of the improvement money, but will gradually pay the capital also. A case might be figured in which the improvement expenditure was no greater than the third of the rent, so that it would be paid by payment of a third of one year's rent. It would in that case, it is thought, be impossible to hold that the rent of the estate was diminished by a third. The assignation of a third of the rents is a mode of paying the improvement expenditure, but cannot be justly held to involve the diminution of the rental to that extent.

"But improvement expenditure incurred by a deceased heir of entail and not charged by him on the estate may be made to affect the estate and the rents in another way. By the Entail Act of 1875, sec. 11, it is made competent for any person to whom a deceased heir of entail who has made improvements but not charged them on the estate has bequeathed the amount which he was entitled to charge, to pray the Court to ascertain the amount expended and chargeable, and to ordain the heir in possession to grant a bond over some sufficient part of the estate for the amount with which the deceased heir of entail might have charged the estate. And in this manner this expenditure, when ascertained by the Court might be charged on the estate. But then there is at the close of the section the important proviso—'that the said sums shall only be deemed a debt against the entailed estate and the heirs of entail therein, and shall only bear interest from and after the date of the decree of the Court pronounced in such petition.' So that it appears that if the procedure sanctioned by this clause of the Act of 1875 were adopted, it would be impossible to say that the estate was burdened with the improvement money, or that interest diminishing the rental was running on it at the date of the death of the heir of entail who granted this provision.

"In short, seeing that the proper amount of this improvement expenditure has not been ascertained, that it has not been charged on the estate, and that it is not a sum bearing interest, I do not see that it can be said to diminish the rental to any extent at the date of the granter's death; and therefore I think the rental must be taken, without any such deduction, as it actually stood at the granter's death, and that it therefore follows that the provision of £1400 was not in excess of the granter's power.

"I arrive at this conclusion with some hesitation, for it seems somewhat anomalous and not altogether just to allow an heir of entail, by merely abstaining from charging the estate with improvement expenditure during his life, to charge it with provisions to a larger amount than would have been in his power had he constituted and charged the improvement expenditure. But the provisions of the entail and of the statutes seem to necessitate this conclusion.

"Reference was made to the first and fourth sections of the Aberdeen Act as affording some guide to the meaning of the words "free rental" as used in the deed of entail. But the legitimacy of the reference for that purpose seems doubtful, and it does not appear that any material assistance is obtained from the language of the Aberdeen Act.

"Reference may be made to the case of *Hamilton of Pinmore*, March 11, 1857, 19 D. 723, where a question arose as to the amount of free rental supposed to be the measure and limit of Montgomery expenditure, and where opinions were expressed to the effect that the interest of unconstituted improvement expenditure could not be deducted.

"The petition contains, besides, a conclusion for charging the estate with a sum of improvement expenditure laid out by the petitioner. The proper amount of this improvement expenditure has been ascertained by the reporter, and on that point all that need be said is, that only three-fourths of the expenses can be included in the bond—*Leith* v. *Leith*, July 18, 1888, 15 R. 944."

Counsel for the Petitioner—J. Campbell—Lorimer. Agents—Menzies, Coventry & Black, W.S.

Thursday, January 9, 1890.

FIRST DIVISION.

HENDERSON (LAWRIE'S TRUSTEE) *v.* HENDERSON AND OTHERS.

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

A testator directed his trustees to divide the residue of his estate into six parts, and to convey one part to each of his nephews and nieces *nominatim*. He also directed that the issue of the residuary legatees who might predecease him should have right to their parent's share, and that if any of the beneficiaries predeceased him without leaving issue, that the share "provided to such deceaser shall be divided equally among his or her brothers and sisters."

Held that the children of a niece who predeceased the testator were entitled to the original share of residue destined to their mother by the trust-deed, but not to any accretions from the lapsed shares of other beneficiaries who predeceased the testator. *M'Nish* v. *Donald's Trustees*, 7 R. 96, followed.

John Lawrie, innkeeper, Bellsquarry, who died on 16th December 1888, by the third purpose of his trust-disposition and settlement directed his trustees as follows:—"My trustees shall divide the residue of my estate and effects into six equal shares, and shall pay one-sixth share to each of Archibald Henderson, Jessie Leishman Henderson, John Henderson, Robert Lawrie Henderson, and James Lawrie Henderson, the children of my sister Mrs Jessie Lawrie or Henderson now Cribbes, wife of

Robert Cribbes, wine and spirit merchant, Edinburgh, and the remaining one-sixth share to my niece Mrs Jessie Dowie or Borthwick, wife of Borthwick, residing at , only daughter of my sister Mrs Mary Lawrie or Dowie, wife of John Dowie, Bellsquarry: Declaring that the issue of such of my said nephews and nieces as may predecease me shall have right to the share which would have fallen to their parent had he or she survived me; and that in the event of any of the children of the said Mrs Jessie Lawrie or Henderson now Cribbes predeceasing me without leaving issue, the share provided to such deceaser shall be divided equally among his or her brothers and sisters."

