should all be paid *pari passu*. As to Miss M'Leod's claim to a preference as having a demonstrative legacy—that is, a legacy out of a particular fund—I think there is nothing in it. Here the fund to pay all the legacies is just that which remains after the preferable legacies are satisfied. They are all demonstrative legacies, since all that is needed to satisfy the definition of that kind of legacy is that there should be an intention on the part of the testator that a legacy be paid out of a particular fund. I think therefore that there should be no preference among the legacies of January 2, 1877, and subsequent legacies, and am for altering the interlocutor to the effect of making them rank *pari passu*.

Lord Craighill concurred.

The Court altered the interlocutor reclaimed against, and found the legacies of January 2, February 27, and April 23, 1877, payable *pari passu* out of the fund *in medio*, after satisfaction of the legacies prior in date to January 2, 1877.

Counsel for Reclaimer—J. P. B. Robertson—Maconochie. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Claimants Miss Adam and Others—W. Campbell. Agent—R. C. Gray, S.S.C.

Counsel for Real Raiser and Remaining Claimants—J. A. Reid. Agents—R. C. Gray, S.S.C.; W. J. Cook, W.S.; F. J. Martin, W.S.; Paterson, Cameron, & Co., S.S.C.

Tuesday, November 1.

SECOND DIVISION.

[Lord Adam, Ordinary.

REID AND ANOTHER *v.* M'PHEDRANS.

Succession—Will—Substitution under a Condition where Condition does not come into effect—Power of Disponee to Defeat by Will Right of Person conditionally Substituted.

A testator executed a general conveyance of his estate to "his beloved friend A. M.," declaring the conveyance to be under the express condition that should A. M. not by writing under his hand explicitly declare that the property thus taken by him should form part of his own means and estate and descend to his heirs, the children of a brother of the testator who should be alive at A. M.'s death should receive from A. M.'s estate "the full amount of my whole means and estate hereby disponed to him, it being my wish and intention that whatever he may receive in virtue of these presents shall be completely and effectually at my friend's disposal." A. M. having died, leaving a *mortis causa* deed bearing to exercise the power thus conferred, by declaring that the estate thus left to him should belong to his own heirs, a niece of the testator raised an action to have the estate handed over to her, on the ground that the deed of testator was invalid to confer more than a liferent on A. M., in respect that it was an attempt to confer on A. M. the power of making a will for another. She concluded also for reduction, if necessary, of the declaration by A. M. *Held* that the deed of the original testator was merely a substitution under a condition, and that the condition having never come into operation, the pursuer had no right under the will.

Process—Proof—Party declining to Lead Proof in respect of Refusal of Commission to Examine a Necessary Witness.

Circumstances in which *held* (*diss.* Lord Craighill) that a party who had, in consequence of a refusal by the Lord Ordinary to allow a commission to examine an important witness abroad, declined to proceed with other proof, and taken a judgment on the action without such proof, was not thereafter entitled to a fresh allowance of proof.

Andrew Inglis, writer in Greenock, died on 5th October 1849. He was never married. He left a will, dated in 1841, consisting of a general conveyance "to my beloved friend Alexander M'Culloch of Craigbet" of his whole estate, heritable and moveable, "declaring always, as it is hereby expressly provided and declared, that these presents are granted and to be accepted of by my said disponee under this condition and stipulation, that should he not, by writing under his hand, expressly declare that what he may succeed to and receive in virtue of these presents is to form part of his own means and estate, and belong to his own heirs or disponees, then and in that case such of the children of my deceased brother John as may be alive at the time of the decease of the said Alexander M'Culloch, shall receive from his means and estate, or heirs and disponees, the full amount of my whole means and estate hereby disponed to him, it being my wish and intention that whatever he may receive in virtue of these presents shall be completely and effectually at my friend's disposal, and used by him for his own purposes, but that on his death the children of my said deceased brother John shall be entitled to receive from my friend's estate the amount so received, unless my said friend shall, by a writing under his hand, explicitly declare the said children shall have no such claim; and under the condition and stipulation before written, I do hereby nominate and appoint the said Alexander M'Culloch my sole executor and universal intromittor with my moveable means and estate, with power to expede confirmation, and all other titles necessary, reserving always my own liferent, use, and enjoyment, and full power and liberty to sell, use, and dispose, of the whole means and estate hereby disponed, and power also to revoke these presents in whole or in part as I may think proper, dispensing with the delivery hereof." The estate left by Inglis consisted mainly of heritable property in Greenock. M'Culloch was a physician in Greenock who was for many years on intimate terms with Inglis. In 1851 M'Culloch, who was then fifty-five years of age, executed a writing, which after narrating the terms of the will by Inglis, proceeded thus—"And now seeing that it is the will and desire of me the said Alexander M'Culloch that the whole means and estate, heritable and moveable, conveyed to me by the said disposition and settlement, should form part of my own means and estate, and belong to my own heirs or disponees, therefore I do hereby, in exer-

