LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor [5th January 1899]: Find that the discharge granted by William Smith and Hugh Osborne Smith in favour of the defender dated 3rd November 1896 was entirely gratuitous and *sine causa*, and was granted by the said William Smith and Hugh Osborne Smith, and obtained by the said defender without any consideration having been received or given therefor, and is invalid and ineffectual to discharge the defender of his liability for the loan: Find that the said discharge was granted by the said William Smith and Hugh Osborne Smith fraudulently: Therefore sustain the second and third pleas-in-law stated for the pursuers: Reduce, decern, and declare in terms of the reductive terms of the summons: Further, decern and ordain the defender to make payment to the pursuers, as trustees foresaid, of the sum of £9682, 17s. 6d. sterling, with interest at 5 per cent., on the sum of £10,702, 2s. 6d., from 15th April 1898 to 7th July 1898, with interest at 5 per cent., on the sum of £10,192, 10s. from 7th July 1898 to 22nd September 1899, and with interest at 5 per cent., on the said sum of £9682, 17s. 6d. from 22nd September 1899 to the date of payment: Find the pursuer entitled to expenses," &c.

Counsel for the Reclaimers—Ure, Q.C.—Findlay. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Salvesen, Q.C.—Younger. Agents—J. W. & J. Mackenzie, W.S.

Wednesday, March 14.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WALLACE *v.* BRAID.

Liferenter and Fiar — Repairs Executed by Liferentrix on Property Liferented—Recompense.

A contractor who had executed repairs on certain house property, sued the fiars for the cost of the repairs, amounting to £392. The pursuer averred that he had done the work on the instructions of the liferentrix in order to prevent the property becoming ruinous; that after being repaired the property yielded a gross rental of £60 a-year; that the defenders having refused to pay any part of the cost, the liferentrix had assigned to the pursuer all her claims against them, and that the sum sued for represented the value of the work to the defenders.

The Court *dismissed* the action as irrelevant, holding that a liferenter was always presumed to make such improvements for his own benefit, and that this presumption was not excluded by the pursuer's averments.

Liferenter and Fiar—Payment by Liferenter of Debt Secured on Property Liferented—Recompense.

In an action for payment of a sum of money raised against the fiars of a heritable property, the pursuer averred that the former proprietor of the subjects had left them in his trust-disposition to different persons in liferent and fee; that there had been a debt left by the deceased heritably secured on the property; that the lifereutrix at her own hand had paid off this debt without taking any assignation to the bond; that in doing so she had enhanced the value of the fee; and that therefore the defenders were liable in repayment to the pursuer as assignee of the liferentrix of the sum so paid by her.

The Court *dismissed* the action as irrelevant.

Process—Res judicata—Judgment on Relevancy.

A tradesman who had executed certain repairs on buildings, sued the fiars and a liferentrix who had ordered the repairs, jointly and severally, for payment of his account. The action was dismissed against all the defenders as irrelevant. In a subsequent action the same pursuer after the death of the liferentrix sued the fiars for the same account, founding on an assignation by the liferentrix of her claim, if any, against the fiars for the cost of the repairs, no such assignation being founded on in the previous action.

Opinion by the Lord Justice-Clerk and Lord Trayner that the second action was not excluded by the plea of *res judicata*. *Opinion* by Lord Young and Lord Kincairney *contra*.

On 24th March 1899, Richard Wallace, contractor, Edinburgh, as an individual and also as an assignee of Miss Christian Braid, liferentrix of certain heritable property in the parish of Livingstone, Linlithgowshire, conform to assignations in his favour dated 10th February 1896 and 22nd February 1899, raised an action against Robert Braid and Andrew Braid asking the Court to ordain the defenders to pay him (1) £134, 17s., and (2) £392, 10s. 9d., and further or otherwise to declare that he was entitled to have the fee of the above subjects burdened with these sums, and in any event to adjudge and declare that these subjects belonged to him in security and satisfaction of the said two sums, or otherwise to declare that the fee of these subjects was burdened with repayment to him and his heirs and executors of said two sums.

