her claim to maintenance from his estate.

It being thus, in my opinion, clear that the child is entitled to a decree for aliment, the next question is, for what period should aliment be awarded. The action concludes for payment of £30 per annum, and it appears to me that we should only award aliment from Martinmas last, as the child has in fact been maintained down to that date and since, although the question had been made contentious by the action.

The remaining question relates to the amount of aliment, and on that question we were referred to a case decided in 1831 (*Marjoribanks* v. *Amos*, 10 S. 79), when the expense of living was probably not so great as it is now, in which an award of £20 a-year was made, and I think we should be giving a moderate amount if we followed that case and allowed aliment at the rate of £20 a-year, carefully guarding the award by declaring that it should continue only so long as the child shall be unable to maintain herself. We shall make that clear in the interlocutor, and if at any time the child should become able to maintain herself or be otherwise provided for her claim to aliment from C D's estate will cease.

LORD M'LAREN—I think that the judgments of the Sheriff-Substitute and the Sheriff show a correct appreciation of the legal bearings of the case, but that they have come to a wrong conclusion from attaching too much weight to the element of the supposed contract to maintain the child, and too little to the natural claim of the child against her father's representatives. I am not prepared to say that it would be a good defence to an action of aliment to aver that the pursuer was being maintained on the footing of charity or hospitality by some-one who was under no obligation to give support. But neither do I think that in order to exclude the claim of aliment it is necessary to have a legal obligation, holograph or tested, by a person having capacity to grant an obligatory instrument. There are imperfect obligations recognised by law, and if a child be supported on the basis of a contract which the person giving such aliment recognises and acts upon, this may be a good defence to an action for aliment. The question may arise in many ways—thus, a lady may be maintained by her brother because he considers it a matter of social or moral obligation, and if she is well provided for it does not follow that she will also be entitled to aliment from her father's representatives. I only give the illustration for the purpose of reserving my opinion. It is impossible to decide such questions upon general rules.

In the present case I think it is clear from X Y's evidence that she recognised the existence of a duty to the child's father to do what she could to support it, but I am also satisfied that X Y is not in circumstances to give the requisite support. Considering that X Y may contribute to some extent, I think the allowance of aliment proposed is reasonable.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Sheriff-Substitute dated 10th April and 19th July 1899, and the interlocutor of the Sheriff dated 24th June 1899: Find (1) that the late C D was the father of the pursuer A B; (2) that the said A B is not now in good health and has never been so, and that she is unable to maintain herself; (3) that the defender as trustee and executor of the said C D is, as such trustee and executor, liable to pay aliment to the said A B so long as she is, owing to the state of her health, unable to maintain herself; (4) that £20 per annum is *hoc statu* a reasonable amount to be allowed to the said A B in name of aliment: Therefore decern and ordain the said defender, as trustee and executor foresaid, to pay to the said A B the sum of £20 sterling per annum quarterly in advance so long as she is, owing to the state of her health, unable to maintain herself, commencing the first quarter's payment as at 11th November 1899, with interest at the rate of five per centum per annum on each quarterly payment till paid: Find the defender, as trustee and executor foresaid, liable to the said A B in expenses both in this Court and in the Sheriff Court, and remit the accounts thereof to the Auditor to tax and to report; and find no expenses due to or by the pursuer X Y, and decern."

Counsel for the Pursuer—Kennedy—W. Brown. Agents—Mackay & Young, W.S.

Counsel for the Defender—A. Jameson, Q.C.—Nicolson. Agents—Auld & Macdonald, W.S.

Friday, February 16.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ENSOR'S TRUSTEES *v.* RICHTER.

Succession—Conditio si sine liberis decesserit—Lapsed Share—Accretion.