cise of the power conferred on me to that effect by the said disposition and settlement, declare it to be my will and desire that the whole means and estate, heritable and moveable, conveyed to me by, or to which I have succeeded in, virtue of the said disposition and settlement, is to form part of my own means and estate, and to belong to my own heirs or disponees, to the exclusion of all others; and I therefore do further hereby explicitly declare that the children of the said Andrew Inglis' deceased brother John shall have no right or claim to any part or portion of said means and estate; but reserving, nevertheless, full power and liberty to me, the said Alexander M'Culloch, at any time hereafter, should I be so disposed, to convey and make over to the children of the said Andrew Inglis' deceased brother John such parts and portions of the heritable estate left by the said Andrew Inglis as may remain undisposed of by me at the time of my decease." He died without altering this declaration on 27th December 1853. In 1880 Barbara Inglis or Reid, a daughter of the John Inglis mentioned in these writings, brought this action, with consent and concurrence of her husband, against John M'Phedran and Sarah and Margaret M'Phedran, whom she alleged to be M'Culloch's representatives, for reduction of M'Culloch's declaration above quoted, and whether such decree should be pronounced or not, for declarator that she had right to the estates of Andrew Inglis as at and after the date of M'Culloch's death in 1853. Further, she concluded for an accounting of the intromissions of the deceased Margaret M'Culloch and Mary M'Phedran, the defender's predecessors, with the estate of Andrew Inglis from and after M'Culloch's death. She averred that the estate of Andrew Inglis was extant in *forma specifica* at the date of the death of M'Culloch, and was still extant, and that it consisted chiefly of specified heritable property. This was admitted by the defenders. She also averred that at the time of the execution of the deed of declaration, M'Culloch, who had frequently, when in full possession of his faculties, expressed an intention of taking care that Andrew Inglis' estate should go to the children of John Inglis at his (M'Culloch's) death, was weak and facile, and that the declaration had been impetrated from him by means of undue influence and importunities by the defenders and their predecessors.

She pleaded, *inter alia*—"(1) The deed of declaration by Alexander M'Culloch is invalid and ineffectual to dispose of the heritable and moveable estates of Andrew Inglis, so as to evacuate or defeat the right conferred on the female pursuer and the other children of John Inglis by the settlement of Andrew Inglis. (3) *Separatim*, By the joint operation of the settlement of the said Andrew Inglis and of the said deed of declaration, the fee and capital of the said Andrew Inglis' estate, heritable and moveable, remain undisposed of, and the same fall to the female pursuer as one of his heirs, next-of-kin, and representatives *ab intestato*."

The defenders, besides denying the pursuer's averment as to facility and undue influence, pleaded—"(3) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons. (5) The deed of 7th January 1851 being a writing under the hand of Alexander M'Culloch, containing an express declaration in terms provided for in the deed of Andrew Inglis, no right exists in the children of John Inglis in or to the succession of Andrew Inglis."