The sum available for distribution under this third purpose amounted to about £15,000.

Mrs Jessie Leishman Henderson, one of the residuary legatees under the said settlement, died on or about the 28th October 1882, and the testator, by a codicil to his trust-disposition and settlement, dated 25th February 1884, provided as follows:—"Further, considering that my niece Jessie Leishman Henderson . . . is now dead, leaving two daughters, to whom their mother's share of my estate will fall to be paid in the event of their surviving me, I hereby declare, but without prejudice to the provisions within written, that my trustees shall hold the share which may fall to my said grandnieces, or to the issue of any other of my residuary legatees, for their behoof until they shall respectively attain the age of twenty-one years or are married, whichever of these events shall first happen"—with power to apply the income or capital for their benefit during minority, or to accumulate their shares until the period before mentioned.

Robert Lawrie Henderson, a son of Mrs Jessie Lawrie or Henderson or Cribbes, and nephew of the testator, and one of his residuary legatees, predeceased him, dying on 9th June 1886, leaving a child who also predeceased the testator in infancy. The share which Robert Lawrie Henderson would have taken on survivance thus fell to be divided among the other members of Mrs Cribbes' family, and a question arose whether the two daughters of Mrs Jessie Leishman Henderson, in addition to their mother's share of the said residue, were entitled to a share of the sum destined to the said Robert Lawrie Henderson.

The present case was accordingly presented by (1) John Henderson, sole surviving trustee and executor under the above-mentioned trust-deed; (2) Archibald Henderson, John Henderson, and James Lawrie Henderson, nephews of the testator; (3) The two children of Mrs Jessie Henderson, who predeceased the testator.

The following questions were submitted for the decision of the Court—"(1) Whether the two children of Mrs Jessie Leishman Henderson, the parties hereto of the third part, are entitled, either under the settlement and codicil of the said John Lawrie, or under the doctrine of *conditio si sine liberis decesserit*, to a share of the one-sixth share of the testator's estate, provided to the said deceased Robert Lawrie Henderson, in addition to the sixth share to which they are entitled as in right of their mother? Or (2) Whether the said share which would have fallen to Robert Lawrie Henderson had he survived now falls to be divided among the said Archibald Henderson, John Henderson, and James Lawrie Henderson, the parties hereto of the second part?"

Argued for the second parties—The right of the third parties was limited to the original share to which their mother was entitled, and not to any addition which might have been made to that share by accretion. The event had occurred which the last clause of this third purpose was intended to provide for, and to read in "or their issue" as was necessary if the third parties were to prevail would be to go in the face of the expressed intention of the testator. The question was settled by the authority of *M'Nish* v. *Donald's Trustees*, October 25, 1879, 7 R. 96.

Argued for the third parties—Though the nephews and nieces were called *nominatim*, yet all were called. It was the same, therefore, as if they had been called *per stirpes*, and the clause of residue should be read as if this had been done. So read, it would favour the contention of the third parties, and would enable them to share not only in the original shares left to their mother but also to any additions to it gained by accretion. The words "the share" to which the third parties were entitled to succeed, meant the accresced share, and not the original share—*Graham's Trustees* v. *Grahams*, March 2, 1868, 6 Macph. 820; *Aitken's Trustees* v. *Wright*, December 22, 1871, 10 Macph. 275; *Eyre* v. *Marsden*, 1838, 7 L.J., Ch. 220.

At advising—

LORD PRESIDENT—This is a short case, and I think that the question raised by it is quite settled by authority.

The testator Lawrie died in December 1888. He was predeceased by one of the residuary legatees, Robert Lawrie Henderson, who had a child who also predeceased the testator, and accordingly the share of residue which would have gone to Robert Lawrie Henderson had he survived the testator lapsed by his predecease. There was another residuary legatee who predeceased the testator, Mrs Jessie Henderson, who left two daughters. They will of course take the share of residue which would have gone to their mother, but the question we have to determine is, whether the share of residue to which Robert Lawrie Henderson would have succeeded if he had survived the testator goes in consequence of his predecease to his surviving brothers and sisters (the parties of the second part), or whether the children of Jessie Henderson are entitled to take the share of it which would have gone to their mother if she had not predeceased the testator.

