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

it were not there. The terms of the deed require survival and majority in order that the children may take. They did not survive. The *conditio* does not apply in favour of grandchildren. It does not apply where there is a destination over, even if there is a clause of survivorship. In the cases of *Wallace* and *Christie* there was no substitution. Nor are they well received decisions. At least their principle should not be extended. Authorities —*Omey*, M. 6340; *Gordon*, M. 6343; *Wishart*, M. 2310; *Rhind's Trustees* v. *Leith*, 5th Dec. 1866; *Cockburn's Trustees* v. *Dundas*, 10th June 1864; *Wright* v. *Ogilvie*, 9th July 1840; *Young* v. *Robertson*, 11th Feb. 1862.(H.L.) M'Laren on Trusts, § 1253.

At advising—

Lord President—The answers to the questions raised by the special case depend on the construction of a disposition by Hugh Stewart, dated 11th February 1852. That disposition is of a testamentary nature, and conveys to the only son of the granter a certain heritable estate. The granter was a widower with only two children; a son, Alexander James Stewart, and a daughter, the wife of a Mr Welsh. It does not appear that the granter was possessed of any estate other than that conveyed by the disposition, and therefore I think we must construe the deed as a conveyance to his son *mortis causa* of his whole estate under a real burden in favour of his daughter. The first provision in favour of the daughter is an annuity of £40, secured to her out of the lands. A further provision is added in these terms: "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 mean time to be applied towards their support and maintenance till they severally attain to that age." Power is then given to Mrs Welsh to appoint guardians to receive and apply the interest effeiring to children who may be in minority at her death, and then follows this important clause: "Declaring 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." The remaining clauses of the deed constitute these provisions real burdens on the subjects conveyed to the granter's son. Now, the daughter who was to have an annuity, and whose children were to have the provision of £500, died having had two children, who both predeceased her. These children were a son who was killed in 1847, who left no issue, and a daughter who died in 1849, leaving three children, who are one set of claimants in this case. They claim that the whole fund should be divided among them; and the other party, Mr George Kellie M'Callum, claims as assignee of the testator's son. If the first parties are not entitled to this provision, it is not disputed that it belongs to Mr M'Callum. The only question accordingly is, whether the Hallidays are entitled to this sum under the deed of Mr Stewart, or otherwise?

The first question appended to the special case, raises, as I understand it, whether those children are expressly called to take under their grandfather's deed, whether, being grandchildren, they can take as included under the designation "children?" This question, I think, must be answered in the negative.

But there are two other grounds on which the Hallidays claim. First of all, they say the provision vested in their parent and in the other child of Mrs Welsh, Hugh Stewart Welsh, during the lifetime of these parties, and they claim it now as in right of their mother and uncle. Their other contention is that, supposing the fund not to have vested in the children of Mrs Welsh during her life, they are yet entitled to take it under the *conditio si sine liberis*.

I do not think the provision vested in their mother and uncle during the lifetime of their grandmother, Mrs Welsh. The case might have raised a question of considerable difficulty had it not been for the declaration which I have quoted. No doubt the provision is to be divided among her children—to be payable six months after her death —and to bear interest from her death, and she is authorised to appoint guardians to apply the interest during the minority of any child, but it is declared that if she should die "without leaving any living child" the provision should fall. With that declaration before us it is impossible to entertain the notion that the provision vested during her lifetime. The condition, as clearly and expressly stated, indisputably means that although she should have had a child, if it do not survive her it shall not prevent Alexander James Stewart and his heirs and asignees from taking the provision.

The third question raises a difficult point. But on that question I have an opinion favourable to the Hallidays' claim. I see nothing to prevent the application of the principle *si sine liberis* here. It is said that this is not an ordinary trust-settlement, but I cannot see any rule or reason for the non-application of the principle in the case of such a deed as we have before us. The *conditio si sine liberis* is simply a provision that in a destination to children, if the children die before succeeding, and leave issue, such issue shall be entitled to take. I do not see that the case of a trust-settlement is more favourable to the application of the principle than the case of such a testamentary conveyance as this. If this had been a deed *inter vivos* it would have been different; but as far as I can see this is as much a settlement of Hugh Stewart's affairs as if it were a trust-disposition and settlement, and its effect is to settle the estate on the granter's son, subject to a real burden in favour of the daughter and her children. The words of the declaration "without leaving a living child" do not exclude the effect of the *conditio*. This is just one of the cases where the law adjects it. I am not in favour of extending the condition—too much inclination has occasionally been shown to do so—but its application here does not involve any extension, but is simply allowing to it its legitimate effect.

Lord Deas and Lord Ardmillan shortly stated their concurrence with the Lord President.

Lord Kinloch—I have arrived without any difficulty at the same result.

I consider the deed now in question to be, in substance and legal character, a deed of family

provision by a father for his children, executed *mortis causa;* and to have properly applied to it the principles of construction appropriate to such a deed. I do not feel called on to pronounce on the principle applicable to any other description of deed.