The Lord Ordinary on 22d February 1881 discharged an order for issues previously made, and fixed a proof for 26th May with regard to the pursuer's averment of facility and impetration. On 19th March he pronounced this interlocutor —"Refuses the pursuer's motion for a commission to examine Charles M. Inglis, a witness for them on the matters set forth in the record, at present resident in Melbourne; and also refuses their motion for leave to reclaim against this interlocutor." Thereafter on 19th May this interlocutor was pronounced—"In respect counsel for the pursuers states that he does not now propose to lead proof with respect to the averments of condescendence 9 and answers thereto, and having heard counsel, repels the fourth plea-in-law for the pursuers, and finds the defenders entitled to the expenses incurred by the said plea having been stated. Further, on the motion of the pursuers, discharges the order for proof on the 26th May current."

On 25th June 1881 the Lord Ordinary assoilzied the defenders. He added this note to his interlocutor:—"The pursuers were allowed a proof of the averments contained in the 9th article of their condescendence, and a diet was fixed for the purpose of taking the proof, but pursuers thereafter intimated that they did not propose to lead such proof, and the Lord Ordinary thereupon repelled their fourth plea-in-law, which was founded on these averments.

"The only question, therefore, which now remains in this case is, Whether on a sound construction of the disposition and settlement of Andrew Inglis, of date 8th June 1841, and relative deed of declaration by Andrew M'Culloch, of date 7th January 1851, the pursuers have a right to any part of the estate left by the said Andrew Inglis.

"Andrew Inglis, by his trust-disposition and settlement, assigned and disponed his whole estate, heritable and moveable, except as therein mentioned, to Alexander M'Culloch, but under the condition, that should his disponee not by a writing under his hand, expressly declare that what he might succeed to was to form part of his own means and estate, and belong to his own heirs and disponees, then and in that case such of the children of his deceased brother John as might be alive at the time of the decease of the said Alexander M'Culloch should receive from his own estate, or heirs and disponees, the full amount of his (Andrew Inglis') whole means and estate thereby disponed. The disposition and settlement further set forth that it was the testator's wish and intention that whatever the said Alexander M'Culloch should receive in virtue thereof should be completely and effectually at his disposal, and used by him for his own purposes, but that on his death the children of his brother John should be entitled to receive from his friend Alexander M'Culloch's estate, the amount so received, unless his friend should, by a writing under his hand, explicitly declare that the said children should have no such share.

"Alexander M'Culloch did, by a deed of declaration dated 7th January 1851, being a writ-

ing under his hand proceeding on a recital of the said disposition and settlement, declare it to be his will and desire that his whole estate to which he had succeeded under the said disposition and settlement was to form part of his own means and estate, and to belong to his own heirs and disponees, to the exclusion of all others, and therefore did explicitly declare that the children of the said John Inglis should have no right or claim to any part and portion of said means and estate.

"In these circumstances the Lord Ordinary cannot see that the pursuers, who are or claim to represent the children of John Inglis, the testator Andrew Inglis' brother, can have any possible claim to any part of the estate left by Andrew Inglis."

The pursuer reclaimed, and argued—Under the will of Andrew Inglis, M'Culloch had only a liferent with a power to expend. The destination was not to him and his heirs. It was to him only, and that under a condition that unless he did a certain thing the nephews and nieces of Inglis should succeed. Now, what he was thus empowered to do was to make a will for Inglis, and that was incompetent by law. The intended exercise therefore of that power was bad. A proof should still be allowed of the averments as to the facility of M'Culloch when he executed the deed of declaration (assuming it to be *prima facie* effectual) and the impetration of the deed by the defenders. The abandonment of the previous opportunity for proof was in consequence of the refusal of the commission to examine an indispensable witness for the pursuer, who was now anxious to obtain such a commission, and this was the first opportunity of doing so.

Argued for defenders—M'Culloch had clearly a right of fee under the will of Inglis. Whatever right the pursuer might have had was not, as the action assumed, a right to claim the estate of Inglis, but only a right to claim against M'Culloch's estate the value of what he had obtained from Inglis so far as not spent. But even that was excluded by the declaration, which was quite in terms of the power lawfully given.