The pursuer averred as follows:—(1) *With regard to the sum first sued for*—Andrew Braid died on 9th February 1870 leaving a trust-disposition and settlement dated 21st August 1866, and recorded 1870, by which he conveyed his whole estate to his three daughters Jean, Christian, and Frances,

and the survivors and survivor in liferent, and to his sons Andrew and Robert and the survivor in fee. He was survived by his daughter Christian and his two sons. He left the heritable property described in the summons, and moveable property, which, after payment of debts, &c., amounted to £4, 7s. 5d. Miss Christian Braid was appointed executor to her father, and as liferentrix in virtue of the trust-disposition and settlement she took possession of the heritable estate. The testator was indebted in the sum of £150 to the National Property Investment Company, and it was secured upon the heritable property. A balance of £134, 17s. was due at the testator's death. Miss Christian Braid, in order to secure the property from sale, borrowed the money and paid off the debt. On making payment she obtained a re-conveyance of the subjects to herself in liferent and the defenders in fee "The said Christian Braid, in making payment of said sum of £134, 17s., did so solely with the view of preventing said heritable subjects, of which she was liferentrix and the defenders fiars, from being sold, and not in any way with the view of benefiting the defenders at her expense. Before and after she paid the said sum of £134, 17s., for which she was in no way personally liable, she was advised that she had a claim therefor against the defenders and the said heritable property." By assignation dated 10th February 1896 Miss Braid assigned to the pursuer all rights of action for relief and reimbursement competent to her against the defender as fiars of the heritable property and against the subjects or buildings therein. (2) *With regard to sum second sued for*—"At the date of the death of the said deceased Andrew Braid there were thirteen small houses erected on the site of said heritable subjects, the rents of which were the only provision made by him for the said Christian Braid. On entering into possession of said subjects the said Christian Braid found that most of the houses were much in need of repair. To try to prevent them from becoming ruinous and uninhabitable, the said Christian Braid caused to be executed repairs on them from time to time. Notwithstanding the repairs so executed by her some of the houses fell into a ruinous, insanitary, and uninhabitable condition, and could not be occupied. She accordingly instructed the pursuer in 1895 to put the houses which were in the worst condition into a habitable condition, and the pursuer did so. The woodwork of said houses was utterly in a decayed state, and the roofs had fallen in. By the work done by the pursuer on the instructions of the said Christian Braid, which work included the putting on of new roofs, putting on new doors, laying down drains and repairing the walls, the said houses have been converted from a ruinous condition into a habitable state, and now yield a gross rental of £60 or thereby. Some of the houses which were not repaired by the pursuer are now unoccupied and are uninhabitable. The work done by the pursuer is set forth in the account herewith produced. . . . Said account begins on 29th June 1895 and ends on 30th April 1897, and amounts to £392, 10s. 9d. By the work executed by the pursuer on said houses their value was enhanced to the extent of £392, 10s. 9d., and that sum represents the value of the work to the defenders. Said sum of £392, 10s. 9d. is, as at the date of the raising of the action, and also at the date of the death of the said Christian Braid, the true value of the meliorations and improvements made by the pursuer's work on the fabric of said houses." By assignation dated 22nd February 1899, on the narrative that the work done by the pursuer had never been paid for, Miss Braid assigned all claims competent by her as liferentrix to the pursuer, and empowered him as her substitute to take any action competent to her against the defenders for payment of the above account.

The pursuer pleaded — "(1) The said Christian Braid having paid the principal of the debt heritably secured on said subjects, and thereby enhanced the value of said property, the pursuer as her assignee is entitled to decree for the sum first sued for, or at least to have the fee of said subjects affected therewith in terms of the second conclusion of the summons. (2) The work contained in said account having been executed on the defenders' instructions, or at least on the instructions of the said Christian Braid as liferentrix of said subjects, and *separatim* said work having enhanced the value of the said subjects as at the date of raising the action, and as at the date of the death of the said Christian Braid, the pursuer, as an individual or as assignee of the said Christian Braid, is entitled to decree for the sum second sued for, or at least to have the fee of said subjects affected therewith in terms of the second conclusion of the summons. (3) The defenders being due and resting-owing to the pursuer the sums sued for, the pursuer is entitled to decree in terms of the first and second conclusions of the summons, or at least of one of them. (4) No relevant defence."