I consider the provision of £500, made in favour of Mrs Welsh's children, to have not vested till Mrs Welsh's death, and, according to the terms of the deed, to have vested in the children who then survived. I rest this opinion mainly on these three facts—(1) That the right given is simply a share in a division which is not to be made till that date. (2) That whilst the term of payment is six months after Mrs Welsh's death (or the majority of those not then major), interest is payable from the date of Mrs Welsh's death. (3) That the deed declares "that if my said daughter shall die without leaving any living child, then the said provision shall belong to the said Alexander James Stewart and his heirs and asignees." It is clearly, I think, implied in this declaration that survivance of their mother, Mrs Welsh, is a condition of any child taking, which is just in other words to say that until Mrs Welsh's death no right vested.

In point of fact, both Mrs Welsh's children predeceased her: but one of them, Mrs Halliday, left lawful issue, the claimants John Halliday and his two sisters, who survived their grandmother, Mrs Welsh, and still survive.

I am of opinion that these claimants are entitled to the provision of £500, exactly as their mother, Mrs Halliday, would have been had she survived Mrs Welsh, and were now in the field as sole claimant. I think they are so entitled by application of the equitable principle, generally known by the name of the *conditio si sine liberis*, though, looking to its original application, that phrase does not always accurately express the principle. In a deed like this, in which a father makes a provision for his direct descendants, I think the law infers (nothing to the contrary appearing) that the right given to a child is given to the children of that child, in the event of the child's own predecease. In the parental contemplation, the term "child" is considered to embrace the child's children, as coming into the child's own place, and entitled to obtain exactly what the child would have himself obtained. Or, to put the position in more technical language, the children of the child who is institute, are conditional institutes, in the implication of the law, to the provision which, if in existence, the child would be entitled to take.

I am therefore of opinion, that the Hallidays', as surviving Mrs Welsh, are entitled to take what their mother, if surviving, would have taken; and should prevail in the present competition.

Agent for the Hallidays—W. S. Stuart, S.S.C.
Agents for Mr M'Callum—Gillespie & Bell, W.S.

Tuesday, November 9.

HALL *v.* LORD-ADVOCATE.

Salmon-fishings—Fishings—Net and Coble—Possession—Rent—Tenants. The proprietor of a barony, whose titles gave him a right to "fishings," sought to establish a right to salmon-fishings by prescriptive possession by persons who were tenants and cottagers of his, and bound to give him the first fish, but who paid him no rent for the permission to fish. *Held* this was not possession by the proprietor.

Question, Will possession for the prescriptive period by the use of nets, not of the ordinary kind, but of the only kind suitable in a locality where net and coble could not be used, suffice to rear up a right to "salmon-fishings" in one whose titles only give him a right to "fishings?"

Sir James Hall, Bart., is proprietor of the lands and barony of Dunglass, and of the barony of Cockburnspath. In his titles he has a right of "fishings," but not of salmon-fishings; and he sought to prove that he had reared up a right to salmon-fishing by prescriptive possession. The case was tried before Lord Ardmillan on the 23d of July on the following issues:—

"(1) Whether, for 40 years prior to 3d March 1869, or for time immemorial, the pursuer and his predecessors and authors have, as proprietors of the said lands and barony of Dunglass, possessed the salmon-fishings in the sea and other waters opposite to the said lands and barony of Dunglass, belonging to the pursuer?

And

"(2) Whether, for 40 years prior to 3d March 1869, or for time immemorial, the pursuer and his predecessors and authors have, as proprietors of the said barony of Cockburnspath, possessed the salmon-fishings in the sea and other waters opposite to the said barony of Cockburnspath, belonging to the pursuer?"

A considerable amount of evidence was led, which went chiefly to establish the fact of salmon having been fished for there. Net and coble were scarcely even used as the coast was very unsuitable for that mode of fishing. Bob-nets and hanging nets were the kind used, and these of a size suited for grilse rather them salmon. The fishers were all tenants of Sir James Hall or his predecessors, and were, in fact, engaged in the white-fishings,—only fishing for salmon when they had time and as an "extra job." They paid no rent, and made very little by the salmon-fishery. They got permission to fish from the proprietor or his factor on condition that the first fish every year should be sent to the proprietor.

The jury unanimously found that the evidence led did not establish such possession; and the pursuer now called on the Crown to shew cause why a rule should not be granted to set aside the verdict as contrary to evidence.

Dean of Faculty and Macdonald, for the pursuer, argued—As the fishers were direct tenants of Sir James Hall's, possession by them was equivalent to possession by himself. Fishing for salmon, or fish of the salmon kind, with nets constructed for that purpose only, and used for that purpose only, and taking salmon with them in a place where the ordinary salmon tackle and nets and mode of fishing would not do, must be held as valid to establish a possession of salmon fishing as the use of net and coble. Authority—*Milne's Trs.* v. *Lord Advocate*, 20th Jan. 1869, 6 S. L. R., 257.

Lord Advocate and T. Ivory, for the Crown, were not called on.

The Court held that as the only possession was by tenants and cottagers of Sir James' who did not pay any rent therefor, that the jury were right in