any more than the obligation actually incumbent on Mr Anstruther. He cannot be considered as purchasing an obligation such as Mr Anstruther never undertook, and never lay under, viz., an obligation to pay the premiums during the whole course of Mr Anstruther's life, whether the debt contained in the bond was discharged or not. It does not affect my conclusion that, in the pleadings presented to the Court with the view of endeavouring to prevent the Court from ordering a sale of the policies, this character was attempted to be put on the obligation, as the subject of sale. The judgment of the Court cannot be interpreted by the anticipative deprecations urged on them by a zealous and rhetorical counsel. Nor is it possible for me to give the effect of *res judicata* on the general matter of right to the mere fact that, in the ranking and sale, a warrant was granted for payment of one or more of the posterior premiums, without the Court having the general question formally raised and discussed, with all parties interested before it.

Having this view as to what alone can be considered as having been sold, I hold it necessarily to follow that we should answer the inquiry of the accountant by saying that Mr Paul, as in room of the purchaser of the policies, and as in right of Mr Anstruther's obligation to pay the premiums, is entitled to claim against Mr Anstruther and his estate the whole premiums arising anterior to the period when the debt was paid—principal, interest, and expenses as aforesaid; but is not entitled to claim any premiums arising subsequently. This is not exactly the answer given in the interlocutor of the Lord Ordinary now under review, though I think it is the answer pointed at in his Lordship's note. It seems to me that it is the answer which ought in terms to be now given.

I conceive that for the purposes of the accountant any further answer is unnecessary. A question is indicated by the accountant as to how far premiums could be charged which were not actually paid by the creditor in keeping up the policy. It was stated to us from the bar that in point of fact all the premiums were paid to the insurance office down to the date of Mr Anstruther's death. The contrary of this was not shown. The state of fact has therefore not arisen to which this question is applicable, and we cannot be called on to answer the question contingently and hypothetically.

The other judges concurred with Lord Kinloch, after commenting on some specialties in the history of the case and the position of the parties in it.

Agent for Mr Paul—T. J. Gordon, W.S.
Agents for Mr Steuart—J. & C. Steuart, W.S.
Agents for Mr Mackenzie—Mackenzie & Black, W.S.

Saturday, November 6.

SECOND DIVISION.

M'LAREN *v.* HOWIE.

Trust—Provision—Legacy—Payment by Anticipation—Proof—Legitim. (1) Circumstances in which *held* that the executors under a trust-deed had proved by competent evidence prepayment during his lifetime of a provision made by a father to one of his children. (2) *Held* that a provision of this nature may thus be satisfied so as to bar a claim against the executors on the ground that it was not expressly revoked. (3) That the provision in the deed having been accepted by the child in full of legal claims, she could not maintain an action for her share of legitim.

Question, whether it would be competent to prove the ademption of a *pure* legacy, standing uncancelled in the will, by payment in anticipation during the life of the truster?