At advising—

Lord Justice-Clerk — This case has been argued to us with ingenuity, but I am satisfied that no ingenuity could make a plausible or consecutive argument for the reclaimers.

This is a peculiar and eccentric will, and not one of a kind which the Court would be anxious to sustain if any good ground of challenge could be made out. But it has now stood for upwards of thirty years without being disputed, and I am not disposed to disturb it except on very strong grounds.

The testator (Andrew Inglis) had an intimate friend (Alexander M'Culloch), and to him left his whole estate in the terms we have before us. There is no reason given for this bequest, but we may assume that there was some good reason. The case falls under a very simple category. It is a bequest under a substitution in favour of third parties on a condition. This condition is a peculiar one, namely, that it was to rest with the donee whether the substitution is to take effect or no—"I give you my estate; it is yours absolutely, but you must make a declaration that you consent to take it, and if you do not I substitute others to the estate which you have taken." It is not a case of allowing Alexander M'Culloch to nominate the heir of Andrew Inglis. He is allowed to make a declaration that the estate belongs to himself, and if he does so then it becomes absolutely his own. Such a condition is common in the law of legacies. It is a condition just within the power of the legatee, which if he fulfils gives him the subject absolutely.

If nothing had been done by Alexander M'Culloch in the way of making a declaration, and the children of John Inglis alive at his death had been claiming under the non-fulfilment of the condition, it might have been difficult to say whether this substitution could have effect or not, but that has not occurred, and we have not to decide that point.

On the question as to the refusal of the Lord Ordinary to grant the commission asked for, I do not think we should interfere with the Lord Ordinary's discretion.

On the whole matter I think we should adhere.

Lord Young—I am of the same opinion, and from the time the facts were all explained I felt no difficulty. If anything could have been done for the case, no doubt the reclaimer's counsel would have done it, but the case against him is as clear as it can be. This is a whimsical will, but whimsical as it is it is a good will. Andrew Inglis has a beloved friend, and has no relative alive nearer than his nephews and nieces. He gives his whole estate to that beloved friend, Alexander M'Culloch by name, and makes no provision in favour of the children of his deceased brother John. But he does make a condition, and here the whimsical character of the will comes out, in favour of any child of his brother John who may be alive when his beloved friend dies; and there might have been none such at all at the date of M'Culloch's death, in which case there would have been no pretence for the pursuer's argument. That was, that any such child then alive should be satisfied out of Alexander M'Culloch's estate at his death if M'Culloch did not will away the estate thus left to him. But in giving everything to M'Culloch, Inglis says, "I do not mean you to be either a trustee or a liferenter;" on the contrary, "my wish and intention is (as the deed says) that whatever he (M'Culloch) may receive in virtue of these presents, shall be completely and effectually at my friend's disposal, and used by him for his own purposes." If M'Culloch does not signify his pleasure otherwise, then he declares his intention to be that any child or children of his brother John should be paid out of his estate as much as he (M'Culloch) received out of the testator's. But the deed goes on to express the condition on which the children shall take to be "unless my said friend shall by a writing under his hand explicitly declare the said children shall have no such claim." And his friend did explicitly declare that to be his will. Under this will, in which it is said that these children shall take in a certain case and event, and then and in that event that they shall have no claim if Alexander M'Culloch shall signify his will to the contrary,

without that event having occurred, and in the face of the declaration they should have nothing, the pursuers raise this action.

I think that the pursuers' contention is extravagant. I know no proposition of law on which it is even arguable. I therefore concur with your Lordship. As to the motion for a proof, I agree with your Lordship as to that also. In a case in which proof was to be led as to the intelligence of a granter of a deed which was executed forty years ago, where the party has been allowed a proof, and then, because a motion for a commission was refused, abandoned his allegation and took a judgment on the case without it, and where the Lord Ordinary has decided that the new allowance of proof he asks ought not to be given, I am not for disturbing the procedure in the Outer House.