A testator directed that the residue of his estate should, on the expiration of a liferent, be divided among his nephews and nieces *nominatim*, "equally among them, share and share alike." He declared that the bequest should not vest until the death of the liferenter or his own death, should the liferenter predecease him, and that in the event of any of the nephews or nieces predeceasing the period of vesting, their share should accresce to the survivors. A nephew predeceased the testator without issue, and a niece survived the testator but predeceased the liferenter, leaving a daughter. *Held* that in virtue of the *conditio si institutus sine liberis*

decesserit the daughter was entitled to her mother's share, but that she was not entitled to participate in the share which had lapsed by the death of the nephew.

The late William Edward Ensor died in June 1887 leaving a trust-disposition and settlement, which contained the following clause:—"Lastly, with regard to the disposal of the fee of the said free residue and remainder of my said whole moveable and personal estate, I direct and appoint my said trustee, as soon as conveniently may be after the death of the survivor of my said sisters, the said Mary Ensor or Murray and Martha Ann Ensor, or after my death in the event of my surviving both of my said sisters, to realise and convert into money the said residue and remainder of my said estate, and to pay over and deliver the said sum so to be realised to my nephews and nieces after mentioned, equally among them, share and share alike, *videlicet*—Henrietta Bowman or Adams, wife of Arthur Fulford Adams, Eliza Bowman, Mary Bowman or Carey, widow of Falkland Carey, Emily Rose Bowman, and Caroline Shew Colonna Bowman or Crang, wife of Captain John Crang, all children of my deceased sister, Eliza Shepherd Ensor or Bowman, widow of William Flockhart Bowman; Henrietta Annie Ensor or Denton, wife of John Denton; William Henry Ensor, Frederick Ernest Ensor, and Amelia Mary Ensor, all children of my brother, the said Henry George Ensor; and George William Rome, Mary Murray Rome, William Edward Ensor Rome, and Henry Flockhart Rome, all children of my deceased sister Amelia Rebecca Ensor or Rome, widow of Robert Moncreiff Rome: Declaring that in the event of any one or more of my said nephews and nieces hereinbefore named predeceasing the survivor of my said sisters or predeceasing me in the event of my surviving her, then such share or shares of the said residue of my estate provided to such predecessor or predecessors shall go and accresce to the survivors or survivor of my said nephews and nieces, equally among them, share and share alike; and further, declaring that the provision of the share or shares of the said residue of my said estate conceived in favour of my said nephews and nieces shall not vest in them till the determination of the said liferent by the death of the survivor of my said sisters, or in the event of her predeceasing me, until my death."

Mr Edward Ensor was survived by his sister Mrs Martha Ann Ensor, and by all the above-named nephews and nieces except George William Rome. Miss Martha Ann Ensor enjoyed a liferent of the free residue of the estate until her death in April 1898. One of the nieces mentioned in the settlement, Mrs Mary Murray Rome or Richter, died in March 1892 leaving a daughter, Mrs Fredericke Amalia Richter. The remaining eleven nephews and nieces survived the liferentrix.

Questions having arisen as to the disposal of the shares of residue bequeathed to George William Rome and Mrs Richter, a multiplepoinding was brought in which the fund *in medio* was the sum of £836, 11s. 11d., being one-twelfth of the whole residue.

Claims were lodged for (1) Miss Richter, and (2) for the surviving nephews and nieces mentioned in the settlement, with the exception of William Edward Ensor Rome.

Miss Richter maintained that she, as in right of her mother, the said Mary Rome or Richter, who survived the testator but predeceased the last surviving liferentrix, was entitled by virtue of the *conditio si sine liberis* to the fund *in medio*, being the one-twelfth share of residue which her mother, if she had survived the last surviving liferentrix, would have taken, and claimed to be ranked and preferred to the whole fund *in medio*.