This is an action at the instance of Mr and Mrs M'Laren, Gillespie Street, Edinburgh, directed against the executors of the late Thomas Howie of Boghall, in the county of Perth, under his trust-disposition and deed of settlement. The female pursuer is a daughter of the late Mr Howie, and she sues the defenders, who are her brothers, to count and reckon with her for their intromissions with their father's estate, and, alternatively, to pay to her a sum of £500 as the balance to be held against them. The defence to the action is, that in 1846 Mr Howie executed a trust-settlement of all his means and estate, by which he provided the pursuer a legacy of £40, being a like sum as was granted to the other daughters. The deed, it is said, declared these provisions in favour of his children to be in full to them of all legitim, bairns' part of gear, or other claim whatsoever. The defenders further say that Mrs M'Laren was aware of the provision in the deed to her, and then they make the following statements:—"(8) During the lifetime of the said Thomas Howie the female pursuer was frequently in the habit of writing letters to him complaining of want of money, her family being then young, and her husband, as she alleged, not being in very good health. In order to relieve his said daughter, the said Thomas Howie in his lifetime made several payments to her in anticipation and satisfaction of the specific legacy bequeathed to her in his deed of settlement. The said payments, at least, amounted to the sum of said bequest, and were accepted by the female pursuer and her husband as in payment and satisfaction thereof. (9) Accordingly, the pursuers subscribed and transmitted to the said Thomas Howie a receipt in the following terms:—'*Edinburgh, 9th September* 1853. —I, Mrs Ann M'Laren or Howie, spouse of Peter M'Laren, Officer of Excise, Edinburgh, with consent concurrence of my said husband, and him for his interest, grant me, the said Ann M'Laren or Howie, to have at different times received from Mr Thomas Howie, farmer, Boghall, my father, sums amounting in whole to £40 sterling, being in full of my share of the estates and effects of the said Thomas Howie, and of the late Mrs Ann Baxter or Howie, his wife, which would fall to be paid to me or my children by and through the decease of my father, he and his heirs, executors, or representatives being discharged of all claim competent to us, or either of us, in any manner of way.' (Signed) 'ANN M'LAREN. PETER M'LAREN. £40 stg.'"

After the record was closed, the pursuers obtained leave to amend their record, to the effect of enabling them to ask payment of the legacy in question, and they made an averment that it had not been paid. After a debate, the Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the closed record and productions,—Finds that the pursuers now claim, under the conclusions of the summons, the sum of £25, bequeathed to the female pursuer by

her father, the deceased Thomas Howie, in his disposition and settlement: Finds that, by so claiming, the pursuers homologate and approbate the said disposition and settlement, and are thereby precluded from claiming legitim: Finds that the defenders do not allege that, at the death of the said Thomas Howie, he had any claim of debt against the pursuers, or either of them, in respect of advances made by him to the female pursuer, or otherwise: Finds that the defenders aver that, during his life, the said Thomas Howie made several payments to the female pursuer in anticipation and satisfaction of the specific legacy bequeathed to her in his disposition and settlement, amounting at least to the said bequest, which were accepted by her and her husband as in payment and satisfaction thereof, and that accordingly they subscribed and transmitted to him the receipt: Finds that, by the terms of said receipt, it does not import a discharge of said bequest: Finds that the defenders have not made any relevant averment of acquiescence in, or homologation by the pursuers of, the defenders' actings under their father's settlement, such as can bar them from pursuing the present action as it is now insisted in, and repels the fourth plea in law stated for the defenders: Appoints the cause to be enrolled, that the defenders may state whether they ask a proof of their averments in reference to said payments otherwise than by said receipt, or evidence in regard to it, and reserves the question of expenses.

"*Note.*—The pursuers now demand from the defenders, as executors of their father, payment of the bequest of £25 left by him to Mrs M'Laren, and they state that they do not make any farther claim for legitim, or otherwise. This is obviously a very different claim from that with reference to which they brought their action in the form of a count and reckoning. But there does not seem to be any incompetency in their now insisting in the action to this limited effect, though it may not be necessary to have an accounting.

"The defence against the claim for the legacy was rested at the debate upon the receipt founded upon by the defenders as having been granted by the pursuers to the testator for sums amounting to £40, 'being in full of my share of the estates and effects of the said Thomas Howie and of the late Mrs Ann Baxter or Howie, his wife, which would fall to be paid to me or my children by and through the decease of my father, he and his heirs and executors being discharged of all claim competent to us or either of us in any manner of way.' The Lord Ordinary holds it to be quite settled that a discharge so expressed does not exclude a child's claim to dead's part (*Anderson* v. *Anderson*, Elchies, 'Executor,' No. 12; *Pringle* v. *Pringle*, Elchies, 'Legitim,' No. 5). Quite as little can it be held to discharge by anticipation a legacy left unrevoked in the father's settlement. The defenders founded upon the circumstance alleged by them, that the sum of £40 in the receipt is just the amount of the legacy of £25 and a bill granted by the female pursuer or her husband for £15, which the testator by his settlement directed to be delivered up to her. The Lord Ordinary does not think that this circumstance can be received to set aside the legal presumption in this matter arising from the terms of the discharge, and the fact that the testator allowed the legacy to stand unrevoked.