The defenders explained, *inter alia*, that in a former action, raised on 10th November 1897, the pursuer "sued the defenders and the said Christian Braid for, *inter alia*, the sum of £150 and £388. The sum of £134, 17s. now sued for really represents part of the said sum of £150 formerly sued for, and the sum of £392, 10s. 9d now sued for really represents the account for the sum of £388 formerly sued for. In that other action Lord Kincairney, Ordinary, on 19th July 1898 assoilzied the defenders in the present action from the conclusions for payment of the first and second sums therein sued for, being the said sums of £388 and £150. This interlocutor has become final."

The defender pleaded, *inter alia*—"(1) *Res judicata.* (2) The pursuer's averments are irrelevant and insufficient in law to support the conclusions of the action."

The action referred to by the defenders was one brought by the pursuer against the present defenders and Christian Braid.

In that action the Lord Ordinary (KINCAIRNEY) pronounced on 19th July 1898 the following interlocutor:—"Finds that the averments of the pursuer in support of the conclusions against the defenders Robert Braid and Andrew Braid for payment of the first and second sums sued for are irrelevant, and assoilzies the said defenders from the conclusions to that extent: Finds that no decree can be pronounced under the conclusions of the summons against the defender Christian Braid for said sums, and to that extent dismisses the action as against her."

Note—"This is an excessively confused case, very imperfectly stated; and I have not found it easy to disentangle it. The defenders are two nephews, Andrew Braid and Robert Braid, and a sister Christian Braid, of Andrew Braid, who died in 1870 leaving his estate to his three sisters, the defender Christian being one of them, for their liferent use allenarly, and to the two defenders Andrew and Robert Braid equally in fee. It does not appear on record why of the three sisters, Christian only has been called as a defender. The other two are not said to be dead. The action is directed against the three defenders jointly and severally.

"The first and chief conclusion is for payment of £388, which is the amount of an account for repairs of a house in the village of Livingstone, which formed part of the property of the deceased Andrew Braid. It is averred that the repairs were executed on the employment of the defender Christian Braid. It is said that she is unable to pay for them, and the pursuer seeks to recover his account from the fiars of the property, in respect of the benefit which has been done to the property.

The pursuer's averment is conceived in very loose and general terms, and he did not refer to any authority which in my opinion supported his claim. He quoted the case of *Halliday* 1709, M. 13,479, in which, in a question between fiar and liferenter, the fiar was held to be burdened with the principal sum expended but not with the interest during the liferent. Professor Bell says that a liferenter must keep up the liferented tenement by necessary and proper repairs (Bell's Prin. 1062), and speaking of the natural and irreparable decay of a subject liferented, or its accidental destruction by fire, he says—'If the liferenter repair the subject, he will have right to indemnification from the fiar taking the benefit of it to the extent of the *lucrum* accruing to him.' In *Morrison* v. *Allan.* 14th July 1886 (13 R. 1156), quoted for the defender, the Lord President stated the general rule of law to be 'that where a liferenter expends money in improving the subject of his liferent he is presumed to do so for the purpose of enhancing his own benefit and enjoyment of the estate.' But his Lordship added that this rule was a presumption only. I do not read the statements on record as amounting to an averment that the liferenter executed the improvements on her house with the view of benefiting the fiars, and I think it is not relevantly averred that she did more than fairly fell on the liferentrix. Further, even if it were true that the liferentrix would have a claim on the fiars it does not follow that the tradesman can recover his account from the fiars, with whom he never contracted, and no authority to that effect was quoted. I am not prepared to sustain that claim, and think that the action for this sum against the fiars is irrelevant. The second conclusion is for payment of £150, and that claim is in a still more peculiar position. The record on this point is extremely confused. What I understand to be averred is briefly this, that the late Andrew Braid was indebted in the sum of £150 to the National Property Investment Company, that it was secured over his heritable property, and that after his death the defender Christian Braid paid this bond or the balance of it; that afterwards she borrowed £150 from the pursuer, and that she granted him an assignation dated 10th February 1896, by which she assigned to him all rights of action for relief and reimbursement competent to her against the fiars of the heritable property which was burdened, that is, against the defenders Andrew and Robert Braid. . . . I am of opinion that there is no relevant case against the fiars for this £150 second sued for. . . .