The remaining nephews and nieces maintained that the whole residue of William Ensor's trust-estate fell to be divided equally among those of his nephews and nieces called to succeed thereto who survived his sister and liferentrix Miss Martha Ann Ensor, being eleven in number, and that they and the said William Edward Ensor Rome were entitled equally among them to the whole fund *in medio*. Alternatively, they maintained that in the event of the real raiser Frederike Amalia Richter being entitled to succeed under the *conditio si sine liberis*, her right extended only to the one-thirteenth share of the residue originally bequeathed to her mother Mary Murray Rome, and did not include a proportion of the one-thirteenth share destined to George William Rome."

They claimed to be ranked and preferred equally with William Edward Ensor Rome, each to one-eleventh share of the fund *in medio*.

On 17th June 1899 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Sustains the claim for the said Friedericke Amalia Richter, and ranks and prefers her to the whole fund *in medio* in terms thereof: Repels the claim for Henrietta E. Bowman and others, and decerns."

Opinion.—"I have not had the benefit of a full argument in this case. The case was called at 11·30 o'clock, but there was no appearance by agents or counsel, except by counsel for the claimant Miss Richter. I accordingly have been obliged to hear the case *ex parte*, and to decide it on an *ex parte* argument. But having heard Mr Kemp and been referred by him to the leading authorities, I am of opinion that Mr Kemp is entitled to judgment. It appears to me that the general question of the application of the *conditio si sine liberis* is settled in Mr Kemp's favour by the decision in the case of *Waddell's Trustees*, 24 R. 189, not to mention earlier cases. And as regards the minor question, viz., whether the claimant Miss Richter is entitled to participate in the lapsed share of George William Rome, who appears to have predeceased the testator, I am of opinion that the case does not at all raise the question raised in the case of *Young* v. *Robertson*, 4 Macq. 337. In other words, it is not at all the same case as would have arisen if George William Rome had sur-

vived the testator but predeceased the period of vesting. In short, the limitation of the *conditio si sine liberis* to the share which the parent would have taken if he had survived, while it may exclude participation in devolved shares, does not, in my opinion, exclude also participation in lapsed shares. I therefore sustain the claim for Miss Richter and her father, and repel the claim for the other and competing claimants."

The claimant Mrs Bowman or Adams and others reclaimed. At the hearing they did not dispute the Lord Ordinary's judgment in so far as it found the claimant Miss Richter entitled to her mother's share. With regard to the share of George William Rome, they argued that a child taking her parent's share in virtue of the *conditio si sine liberis* was not entitled, in the absence of any indication of an intention to the contrary in the deed, to anything more than the share originally given to the parent. The *conditio* has never been extended so as to give the child a right to participate in a lapsed share, which would have accrued to the parent, had he or she survived the period of vesting—*Young* v. *Robertson*, February 14, 1862, 4 Macq. 337; *M'Nish* v. *Donald's Trustees*, October 25, 1879, 7 R. 96; *Henderson* v. *Hendersons*, January 9, 1890, 17 R. 293; *Cumming's Trustees* v. *White*, March 2, 1893, 20 R. 454; *Neville* v. *Shepperd*, December 21, 1895, 23 R. 351 per Lord M'Laren at page 357. Accretion here did not take place *ex lege*, but only in virtue of the survivorship clause — *Earl of Lauderdale*, May 19, 1830, 8 S. 771; *Clelland* v. *Gray*, June 20, 1839, 1 D. 1031; *Thornhill* v. *Macpherson*, Jan. 20, 1841, 3 D. 394; *Paxton's Trs. v. Cowie*, July 16, 1886, 13R. 1191.

Argued for the respondent—The respondent was entitled to all that her mother would have received had she survived the period of distribution, that is, to the mother's own share and a proportion of the lapsed share. There was no artificial rule to the effect that the *conditio* gave the child the parent's original share and no more. The case only limited the child's right in cases where the share in question was that of an institute who survived the testator but predeceased the period of distribution—*Aitken's Trustees* v. *Wright*, December 22, 1871, 10 Macph. 275; *Muir's Trustees*, July 12, 1889, 16 R. 954; *M'Culloch's Trustees*, May 14, 1892, 19 R. 777.