"As the defenders have a general averment as to payments made and received as in anticipation of the legacy, the Lord Ordinary has given them an opportunity to state whether they offer any, and what, description of proof on that subject, apart from the receipt produced."

The defenders having asked a proof, they were allowed to prove the statements above set forth, and the proof was led before the Lord Ordinary. It consisted mainly of letters from the pursuers to the late Mr Howie, asking advances of money on the footing of pre-payment of their legacy. Besides the receipt quoted in the statements of the defenders, they produced another one in similar terms, and they were both improbative. After hearing parties on the import of the proof, his Lordship pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the closed record and proof—Finds it is proved that, subsequent to the date of the disposition and settlement executed by the deceased Thomas Howie, the father of the female pursuer, various sums of money, amounting to the sum of £25, being the amount of the money legacy bequeathed to the female pursuer by said disposition and settlement, were received by the pursuers from the said Thomas Howie as in prepayment and satisfaction of said legacy: Sustains the defences, assoilzies the defenders from the whole conclusions of the libel, and decerns: Finds the pursuers liable in expenses, allows an account thereof to be given in, and when lodged, remits the same to the Auditor to tax and to report."

The pursuers reclaimed.

FRASER and CAMBELL SMITH, for them, argued—The proof allowed by the Lord Ordinary was incompetent, in respect it was parole, which was not a competent mode of proving the defenders' statements. The receipts founded on were improbative, being neither holograph nor tested, and therefore could not be relied upon as instructing payment of money. The import of the proof was to show that the advances of money made to the pursuer were mere gratuities, and were not intended by the truster to discharge the pursuer's legacy. Moreover, they had not that effect, for it was incompetent by payment in anticipation to satisfy or adeem a legacy, which was a claim against the executor. *Grierson* v. *King*, M. 17,054; *Reid* v. *Hope*, Jan. 28, 1826, 4 S. 405; *Hamilton* v. *Struthers*, Dec. 2, 1858, 21 D. 51; *Bowe* v. *Christie & Co.*, March 13, 1868, 40 Jur. 326; *Eton* v. *Smith*, 5 Ves. 341; *Kippen* v. *Darby*, 3 Macq., 238; *Erskine*, May 24, 1827, 5 S. 697; *Miller's Trs.*, Feb. 23, 1848, 10 D. 767.

SCOTT and W. A. BROWN, in support of the judgment,—The proof allowed by the Lord Ordinary was not parole, but was merely such as was competent, and nothing but writing was tendered. There was no parole proof except what was necessary to identify or to explain writings. It was true that the receipts produced were improbative, but the defenders did not rely upon them as validly discharging the legacy. They founded on the correspondence, which was holograph, and which proved that certain advances had been made in pre-payment of the legacy. Having received it, the pursuers were barred from claiming it a second time. The question of law stood clear both upon authority and principle. It is quite settled that provisions to children, and even such as are made by parties not standing *in loco parentis*, may be satisfied by anticipation, and the fact of the provision standing unrecalled in the deed is a mere element in considering the intention of the truster. There could be no difference between a provision and a

legacy, except that evidence of intention might be more readily got in the one case than in the other. The intention in the present case was not doubtful, the testator having preserved in his repositories the evidence that the legacy had been prepaid. Dig. b. 34, tit. 4, l. 4, § 11; Ersk. 3, 9, 24; *Robertson* v. *Robertson's Trs.*, Feb. 15, 1838, 16 S. 554; *Scott* v. *Scott*, June 2, 1846, 8 D. 791; *Buchanan* v. *Mollison*, June 16, 1824, 2 S. (Ap. Ca.) 445; *Ravenscroft* v. *Jones*, 32 L. J. (Chan.) 482; *Nevin* v. *Drysdale*, Law Rep. 4 Eq. Ca. 517.