"As regards the defender Miss Christian Braid, I find myself in a difficulty. I do not see why she should not pay for the work done on her house if she employed the pursuer to do it, or why she should not repay the £150 if she borrowed it; and I should have thought it not impossible under the conclusions of this summons to decern against her severally and individually. But counsel for the defender quoted an opinion by one of the Judges in the case of *Mackersey* v. *Davis & Son Limited,* 16th February 1895, 22 R. 368, to the effect that when a claim was joint and several there could be no decree against either defender unless there could be decree against both. I have learned that in a more recent case a judgment or opinion to the same effect has been delivered in the First Division. Deferring to these opinions, I must hold that it follows from my judgment that the action, so far as regards the first and second conclusions, is irrelevant against the fiars, that I must hold that the action, so far as regards these conclusions, cannot proceed against Christian Baird either, and must, as against her, be dismissed."

In the present action, on 5th December 1899, the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Having heard counsel for the parties in the Procedure Roll in regard to the sum of £134, 17s. first concluded for—Sustains the defender's plea of *res judicata:* Further, finds that the pursuer's averments are irrelevant: Further, in regard to the sum of £392, 10s. 9d. second concluded for, finds that the pursuer's averments are irrelevant: Therefore assoilzies the defenders from the conclusions of the summons, and decerns."

The pursuer reclaimed, and argued—(1) As to the £134, 17s. sued for — This was a debt of the testator's which had been paid off by Miss Braid, and as her assignee the pursuer was entitled to recover it as against the testator's estate. There was no relevant statement on record to sustain the defenders' plea of *res judicata*. The pursuer in the last action did not sue in his capacity as assignee of Miss Braid; the sums sued for were not of like amount; and there were new allegations in the present action. The decision in the former action could not be *res judicata*—*Gillespie* v. *Russel*, May 22. 1859, 3 Macq. 757. Besides, the dismissal of an action or absolvitor on the ground of relevancy could never be *res judicata*, as in such circumstances there was no judgment exhausting the cause—*Menzies* v. *Menzies*, March 17, 1893, 20 R. (H.L.) 108, opinion of Lord Watson. (2) As to the £392, 10s. 9d. sued for. There was a presumption in law that a liferentrix making repairs on the subjects liferented did so on her own behalf, but this presumption might be overcome—*Morrisons* v. *Allan*, July 14, 1886, 13 R. 1156, opinions of Lord Mure, 1157, and L.P. Inglis, 1169. The averments on record, however, showed that the liferentrix was not in the present case acting in her own interest. The liferentrix was therefore entitled to indemnification from the fiar taking benefit to the extent of the *lucrum* accruing to him, and was entitled to be repaid for her expenditure so far as it enhanced the value of the subjects—Erskine, ii. 9, 60; Bell's Prin., 10th ed. 1062, 1063; More's Conveyancing, i. 213; *Guthrie* v. *M'Kerston*, February 2, 1672, M. 13,414; *Haliday* v. *Gardine*, February 20, 1706, M. 13,419; *Scott* v. *Forbes*, March 5, 1755, M. 8278; *Douglas* v. *Douglas' Trustees*, July 20, 1864, 2 Macph. 1379; *Nelson* v. *Gordon*, 26 June 1874, 1 R. 1093, opinion of L.P. Inglis, 1099. The pursuer as assignee of the liferentrix was therefore entitled to this sum.