At advising—

LORD PRESIDENT—The testator by his testamentary settlement directed his trustees, after the death of the survivor of his two sisters, to whom he provided a liferent of the residue of his estate, or after his own death in the event of his surviving them, to realise that residue, and to pay over the proceeds to his nephews and nieces thereinafter named, equally among them, share and share alike. The nephews and nieces so named were thirteen in number, and were described in the settlement, five, as children of a deceased sister, four, as children of a living brother, and four as children of a deceased sister of the testator. He further directed that in the event of any one or more of his said nephews and nieces predeceasing the survivor of his sisters, or predeceasing him in the event of his surviving her, the share or shares of the residue provided to such predeceasor or predeceasors should go and accresce to the survivors or survivor of his said nephews and nieces, equally among them, share and share alike: and he declared that the provisions of the share or shares of the residue conceived in favour of his said nephews and nieces should not vest in them till the determination of the liferent by the death of the survivor of his sisters, or, in the event of her predeceasing him, until his death. One of the nephews, George William Rome, predeceased the testator without leaving issue, and one of the nieces, Mrs Richter, survived him, but predeceased the survivor of his sisters, leaving a daughter, the claimant Miss Richter.

Two questions are raised—(1) whether Miss Richter is entitled in respect of the *conditio si sine liberis decesserit* to any share of the residue, and (2) if she is entitled to a share of it, whether that share is one-twelfth or one-thirteenth part.

The Lord Ordinary has sustained Miss Richter's claim, which is to one-twelfth, thereby holding in effect that she has right to the share bequeathed to her mother by the testator's settlement, and also to participate, equally with the nephews and nieces who survived the liferentrix, in the share bequeathed to George William Rome. The Lord Ordinary in the note to his interlocutor says that "the limitation of the *conditio si sine liberis decesserit* to the share which the parent would have taken if he had survived, while it may exclude participation in devolved shares, does not, in my opinion, exclude also participation in lapsed shares."

I agree with the Lord Ordinary in thinking that Miss Richter is, by virtue of the *conditio si sine liberis decesserit*, entitled to the one-thirteenth share of the residue bequeathed to her mother, but I am unable to concur with his Lordship in the view that she has also right to participate in the share bequeathed to George William Rome, and which lapsed by his having predeceased the testator.

I may say, in the first place, that I think that there is such a severance of the interests given to the nephews and nieces in the residue as to prevent accretion from taking place *ex lege*, in accordance with the principles explained in the case of *Paxton's Trustees* v. *Cowan*, 13 R. 1191. The bequest is to the nephews and nieces "equally among them share and share alike"—clear words of severance.

The next question, assuming that the thirteenth share bequeathed to Mrs Richter did not accresce to the surviving nephews and nieces *ex lege*, is whether it passed to her daughter Miss Richter by virtue of the *conditio si sine liberis decesserit*, or to the surviving nephews and nieces under the ulterior destination in their favour contained in the settlement, and I consider that it passed to Miss Richter. The first requisite, viz., that the parent should be

instituted to the share, is satisfied, seeing that Mrs Richter was so instituted. In the second place, it appears to me that the other requisites for the application of the *conditio*, as explained, especially by Lord President Inglis, in *Bogie's Trustees* v. *Christie*, 9 R. 453, and, by Lord M'Laren, in *Waddell's Trustees* v. *Waddell*, 24 R. 189, are complied with in the present case. The testator directed the division of the residue to be made among no fewer than thirteen nephews and nieces, the children of one brother and two sisters, and it does not appear that he had any other nephews or nieces. Under these circumstances the reasonable inference appears to me to be that he had placed himself *in loco parentis* to these nephews and nieces in the sense that he made the bequest to them, primarily at all events, in consideration of their relationship to him.