At advising—

Lord Justice-Clerk—I shall content myself with stating very shortly the conclusions at which I have arrived on the questions which have been argued before us.

1. I am of opinion that it has been proved by competent evidence that Mrs M'Laren received from her father during his life, and after he had executed his settlement, sums amounting in all to £25. £7 is proved to have been received by the letter No. 46 of process, from Mr and Mrs M'Laren —the letter No. 41 of process from Mr M'Laren— and the receipt No. 48 of process, written by the testator and signed by Mr M'Laren. £10 is proved to have been received by the letter No. 17 of process. £5 is proved to have been received by the letter from Mrs M'Laren, No. 21 of process.

I do not think that any difficulty arises in regard to these sums in respect of the informal character of some of the writings, or the want of a stamp. Independently of the letters referred to, the first two payments are substantially admitted to have been received by the letter No. 8 of process; as I hold it to be established that this letter refers to the sum of £25 which had been provided in the will, and the balance of £8 there mentioned could only have been brought out by assuming the other two sums to have been received. I also agree with the defenders in thinking that the balance of £3, which Mrs M'Laren alleges in this letter not to have been sent, must, in the circumstances, and after so long delay, be presumed to have been paid.

I think the payment of these sums sufficiently established, without the assistance of the receipt and discharge No. 21 of process, or the parole evidence. In regard to the first of these, I am of opinion that, as it is proved to have been signed by the parties, and transmitted to the testator on the footing mentioned in the correspondence, it may be read as instructing the receipt of the sum there mentioned, although not holograph; and I also think that, whether in itself available as a discharge, it may also, although unstamped, be read for the purpose of throwing light on the meaning of the letter.

2. I am of opinion that it has been proved by competent evidence that these sums were received by the pursuers in anticipation and satisfaction of the sum of £25, which had been provided to Mrs M'Laren in Mr Howie's will.

On this matter it was competent to instruct by parole evidence—(1) that the pursuers knew of the provisions of the will; and (2) that the expressions contained in the letters referred to these provisions. The course followed in the case of *Buchanan* amply supports the competency of such a course of inquiry. And on the import of the proof, I think it does not admit of doubt that the parties did know of the terms of the will; and that they applied for and obtained these payments in satisfaction of the sums bequeathed by it.

The remaining question—What is the effect of the facts thus proved on the pursuer's right to payment of this legacy which was left uncancelled at the testator's death, is one of importance. But I am of opinion that the legacy or provision was satisfied during the testator's lifetime, and is not now exigible.

This provision does not stand in the position of a gratuitous or purely voluntary bequest. This man had made his will, and in it had made provision to his daughter; and intended to satisfy not only what might be expected from natural affection, but all that could be claimed on the score of legitim or share of the goods in communion. It was his daughter's portion which he so provided, as he himself expressed it, in the receipt No. 48 of process. I think, therefore, that this provision might be made the subject of transaction and anticipation; and that the fact that the provision was left unrecalled in the father's settlement, is not of itself conclusive of the intentions of the testator to alter the footing on which the money had been advanced during his life.

The principle on which effect is denied to the provision contained in the will, was fully recognised in the cases which were quoted to us of *Scott*, *Robertson*, and *Buchanan*. In the first of these cases the provision was sustained, notwithstanding the advances made during life; but this on the express ground that there was no sufficient proof of the footing on which the advances were made. In the case of *Robertson*, effect was denied to the provision in the will, on the ground that the testator, by a holograph writing, had stated that the legatee had been paid. The case of *Buchanan* is very much in point; as in that case the will remained unrevoked? and the Court, after examining the parties, held notwithstanding that a sum advanced during life was in anticipation of this bequest. I give no opinion, however, as to how this case would have stood had the bequest been entirely voluntary.