Argued for defenders—(1) As to the £134, 17s. sued for—The Lord Ordinary, who had heard both actions, was of opinion that on this point the real issue had been considered and decided in last action. He had therefore sustained the defenders' plea of *res judicata*. The grounds on which the Lord Ordinary had decided the former action were sound—*Waddell* v. *Waddell*, March 9, 1818, 6 Dow's App. 279. The pursuer's averments were not specific enough to be remitted to probation. Indeed, so far as they went they told against his case, for they showed that Miss Braid had not kept up the debt against the property, and had therefore nothing to assign. (2) As to the £392, 10s. 9d. sued for — The old cases in Morison did not apply. These cases and Erskine, ii. 9, 60, showed that the authority of the Court was necessary before the repairs could be made. The law laid down in these cases was now obsolete, and since the beginning of the century no liferenter had ever been found entitled to repayment from the fiar for repairs on a property except in exceptional circumstances. No such exceptional circumstances existed here. The liferentrix had possessed the property for twenty-five years, and it must be assumed that the subjects had fallen into decay because she did not keep them up. The presumption was that she had repaired the property for her own benefit, and had no claim for reimbursement against the fiar—*Readie* v. *Yeaman*, July 1875, 12 S.L.R. 625.

At advising—

LORD JUSTICE-CLERK—In this case there are two questions. The Lord Ordinary has held, as regards the first of them, that there is a previous judgment which is *res judicata* against the pursuer. In that previous case there was no judgment on a concluded cause but only a judgment on relevancy. And while I do not say that there may not be cases where such a judgment may give rise to a plea of *res judicata* in a subsequent case relating to the same matter, it appears to me that it will be more satisfactory to decide this part of the case upon the plea against relevancy rather than to base the decision on a plea of *res judicata*, particularly as this case is not in the same position as the former case was. The circumstances are changed by death of one of the parties to the former action. The first question relates to a sum of £134 which the pursuer alleges that the defenders were due to Miss Braid, now deceased, and to which he has acquired right. Miss Braid received a liferent of the deceased Mr Andrew Braid's property. She was also appointed his executor. The defenders are the fiars of the heritable estate. She paid the debts left by the deceased, including a debt of £150 on a bond, and the fee of the heritable estate was conveyed to the defenders without her having taken any assignation to the bond, and the property is accordingly unburdened of that debt. Having done this, and having thus no claim against the property, I am unable to see how she can claim as a debt from the defenders a sum of money as to which there is no document of debt to support the demand. They would not have been liable to pay the debt had it remained upon the property. The creditor could have only gone against the property for the debt, and the fiars would not have been liable to pay the debt. There does not seem to be any relevant case for this conclusion of the summons.

The second question relates to certain works in the way of building which Miss Braid executed on the property. These consisted of repairs on a house which had fallen into decay and could not be kept up by ordinary repairs but required very substantial renewals. The cost of these works is said to have been £392, and the pursuer avers that the value of that house was enhanced by that amount. Miss Braid drew a rent down to her death for the premises of about £60 a-year. The pursuer as in right derived from her demands that the fiars shall pay him £392 as in reimbursement to her. It is difficult to see on what legal ground this claim can be made good on such averments as we have in this case. They seem to come to nothing more than

this, that the liferentrix executed extensive repairs on buildings on the property. If the liferenter chose to spend her money in repairing buildings on the property, that was a matter with which the fiars had nothing to do. This is not like the case which sometimes occurs where a party, in *bona fide* exercise of what is believed to be a good title, executes works on a property from which he is afterwards ousted by one proving a better title. The considerations which come in in such a case do not apply. Here the fiars got the fee of the estate, and Miss Braid knowing she had only a liferent could consider for herself what she would do in the way of expenditure for her own enjoyment of the estate. But of course what she chose to do to buildings on the ground went with the lands when her liferent came to an end. She might have enjoyed what she did for many years, and recouped herself possibly altogether for her outlay. But her not having done so, and her having died in a few years after the works were done, is not a matter with which the fiars have anything to do. They are entitled to possession of their property, and if they are to be called upon to pay for work done on it in the way of repairs by the liferenter, it must be because of some special obligation undertaken, or some condition imposed upon them in the gift of the fee. There is no such thing here, and therefore I agree in the result at which the Lord Ordinary has arrived.

LORD YOUNG—I concur in the result also.