The remaining question is, whether Miss Richter is entitled to participate in the thirteenth share which lapsed by George William Rome having predeceased the testator, and the first fatal objection which seems to me to stand in the way of that claim being sustained is that her mother was not instituted to that share. If her mother had survived the period of division specified in the settlement, she would, by virtue of the ulterior destination of the shares of predeceasing nephews and nieces therein contained, have been entitled to participate in the share bequeathed to George William Rome, but she did not survive to fulfil the condition of such participation. It appears to me to have been settled by a long series of decisions that the *conditio si sine liberis* does not apply to such a case. On this subject I may refer to the judgment of the Lord Chancellor in *Young* v. *Robertson*, 4 Macq. 337, and authorities there cited. The rule has not, as the Lord Ordinary appears to think, been limited to devolved shares, but has in a number of cases been applied to lapsed shares. Thus in *Graham's Trustee* v. *Graham*, 6 Macph. 820, it was held that the right to participate in the lapsed share of one of the beneficiaries was by the terms of the deed limited to brothers and sisters (also beneficiaries), to the exclusion of the issue of one of them who had predeceased. In giving judgment Lord President Inglis said—"I think that the question as to the application of the *conditio si sine liberis* to a lapsed share is very important. Where a father has divided his estate among his children, without specially providing for the event of any of them predeceasing the period of vesting, or the time of payment, leaving issue, then the rule applies. But suppose that the child so predeceasing and leaving issue is himself predeceased by a brother or sister who had no children, and whose share in the father's succession had therefore lapsed, and would have accresced in part to the second deceaser had he survived the term of payment or of vesting, I think that the child of the second deceaser would not be entitled to participate in that lapsed share." If in this *dictum* the words "uncle who has placed himself *in loco parentis*" be substituted for "father" and "nephew or niece" for "child," it would be directly applicable to the present case. Similar views were expressed in *M'Nish* v. *Donald's Trustee*, 7 R. 96; *Henderson's Trustees* v. *Henderson*, 17 R. 293; and *Cumming's Trustees* v. *White*, 20 R. 454. In the case of *Henderson's Trustees* v. *Henderson* the *condition si sine liberis* was expressed, and Lord President Inglis said that he could see no distinction in principle between the case in which the *conditio* is expressed, and that in which it is implied. "The principle in both cases is simply this, whether the *conditio* is implied or expressed, that the share of the predeceasing parent goes to his or her issue—that is the original share of the parent—and not any further provision that may come to the parent by the lapse of a legacy to some predeceasing legatee in virtue of any other provision in the deed."

Miss Richter's counsel relied especially on the cases of *Aitken's Trustees* v. *Wright*, 10 Macph. 275; *M'Culloch's Trustees*, 19 R. 777; and *Muir's Trustees* v. *Muir*, 16 R. 954, but it does not appear to me that there is anything in these cases at variance with the views now expressed.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming-note for the claimants Mrs Henrietta E. Bowman or Adams and others against the interlocutor of Lord Kyllachy, dated 17th June 1899, Recal the said interlocutor: Sustain the alternative claim for said claimants, and prefer them on the fund *in medio* in terms thereof: *Quoad ultra* sustain the claim for the claimant Fredericke Amalia Richter, and rank and prefer her to the balance of the fund *in medio*, and decern: Find no expenses due to or by either party since the date of the Lord Ordinary's interlocutor, and remit to the Lord Ordinary to proceed with the cause."

Counsel for the Reclaimers—Chree. Agent—J. Knox Crawford, S.S.C.

Counsel for the Respondent—A. S. D. Thomson—Kemp. Agent—A. C. D. Vert, S.S.C.

Friday, February 16.

FIRST DIVISION.

[Lord Low, Ordinary.

GLEBE SUGAR REFINING COMPANY *v.* PATERSON, *et e contra.*

Lease—Granary—Fitness for Purpose for which Let—Reasonable Use—Custom of Trade.

A sugar refining company took a lease of a sugar store for a year, and proceeded to store therein sugar in bags. Within a month the store fell. An action was raised by the company