Lord Cowan—The claim of the pursuer and her husband is for the sum of £25, bequeathed to her by her father's trust-settlement dated in 1846—his trustees being directed to pay to her that sum, and also to deliver up to her a bill for the sum of £15, granted to him by her or her husband. The settlement contains other legacies provided to members of the family, and contains this general declaration:—"And I declare the provisions hereby conceived in favour of my children to be in full to them of all legitim, bairns' part of gear, or other claim whatsoever." The father died in 1855, and the legacy was payable two years after his death; but no demand was made for payment till the institution of this action in 1868.

The Lord Ordinary, in his interlocutor of 4th March 1869, held that the receipt dated 9th September 1853, quoted in the record, did not import a discharge of the bequest; but by a subsequent interlocutor, before answer, allowed the defenders a proof of their averments in articles 8th and 9th of the condescendence. These averments are to the effect,—that during his lifetime, on the application of the pursuer complaining of want of money, her father made payments to her, in anticipation and satisfaction of the specific legacy, bequeathed to her in his deed of settlement; and that these payments were accepted of by her and her husband on that footing. And on 9th April 1869, the Lord Ordinary held it established by the proof that various sums of money, amounting to £25, had been

paid to and received by the pursuers in prepayment and satisfaction of the legacy.

The case involves the consideration of some points of nicety and difficulty which were fully and ably argued; and the Court took time to consider, whether the interlocutor under review was objectionable, on any of the legal grounds urged by the pursuers. I am of opinion that it is not, and that the view taken of the case by the Lord Ordinary ought not to be disturbed.

It is not open to dispute that a discharge such as that founded on in this case does not *in itself* afford evidence of payment, seeing that it is neither holograph nor tested. Neither is it open to dispute that the terms of this discharge, supposing it had been probative, can be held to discharge the child's claim for dead's part, or for a legacy out of dead's part, contained in a settlement, not becoming operative by the testator's death till a subsequent period. And it may be further taken to be free of question, that mere parole proof of an intention by the testator to revoke a legacy, which he leaves unrecalled, will not be admissible. But taking these propositions not to be doubtful, there is afforded by the evidence, written and parole in this case, very clear ground for sustaining the defence of extinction by prepayment of the legacy or provision claimed in the action.

The provision made for the pursuer as one of his daughters is expressly stated by the testator to be in full of her legal claims, and is not therefore to be viewed in the light of a mere gratuitous legacy. And this consideration it is of importance to have in view, in the examination of the evidence that exists in the case of the several sums of money, received by the pursuer in her father's lifetime, having truly been in satisfaction of this provision. The letters holograph of the pursuers addressed to the father soliciting advances of money, and those acknowledging the receipt successively of £7, £10, and £8, making in all £25,—the precise amount of the legacy,—demonstrate that what was in the view of both parties was the extinction of all claims against him or his representatives, whether these had their foundation in legal right or in voluntary grant; and from these letters, and the statements made by the pursuer and her husband in explanation of their contents when examined as witnesses, I think it clearly established, in the *first* place, that the pursuers had been made aware of the provision made for them by the father's settlement, executed so long before as 1846; in the *second* place, that the document in the form of a discharge of 9th September 1853 was subscribed by both pursuers and transmitted to the testator as evidence, that they had received satisfaction and prepayment of every claim that might be competent to them by and through his decease; and, in the *third* place, that the letters holograph of the pursuer, when read along with the document of September 1853, affords evidence irresistibly establishing the discharge by the father in his lifetime of the provision contained in his settlement.

It was contended that the evidence thus relied on by the defenders was not legally competent or admissible. This is a mistake. In a case of this kind letters written by the parties, when holograph, are truly the best kind of evidence of such a transaction that can be appealed to. And further, a document expressed in the general terms of the writing dated September 1853,—which I hold to be genuine, and to have been adopted and referred to in the holograph letters,—is quite capable of being explained and supported by evidence such as that here adduced.