LORD TRAYNER — There are two petitory conclusions in this action, one for the sum of £134, 17s., and the other for £392, 10s. 9d. With regard to the first of these conclusions the Lord Ordinary has sustained the defender's pleas of *res judicata* and irrelevancy. The plea of *res judicata* is based upon a judgment pronounced by the Lord Ordinary in a former action between the same parties dismissing that action as irrelevant. I think that plea is inapplicable here, for an interlocutor dismissing an action as irrelevant is not a *res judicata* in the sense in which we usually employ that term—*Menzies*, 20 R. (H.L.) 110. I would therefore have repelled that plea, and all the more that the present action is not identical with the previous one, which was dismissed. The pursuer now sues in a different character from that set forth in the previous action, and the sum sued for is different. But I agree with the Lord Ordinary in thinking that *quoad* the first conclusion the pursuer's averments are irrelevant. The case he presents is this—that there was a debt heritably secured over the subject of the liferent, which the liferentrix paid off; that in doing so she enhanced the value of the fee which fell to the defenders; and that therefore the defenders are liable in repayment to the pursuer as the assignee of the liferentrix in the amount so paid by her. Now, the premises here are true, but the conclusion does not follow. The debt which was discharged was not at the time of its constitution, nor indeed at any time, the debt of the defenders. They could never have been called upon to pay it. Had it remained undischarged the subjects would have been liable to adjudication at the instance of a creditor. But the liferentrix at her own hand discharged the debt, and thus even as a burden on the subjects it disappeared. That the defenders are liable as debtors on a debt because some other has been good enough to discharge it is a plain *non sequitur*. As therefore it does not appear from the pursuer's averments that the defenders ever incurred the debt now sued for, ever undertook to pay it, or had it laid on them by legal process as their obligation, I see no ground upon which the pursuer can ask decree against them for it.

The action in so far as regards the second conclusion is also, I think, irrelevant. The sum here sued for is the amount alleged to have been expended by the liferentrix in repairing and improving the subject of the liferent. This is also claimed from the defenders on the ground that by this expenditure the value of their fee has been enhanced. Now, I take it to be well established that a liferenter cannot at his own hand make improvements on the subject of the liferent and charge them against the fee. There are cases where the liferenter has been allowed to do so, but I think they are special. At all events, the liferenter is always presumed to make such improvements for his own benefit, and that presumption is not excluded by any averment which the pursuer makes. On the contrary, the pursuer's averments favour rather than repel the presumption. The subject of the liferent here consisted of some small houses in a more or less dilapidated condition, yielding very little if any return. The liferentrix expended about £390 upon them, and secured a return of £60 a-year—a good investment, yielding 15 per cent. This benefit she got from her expenditure as long as she lived, and had she lived for a few years longer she would have been entirely recouped. I think the legal presumption in the circumstances remains in full force, and if so, the defenders are not liable for the sum expended. It would not be fair to make them liable, for to do so would be to give the liferentrix the whole benefit or produce of the expenditure while she lived, and burden the fiars with the whole capital expenditure after her death—that is, in other words, to increase the liferent right at the expense of the fiars.

The Lord Ordinary has assoilzied the defenders from the conclusions of the summons. I think the proper interlocutor where the plea of irrelevancy has been sustained is to dismiss the action as irrelevant and not to grant absolvitor.

LORD YOUNG — Agreeing as I do with your Lordship that the action is irrelevant, I did not think it necessary to say anything on the question of *res judicata*. But after Lord Trayner's remarks on the subject it is perhaps proper that I should say that I cannot concur in them, and I undoubtedly

agree with the Lord Ordinary's view on *res judicata*. My opinion is that the judgment of a competent Court that a statement of facts is irrelevant to support a claim which is the subject of an action in that Court is *res judicata* to this effect—that a claim thereafter put forward on the same statement of facts, or what is substantially the same statement of facts, can never thereafter be sustained. It is all one whether the Court determines that the statements are insufficient in law or insufficient in fact and not supported by the proof. I am therefore of opinion that the proper form of the judgment on this part of the case is absolvitor.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against, dismissed the action as irrelevant, and decerned.

Counsel for the Pursuer—W. Campbell, Q.C.—T. B. Morison. Agents—Irons, Roberts, & Cosens, W.S.