LORD CRAIGHILL—There are here three questions—(1) as to the import of the will, (2) whether the declaration executed by M'Culloch was sufficient to exclude the claim of this pursuer, and (3) whether proof ought yet to be allowed? As to the first and second of those questions, I have no difficulty in agreeing with your Lordships. The will is no doubt peculiar, but it is also plain. It is a conveyance of a general kind in favour of M'Culloch, and not merely from the character of the conveyance but from the language used in the subsequent part of the deed I think that the effect and the intention of it was that this was neither a liferent nor a trust, but that under it what had been the property of Andrew Inglis became the property of M'Culloch. The import and effect of the deed is—"You, Alexander M'Culloch, shall take the property I leave, but unless you exclude the claim of John's children by an explicit declaration in writing under your hand, then they shall have a claim on your estate at your death for the value of what you get from me." It would have been a claim of debt for the value of that succession. The pursuers do not so come forward. Their only claim would be a claim of that kind if not cut out by Alexander M'Culloch. But they were so cut out by his explicit declaration. Now, I think there is no conveyancing difficulty in the case. All that was required was a declaration by which M'Culloch's will should be expressed, and that there was. Therefore I concur with your Lordships.

As to the allowance of proof, even now there is more difficulty. I am not insensible to the consideration that thirty years have elapsed since the declaration was made. At the same time the facts are, that four weeks after proof was allowed no doubt, but still before the diet of proof arrived, a commission was asked which the Lord Ordinary refused, and he refused leave to reclaim against that interlocutor. In consequence, the pursuer a week before the diet fixed for the proof announced that she would not proceed to proof, the reason being that the witness for whose examination a commission was desired was essential to her case. I think there is no reason for refusing even now an opportunity for leading evidence. Whether or not the pursuer was ill-advised in not going on with the proof, it would be hard that on taking this, the first opportunity of again asking an allowance of proof, the pursuer should be held foreclosed, and dealt with as having abandoned her case on that point on which proof would be indispensable.

LORD YOUNG—I should like to add, with regard to the doubt which I understood your Lordship to express as to the efficacy of the will of Andrew Inglis to give to John's children a *jus crediti* on the estate of Alexander M'Culloch, in the case which did not occur of no declaration being made, that I share that doubt. I doubt exceedingly whether in that event John's children would have had any claim as creditors against M'Culloch's estate. I doubt the effect of such a provision as that which Inglis made to give any such right.

The Court adhered.

Counsel for Pursuer—R. V. Campbell. Agent—Thomas Hart, L.A.
Counsel for Defender—J. P. B. Robertson. Agents — Duncan, Archibald, & Cunningham, W.S.

Thursday, November 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ARNOTT'S TRUSTEES *v.* FORBES.

(Before the Lord Justice-Clerk, Lords Young and Adam.)

Superior and Vassal—Assignation — Rights of Security-Holder against Vassals of the Granter of the Security.

The holder of a bond and disposition in security over lands subsequently feued out by the granter of the bond, the feu-duties being assigned to the security-holder, and the granter's right to the superiority being declared to be subject to the security, has no claims or rights against the vassal except as in right of the superior, and a claim for retention of feu-duties which could be successfully pleaded against the superior may be pleaded against the holder of the security.

In this case the pursuers were the accepting and acting trustees of the late James Arnott, Esq., of Leithfield, W.S., Edinburgh, under his trust-deed and settlement dated July 7, 1866. In the course of their management of the trust-funds they, in June 1873, advanced on loan to John Renton, accountant, Glasgow, the sum of £750 sterling, which sum the latter, by bond and disposition in security dated June 13, 1873, bound himself to repay to them at the term of Martinmas 1873, with a fifth part more of liquidate penalty in case of failure, and interest at the rate of £5 per cent. per annum by equal proportions at the terms of Whitsunday and Martinmas in each year, and a fifth part more of said interest in case of failure in the punctual payment thereof. In security of the personal obligations contained in the said bond and disposition in security, John Renton disponed to the pursuers, in the first place, a plot of ground, part of the lands of Craigton, lying in the parish of Govan and county of Lanark, and containing 2 roods 14 poles and 28-100th parts of a pole or thereby imperial standard measure; and, in the second