But taking this to be established, there still remains the question, whether,—as the father survived after making these payments for more than a year without making any alteration upon the terms of his settlement as regards this bequest,—it may not be held that he intended it to take effect, notwithstanding what had passed between him and the pursuers. It is only at the testator's death that his settlement becomes operative. It is his last will, and is presumed in law to contain his intentions as at the last moment of life. Hence it is revocable at any time by the testator, and, if not altered, must receive effect as at death. On these grounds, it was contended that this presumption—there having been no revocation of the legacy claimed, in express terms—is sufficient to support the claim for it. And it was, no doubt, possible that the testator, although taking a discharge of this very provision in his lifetime, might have seen cause afterwards to let the pursuer take benefit under his settlement. The circumstances of this case, however, will not in my opinion justify the application of a presumption (for it is nothing more) which may be redargued by clear written evidence of a different intention. The bequest in the settlement was, as I have said, of the nature of a provision intended in part, at least, to be taken in satisfaction of legal claims. The letters and other evidence in process indicate the testator's anxiety to have this provision finally settled and discharged. And as subsequent to this transaction with the pursuers, by which they were paid off this very provision, there exists no indication of the testator having at all changed his mind, it cannot be presumed that a provision thus discharged was still to be operative. Had such an intention been entertained, effect behoved to have been given to it by some renewed expression of his will, that the pursuers, notwithstanding their having already got payment of their provision, were nevertheless to take benefit under his settlement and receive second payment.

Lord Benholme—The very distinct judgment of your Lordship in the chair relieves me from the necessity of saying almost anything—I so completely concur. It is very instructive to compare the Lord Ordinary's first interlocutor with his ultimate judgment. In the first, his Lordship held that the receipt founded on did not imply a discharge. I think that was a well-founded judgment, because the terms of it, taken by itself, are not so unambiguous as to be presumed to apply to a bequest. Let me say farther, that I do not think the receipt is not binding upon the party who subscribed it, merely because it is not probative. I look on the distinction between a probative receipt and one merely signed by the party to be this, that the latter requires the signature to be proved, whilst a probative receipt proves itself; but after that is done the writing is binding upon the party; this not being a case where there is *locus penitentiæ*. When the signature is proved, the party signing cannot resile from it. The almost universal practice of merely signing receipts for money is of itself demonstrative of the law. To hold that all such receipts were null and void, although the signature were admitted or proved, would be monstrous. The Lord Ordinary was right in holding that the receipt by itself did not import a discharge of a bequest, although in point

of mere form it was binding on the party who subscribed it. But then proof was ordered to show that it was meant to apply to the bequest. I am of opinion that order was well founded.

One word more as to the competency of a proof *prout de jure*. Had this bequest been sought to be discharged by mere parole, I think the proof would have been incompetent, because a written obligation requires to be discharged by writing. But here there are writings, one in the handwriting of the testator, and the others in that of the daughter and her husband.

It is an important point that this is not a pure bequest, but a provision. The testator had already dealt with one of his children, and had offered to pay off another (Mrs Macfarlane), but her husband refused to take the money in the father's lifetime. This other daughter, again, was needy and besought him to give her her share. That has been proved so satisfactorily that it seems to me the decision of the Lord Ordinary is clearly well founded.

LORD NEAVES concurred.

CAMPBELL SMITH then moved the Court for a proof of the pursuer's averments as to her claim to legitim. The Lord Ordinary was wrong in assuming that that claim had been abandoned; the pursuer had only claimed the legacy alternatively to their claim to legitim.

The Court refused the motion, holding that the acceptance by the pursuer of the legacy under the settlement, which was of the nature of a portion, discharged all claims competent to the pursuer against her father's executry estate.

Agent for Pursuer—Thomas M'Laren, S.S.C.
Agent for Defender—Alexander Morrison, S.S.C.

Tuesday, November 9.

FIRST DIVISION.

HALLIDAY AND OTHERS *v.* M'CALLUM.

