applied it to residue, and *Tulloch* v. *Welsh*, November 23, 1838, 1 D. 94 (where *Paterson's* case was referred to); *Breadalbane*, 3 D. 357 (Lord Medwyn); *Hamilton*, 16 Sh. 478. [The Lord President referred to *Buchanan's Trustees*, June 15, 1883, 20 S.L.R. 666, and to his own opinion (p. 669)—"I think it is very well settled by a series of cases that when a legacy in liferent or fee is given 'in equal shares' there is no room for accretion, while, on the other hand, when the gift is given 'jointly' then the presumption is in favour of accretion;" and pointed out that the case was additionally important because *Robertson's* case had been quoted in the argument, while Hume's Decisions had not yet been published when *Torrie* v. *Munsie* was decided]. The case of *Buchanan* seemed clearly in point, as were also these authorities—M'Laren on Wills, i. 678;

Bell's Prin. 1882; M. Bell's Lectures, ii. 989; Menzies' Lectures (2d ed.) 500; Jarman on Wills, ii. 257; and Robinson and Fraser, 6 Ch. Ap. 696. *Bannerman*, 6 D. 1171 would be cited on the other side. It was an Outer House decision, and it was important to observe that it was itself arrived at by Lord Wood on the specialties of the deed there before him, and that he held (and soundly) that *Robertson* v. *M'Vean* was also a special case.

Argued for Aikman and others—The question was one of intention, and there was no doubt that but for the word "equally" the reclaimers had no case. Now, that word did no more than the law would do without it. *Torrie* v. *Munsie* was decided in ignorance of *Robertson* v. *M'Vean*, which was not yet published, and one Judge expressly said he must follow *Paterson* and *Rose*, believing there was no authority hostile to these cases, and not observing the distinction between special legacies and residue there drawn. The rule was not a rigid one which would not yield to the testator's intention. *Buchanan's* case was not really adverse. *Scott* v. *Scott*, 5 D. 520 (Lord Medwyn and Lord Moncreiff); 2 Williams on Executors, 8th ed., 1467 and 1470; *Begley*, 3 D. 662. [The Lord Justice-Clerk referred to the session papers in *Robertson's* case, quoted *infra* in his Lordship's opinion.] *Bannerman's* case [*supra cit.*] was entirely in respondent's favour.

At advising—

Lord President—The trust-disposition and settlement of Mr Paxton specially conveyed a house and garden occupied by himself in favour of one of the sisters of his deceased wife in liferent, and to her niece in fee. With this exception his whole estate was disposed of by the second purpose of the trust, the first purpose being the formal clause for payment of debts, &c.

By the second purpose the trustees are directed to divide the estate into two equal parts, one of which parts is to be divided among two of his three brothers and his three sisters, and their respective families, share and share alike, children taking their parents' share in the event of their parents predeceasing the testator. No question arises on the construction of this first portion of the second purpose.

The clause proceeds in the following terms:—The trustees "shall divide the other part of my estate as follows—£200 to my late wife's sister Margaret Smith or Crabbie; in the event of her predeceasing me, the said sum of £200 to be paid to my sister Jane Paxton or Cowie; the remaining portion to be equally divided between my late wife's sisters Jane Brown Smith or Aikman, Mary Ann Smith or Swanston, my late wife's brother Robert Smith, and my late wife's niece Jeannie Aikman Swanston." Robert Smith predeceased the testator, and the question for decision is, whether his share of the fund directed to be equally divided between himself and three other persons passes to these other legatees by accretion, or is, in the event which has happened, undisposed of, and falls to the next-of-kin by reason of intestacy.

The legacy to the four persons named is expressly directed to be equally divided between them.

Now, there is a rule of construction settled by a series of decisions beginning in the last century, and coming down to the case of *Buchanan's Trustees*, June 12, 1883, 20 S.L.R. 666, to the effect that when a legacy is given to a plurality of persons named or sufficiently described for identification "equally among them," or "in equal shares," or "share and share alike," or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees. The rule is applicable whether the gift is in liferent or in fee to the whole equally, and whether the subject of the bequest be residue or a sum of fixed amount or corporeal moveables.

The application of this rule may, of course, be controlled or avoided by the use of other expressions by the testator importing an intention that there shall be accretion in the event of the predecease of one or more of the legatees. But in this case there are no such expressions to be found. There is indication of a general intention that the estate should be equally divided between his own relations and his deceased wife's relations. But as regards the division between those of his wife's relations who are made legatees, there are no words or expressions indicating intention, except those contained in the clause specially under construction.

Much reliance was placed in the argument for the parties contending for the application of the doctrine of accretion, on the case of *Robertson* v. *M'Vean*, which was decided in 1819, and is reported by Hume [p. 273]. But in the face of the series of decisions already referred to, it is impossible, and would be most unsafe, to give any weight to a case so obscure and ambiguous, which was not known to the profession for twenty years after it was decided, the report of which seems to leave it in doubt whether it was decided on general principles or on specialties, and which has never been recognised in any of our treatises or books of practice, or in any subsequent judgment of the Court.

That is the opinion of the Court, but my brother on my right [the Lord Justice-Clerk] has an explanation to give of the case of *Robertson* which he will now make.

Lord Justice-Clerk—I have looked into the session papers in Lord Moncreiff's collection in the case of *Robertson*. He seems to have been of counsel in the case, and has preserved a short note of what fell from the Bench at advising. The petition and answers were written by Mr Greenshields and Lord Fullerton, and deal very ably with the points which arise in the present case. But there was one peculiarity in the case which may have in some measure affected the judgment.