Now, this depends upon the terms of the third purpose of the trust-disposition, which provides that the trustees are to divide the residue into six equal shares, five of which

were to be conveyed to the children *nominatim* of the testator's sister Mrs Jessie Henderson now Cribbes, and one-sixth to the only daughter of another sister Mrs Mary Lawrie or Dowie.

The division of residue is thus to be five-sixths to one family, and one-sixth to the only child of another family.

So far, then, there is no ambiguity as to the testator's intention; but the clause goes on to provide as follows—"Declaring that the issue of such of my said nephews and nieces as may predecease me shall have right to the share which would have fallen to their parent had he or she survived me." Now, that is just putting into express words the *conditio si sine liberis decesserit*, and it is followed by this provision—"In the event of any of the children of the said Mrs Jessie Lawrie or Henderson now Cribbes predeceasing me without issue, the share provided to such deceaser shall be divided equally among his or her brothers and sisters."

Something was said in the course of the discussion about the collocation of these two sentences, and it was suggested that had their respective positions been reversed the interpretation to be put upon them might have been different. For my part I do not see that it would have made any difference in the meaning of these clauses if the second had come first, because in the one clause the testator is providing for the case of a nephew or niece predeceasing him leaving issue, while in the other it is for the case of a beneficiary predeceasing him without issue.

It appears to me that the solution of this question, so far as it is not determined by authority, depends upon the meaning which is to be attached to the words "the share."

There can, I think, be no doubt as to the meaning of these words in the latter portion of this clause; it must mean the one-sixth original share of residue belonging to the predeceasing beneficiary which is to go to the surviving brothers and sisters, and is to be divided equally among them. That being so, the words "the share" in the first clause which I read must I think also mean the same thing, namely, one-sixth of the original residue, and must not be held to include any increase of such share by accretion arising from the death of predeceasing beneficiaries.

In the case of *M'Nish*, to which we were referred (7 R. 96), the provisions were substantially the same as we have here, and the *conditio* was there expressed. If anything turns upon the *conditio* being expressed as against it being implied, then we are aided by the authority of the case of *M'Nish*.

But it does not appear to me that we require that authority to assist us in the present decision, because the case of *Young* v. *Robertson*, in 4 M'Queen, established a general proposition, which is to this effect, that where there is a provision in the deed that the shares of beneficiaries predeceasing the testator and leaving issue shall go to their children, then such issue take only the original shares, and not what might have come to their respective parents (provided they had survived the testator) by means of accretion in consequence of the predecease of another beneficiary.

I am therefore for answering the question in the case upon this principle.

LORD SHAND—The testator here directs that the residue of his estate shall be divided into six shares, and paid over to his nephews and nieces mentioned in his settlement, and then follows a declaration that the issue of predeceasing nephews and nieces are to have right to their parent's share. If the deed had ended here, then clearly the share of any nephew or niece who predeceased the testator without issue would have fallen into intestacy. But then follows a provision that if any of the beneficiaries predecease the testator without leaving issue, the share of such predeceaser is to be divided equally among his or her brothers and sisters. Now, I read that clause as a direct provision for what has actually taken place. One of the beneficiaries has predeceased the testator without leaving issue, and his share falls accordingly to be divided among the parties to this case of the second part. It was urged upon us that these two clauses to which I have referred might quite fairly be transposed, and that if this was done the case for the third parties would be much stronger, because then the word "share" would include what had accrued through the death of Robert Lawrie Henderson. Even if this were a fair reading of the clause, I cannot see that it would make any difference on the result, because the case of *M'Nish* makes it clear that the word "share" can only mean the original and not the accrued share.

A clear distinction is drawn in all cases of this class between original and accrued shares, and whenever there is room for the application of the *conditio*, what the children take is restricted to the parent's original share.

LORD ADAM—The case we have to deal with is expressly provided for in the concluding portion of the clause which has been read by your Lordships. If effect is to be given to these words, it can only be done by dividing the share of the deceased beneficiary among his surviving brothers and sisters. What the third parties claim is that there shall be read in after the words "her brothers and sisters" "and their issue." To do this would be to go against a principle of our law well established by a long series of decisions.

LORD M'LAREN concurred.

The Court answered the first question in the negative, and the second question in the affirmative.

Counsel for the First and Second Parties—Craigie. Agents—H. & H. Tod, W.S.

Counsel for the Third Parties—D. Robertson. Agent—C. P. Finlay, W.S.