Conditio si sine liberis decesserit—*Grandchildren—Living—Vesting.* B. conveyed his estate to his son under burden of £500, to be equally divided amongst the children of his daughter C., and payable six months after her death, to those at least who had then attained majority. He further declared if C. should die "without leaving any living child" the provision was to go to his son. C.'s children predeceased her; but the one who died last left issue. *Held* the money vested at C.'s death, and her grandchildren were entitled to it under the *conditio si sine liberis decesserit.*

By disposition dated 11th February 1825, the late Hugh Stewart, Esq., of Gategill, conveyed to his son, Alexander James Stewart, his lands of Gategill and others. He reserved to himself a liferent of the estate, and burdened it with an annuity of £40 to his daughter, Mrs Welsh, "and farther, with and under the burden of the payment of a provision of £500 sterling, to be equally divided among the children of my said daughter forth of the said lands and others, and to be payable to them respectively at the end of six months after the death of my said daughter, or at least to so many of them as shall then have attained to the years of majority, and to the others as soon afterwards as they shall attain to that age, with the legal interest of their respective shares from the time of the death of my said daughter, the interest of the shares belonging to such of the said children as shall not then have attained to the age of majority being in the meantime to be applied towards their support and maintenance till they severally attain to that age." In reference to this provision he thereafter declared "that if my said daughter shall die without leaving any living child, then the said provision shall fall and belong to the said Alexander James Stewart and his heirs and assignees."

These burdens he created real burdens on the land; and in its subsequent transmission they were duly kept up. Alexander James Stewart became bankrupt, and his estate was transferred to a trustee for his creditors. One of his creditors was Mr Kellie M'Callum, father of the second party in the case, and it was agreed that Mr Cruden, who purchased the estate from the trustee, should retain £500 of the price, to be paid to the children of Mrs Welsh, if she left any; and, if she left none, to Mr M'Callum, as in right of Mr Alexander James Stewart. It was further stipulated that the interest should be paid to Mr M'Callum till Mrs Welsh's death.

Mrs Welsh had two children, both of whom predeceased her; the elder without issue in 1847; and the second in 1849 leaving three children—the first parties in the case. On Mrs Welsh's death on the 10th January 1869, the present owner of Gategill brought an action of multiplepoinding to have it determined who was in right of the £500. The money was consigned in bank, as ordained; and the special case was presented by the Hallidays and Mr M'Callum to have the question settled.

FRASER and SCOTT, for the Hallidays, argued—This is a testamentary settlement by Mr Stewart of his estate under the burden of a provision to his daughter's children. The provision came in place of the annuity, and must be held to have vested *a morte testatoris.* If so, Mrs Halliday took her brother's share as his heir. Even if the provision vested at the death of Mrs Welsh, it is settled law that the children of a deceased parent are entitled to take the parent's share under the *conditio si sine liberis decesserit.* This applies equally well in the case of grandchildren, where the testator is *in loco parentis.* The only cases against it are cases of descendents of collaterals. Authorities—*Wallace,* M. App. "Clause," No. 6; *Thomson's Trustees* v. *Robb,* 10th July 1851; *Hewat* v. *Grant,* 22d Nov. 1867; *Rattray's Trustees* v. *Rattray,* 21st Feb. 1868.

SOLICITOR-GENERAL and LEES, for Mr M'Callum, replied—This is a disposition of a special estate, not of the whole estate and means. The provision is a burden on the son, not money given over. He is made a debtor; and, therefore, the *conditio* should not apply. The provision could not vest till Mrs Welsh's death. The words of Mr Stewart's disposition shew he did not intend a conditional institution of the children. Mr M'Callum's right is just that of Mr A. J. Stewart. The substitute is not a stranger therefore, but Mr Stewart's own son. The words "leaving no living child" shew he had no intention to burden his son for great-grandchildren. The position of grandchildren is not that of children. The Intestate Succession Act recognizes a difference. The deed is carefully drawn; and effect must be given to its terms. The substitution of A. J. Stewart is, in effect, according to the Halliday's contention, mere surplusage, for the destination would be the same though