The decision is dated in 1819. But six years before, in 1813, Lord Balgray, as Lord Ordinary, had reported the case to the Court on various points, some of which were decided; but in regard to the claim to the share of Thomas Robertson, who predeceased the testator, his father, they remitted the case to the Lord Ordinary.

On the 17th November 1813 Lord Balgray found, "that from the terms of the general settlement executed by George Robertson, the share of Thomas Robertson, who predeceased his father, must be held as accruing to the respon-

dent Mrs M'Vean, and decerns and declares accordingly."

This interlocutor was allowed to become final; and it was not until after an interval of six years that the claimant renewed the contention. He was ultimately, without opposition, allowed to bring the judgment before the Court, but it appears from the pleadings that these facts were strongly founded on, and there was some evidence that he had expressly stated that he meant to acquiesce in the Lord Ordinary's finding.

While, therefore, the case certainly raised the same question as that before us, it arose under very unfavourable circumstances, which must have impressed the Court adversely to the petitioner.

The note of what fell from the Bench, which Lord Moncreiff has written on the papers, is as follows:—

"HERMAND.—Thinks interlocutor quite right. Goes over ground stated in answers.

"BALMUTO.—Of same opinion. Thinks interlocutor could not be opened.

"BALGRAY, SUCCOTH, PRESIDENT, of the same opinion.

"Whole turns on distinction between special legacy and general settlement."

I cannot resist the opposite current of authority since the date of this judgment.

LORDS MURE, SHAND, YOUNG, CRAIGHILL, and RUTHERFURD CLARK concurred.

The Court recalled the interlocutor of the Lord Ordinary and sustained the claim for the truster's heirs *in mobilibus*.

Counsel for Mrs Aikman and Others—Pearson—M'Watt. Agents—H. & H. Tod, W.S.

Counsel for Trustees (Real Raisers) and for Heirs *in mobilibus* of the Truster—D.-F. Mackintosh, Q.C.—Blair. Agents—Hunter, Blair, & Cowan, W.S., and H. B. & F. J. Dewar, W.S.

Friday, July 16.

FIRST DIVISION.

BELL *v.* BELL.

Husband and Wife—Marriage-Contract—Surviving Spouse—Provision.

A contract of marriage provided that during the subsistence of the marriage the free proceeds of the trust estate, which included the estate of L, which had been conveyed to the trustees by the wife, should be paid to the husband, after deduction of all public and parochial burdens, for the use of the spouses, and in the event, which happened, of the predecease of the wife the trustees should pay to the husband an annuity equal to one-half of the rental of the estate of L after deduction of all public and parochial burdens, and the remaining half of the said rental of the proceeds of the trust-estate should be applied in maintaining the children of the marriage. *Held* that the meaning was not that the husband should have an annuity consisting of one-half the rents payable out of the existing leases, but one-half of the free rents.

In June 1846 Robert Bell, Sheriff-Substitute of Zetland, and Miss Robina Hunter of Lunna entered into an antenuptial marriage-contract by which certain provisions were made for the spouses and for the children of the intended marriage, which took place immediately thereafter, and was dissolved by the death of Mrs Bell in 1863, leaving seven children, of whom three sons, R. H. Bell, B. D. C. Bell, G. J. H. Bell, and one daughter, Miss C. C. Bell, were alive at the date of this case. By the contract Mrs Bell on her part conveyed to trustees her whole heritable and moveable estate, and in particular the lands of Lunna, for the purposes of the trust conveyance, of which the 3d and 4th were—"*Third*—For payment during the subsistence of the intended marriage of the free yearly proceeds of the residue of the trust-estate, after deduction of all public and parochial burdens and existing annuities, to the said Robert Bell for the use of the spouses. And in the event of the predecease of the said Robert Bell" (which event did not occur) "for payment thereafter of the said free yearly proceeds to the said Robina Hunter. *Fourth*—In the event of the predecease of the said Robina Hunter" (which event happened) "the said trustees shall pay to the said Robert Bell an annuity equal in amount to one-half of the rental of the estate of Lunna, after deduction of all public and parochial burdens; the said annuity to commence at the first term of Whitsunday or Martinmas after the death of the said Robina Hunter, and to be payable in equal moieties at the said two terms. And it is hereby declared that the remaining half of the said rental, and the free proceeds of the residue of the trust-estate, or so much thereof as in the discretion of the said trustees may from time to time appear to be necessary, shall be applied in maintaining and educating the children of the marriage."

The moveable estate falling under the trust-conveyance consisted, after certain deductions, of about £7000, which at the date of this case had been invested on permanent improvements on Lunna, and was thus represented by capital expenditure thereon. After the death of Mrs Bell Mr Bell was paid his annuity under the fourth purpose of the said marriage-contract. The manner in which the amount thereof was fixed by the trustees up to the time of this question being raised was thus stated in the case:—"From the gross rents receivable there have been deducted (*first*) the public and parochial burdens for the year, and (*second*) interest at 4 per cent. on the whole sum laid out on capital expenditure, under which term are included large outlays on churches and manses, and law expenses incidental thereto. The balance has then been divided into two equal portions, one portion being stated as the annuity payable to" Mr Bell. "To the other equal portion there has been added interest at 4 per cent. on the whole sum expended on capital expenditure, and from the total there have been then deducted (*first*) repairs and current expenses (including expenses of management) and (*second*) arrears of rent, the balance being stated as the sum available for the education and maintenance of the children."

The present Special Case was presented by