Counsel for the Defenders—H. Johnston, Q.C.—A. S. D. Thomson. Agent—Henry Wakelin, Solicitor.

Tuesday, March 20.

FIRST DIVISION.

FARQUHARSON *v.* BURNETT AND OTHERS.

Succession—Conditio si sine liberis—Illegitimate Child.

The *conditio si institutus sine liberis decesserit* is not applicable to the children of an illegitimate child.

Succession—Legitim—Lapsed Share.

Held (*following Naismith* v. *Boyes*, May 27, 1898, 25 R. 899; affirmed July 28, 1899, 1 F. (H.L. 79) that a child who has taken a conventional provision under his parent's settlement is also entitled to legitim out of provisions which have lapsed and fallen into intestacy.

Succession—Accretion—Conditio si sine liberis.

A testatrix left her whole estate to A, B, C, and D, "my lawful children, share and share alike." The deed contained no survivorship clause or destination-over. D, though described as one of the lawful children, was in reality illegitimate. B, C, and D all predeceased the testatrix, the two last leaving issue. *Held* (1) that no right vested in D's children; (2) that a child of C was entitled to her parent's share under the *conditio si sine liberis*; but (3) not to any part of the lapsed shares, in respect (*a*) (*following Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191) that the gift to the children was so expressed as to create a severance of their interests, and thus to prevent accretion from taking place *ex lege*, and (*b*) *separatim*, that a child cannot take under the *conditio* any more than the share destined to its parent; (4) that the lapsed shares fell into intestacy, and (5) that A, the surviving child, was entitled to claim legitim out of the amount thus falling into intestacy, in addition to the share destined to herself.

Observed (*per* the Lord President) that *Blair's Executors* v. *Taylor*, July 18, 1876, 3 R. 362, is overruled by *Paxton's Trustees* v. *Cowie*, *cit. supra.*

This was a special case presented for the opinion and judgment of the Court on questions arising under the mutual disposition and settlement of Archibald Farquharson and Mrs Jane Wilkie or Farquharson his wife. The circumstances as stated in the case were as follows:—"By mutual disposition and settlement dated 30th November 1878, and registered in the Books of Council and Session 18th February 1896, entered into between Archibald Farquharson, residing in Dundee, and Mrs Jean or Jane Wilkie or Farquharson, his wife, the said Archibald Farquharson disponed in favour of the said Mrs Jean or Jane Wilkie or Farquharson, in case she should survive him, in liferent for her liferent use allenarly, and on the death of the survivor of them, to and in favour of the said Mrs Mary Elder Farquharson or Niddrie, spouse of the said David Niddrie, joiner, Cape Town, Cape of Good Hope, the said Annie Stewart Farquharson, William Wilkie Farquharson, carpenter, Victoria Road, Dundee, and Mrs Jane Smith Farquharson or Burnett, spouse of John Burnett, seaman, residing in Glebe Street, Dundee, his 'lawful children,' equally among them, share and share alike, all and sundry, his whole heritable and moveable estate at the time of his decease, and appointed the said Mrs Jean or Jane Wilkie or Farquharson, in case she should survive him, to be his sole executrix; and in the event of her predeceasing him, the said Mrs Mary Elder Farquharson or Niddrie, Annie Stewart Farquharson, William Wilkie Farquharson, and Mrs Jane Smith Farquharson or Burnett, and the survivor or survivors of them, to be his sole executor or executors; and the said Mrs Jean or Jane Wilkie or Farquharson, with consent of her said husband, who thereby renounced his *jus mariti* and right of administration of her estate, disponed and made over to and in favour of her husband the said Archibald Farquharson, in the event of him surviving her, in liferent for his liferent use only, and on the death of the survivor of her and her said husband to and in favour of the said Mrs Mary Elder Farquharson or Niddrie, Annie Stewart Farquharson, William Wilkie Farquharson, and Mrs Jane Smith Farquharson or Burnett, equally among them, share and share alike in fee, all and sundry her heritable and moveable estate of whatever nature or denomination the same might be which should belong or be addebted to her at the time of her decease,