the law in regard to warrants *in meditatione fugæ* as that stood before the Act. I think it was the intention of the Legislature to leave the law relating to these warrants as it stood at the time, and also that if it had intended to alter their character it would have done so by other words than are in this clause of reservation.

The law relating to warrants *in meditatione fugæ* was and is that they are accessory and incident to the power of imprisonment for debt. The law gave and gives to a creditor a remedy against the person of a debtor by imprisonment. The law formerly gave that power to all creditors for sums above £100 Scots, and the law of warrants *in meditatione fugæ* was an exceptional measure, to be used only in exceptional circumstances where it could be shown that the debtor was preparing to leave Scotland without settling with his creditors, and the law of Scotland knew no other kind of warrant *in meditatione fugæ*. Accordingly it was shown to us by reported cases that this accessory and incidental remedy was not admissible unless the creditor could imprison the debtor for his civil debt.

Now, did the Act of 1880 change that state of things? I think that if that had been intended it would have required words of positive enactment, and there are none such here. The words of reservation in the Act where they were quoted to us require to be construed. I put the case—a stronger one than the present case—suppose the Act had completely extinguished some class of debts which had previously existed—had enacted, for instance, that that class of debts should prescribe in two years, the words of reservation remaining as at present—suppose, then, a warrant *in meditatione fugæ* taken out by a creditor in such an extinct debt and the debtor put in prison. He brings a complaint and founds upon the clause in the Act which renders his kind of debt extinct. But the respondent says—Here are words of reservation which say that nothing in this Act shall affect the rights of warrants taken *in meditatione fugæ*. If the respondent's argument were sustained his debtor would be imprisoned for a debt which was extinct. The words therefore need construction. I am of opinion that the creditor here has no remedy against the person of this debtor, and I think that the complainer cannot be kept in prison under a warrant *in meditatione fugæ* in order that another and competent diligence may be used against his estate when the creditor has constituted his debt in the usual manner.

LORD RUTHERFURD CLARK—I am of the same opinion.

I have already explained my views in the case of *Kidd*, and I need not repeat what I then said. I hold that by the common law a *meditatione fugæ* warrant can only be used as a means of enabling the creditor to use diligence against the person of his debtor, and therefore that it cannot be used for any purpose where such diligence is incompetent. It was argued that the Act of 1880 enlarges the right of the creditor so as to enable him to use this warrant for purposes for which it could not be used before. I do not think that the argument is sound. The statute enacts nothing. It merely reserves.

LORD TRAYNER—I concur in the proposed judgment on the grounds stated by Lord Young. I also concur in his Lordship's criticism of the terms of the Act 1880.

The Court recalled the Lord Ordinary's interlocutor and passed the note.

Counsel for the Reclaimer—Asher, Q.C.—Guthrie. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents—Murray—Dickson. Agent—William Officer, S.S.C.

Saturday, November 29.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MACGREGOR AND OTHERS (MORRISON'S TRUSTEES) *v.* MACDONALD AND OTHERS.

Succession—Conditio si sine liberis—Vesting.

A testator directed his trustees to pay to the lawful children of his deceased sister a legacy of £1000. One of these children had died many years before the date of the will, leaving children, who on the testator's death claimed a share in the legacy as representing their mother. *Held* (following *Rhind's Trustees* v. *Leitch and Others*, December 5, 1866, 5 Macph. 104) that as their mother had never been instituted to the legacy, the *conditio si sine liberis* did not apply.

Hector Morrison, Inverness, who died on 4th October 1888, by a deed of settlement dated 4th June 1888 directed his trustees, *inter alia*, to pay "to the lawful children of my now deceased sister Mary Morrison or Macdonald £1000 sterling." He also appointed his brothers and sisters and the children of the deceased Mary Morrison or Macdonald to be his residuary legatees, "but that only in shares proportionate to the legacies bequeathed to each of them as before mentioned."

Mrs Macdonald left nine children, one of whom, Mrs Margaret Macdonald, died on 7th November 1873 leaving four children—Norman, Donald, Angus, and Hector, who claimed under the settlement in respect that their mother, if she had survived the truster, would have been entitled to a share in the legacy and residue. The trustees accordingly raised a multiplepoinding, and called as defenders all the parties interested. The amount of the fund *in medio* amounted to about £3000.

Mrs Margaret Macdonald's children pleaded — "(1) The claimants being the

whole children of the deceased Margaret Macdonald or Macdonald, who predeceased the truster, are entitled equally among them to the shares of the £1000 legacy and residue as claimed, and to which she would have been entitled had she survived the truster, she having been one of the children of the said Mary Morrison or Macdonald, to whom the same was bequeathed. (2) The testator being *in loco parentis* to the said Mrs Margaret Macdonald or Macdonald and to her children, the rule *si institutus sine liberis decesserit* applies."

Upon 25th June 1890 the Lord Ordinary (TRAYNER) repelled their claim, and preferred certain other claimants to the fund *in medio*.

"*Opinion.*— . . . A good deal might have been said in favour of this claim, looking to the liberality with which the *conditio* has been applied in recent years, had Mrs Margaret Macdonald been alive at the date of the settlement. But as she was then dead (a fact of which the testator is not said to have been ignorant), and was not therefore one of the persons instituted to the legacy, I think there is no room for the application of the maxim which sets up an implied conditional institution. 'There must be a legatee instituted in the first instance, otherwise there can be no conditional institution either under the express terms of the deed or under the implied condition' (*per* Lord Cowan in *Rhind's Trustees*, 5 Macph. 109). The law appears to be settled against the validity of a claim made under circumstances similar to those I am now dealing with—*Wishart*, M. 2310; *Sturrock*, 6 D. 117; and *Rhind's Trustees, supra;* M'Laren on Wills, &c., i. 489. There is this further view against any supposed or implied intention on the part of the testator to favour the present claimants, that he specially provided for the case of two nephews, while he made no provision for the present claimants, whose mother, the testator's niece, had died. The grounds on which I have held that the claimants are not entitled to any share of the legacy equally exclude them from any share of the residue."

Norman Macdonald and his brothers reclaimed, and argued—This legacy was left to a class, of which Margaret Macdonald was a member, and therefore she was instituted. It was plain from the terms of the settlement that the testator had inteded to benefit all the children of his sister, and therefore the descendants of a deceased child ought to get the benefit which their mother would have had. The case of *Wishart* turned wholly upon the definition of the word "children," while in the case of *Rhind's Trustees* it was found that the testator was not *in loco parentis* to the parties claiming; there was, however, no such doubt here. The residue followed the same rule as did the legacy.

At advising—

LORD JUSTICE-CLERK—The testator whose will forms the subject of this litigation left certain legacies to the children of his sister Mary Macdonald. One of these—Mrs Margaret Macdonald—died in 1873, many years before the will was made. Her children now demand the benefit of the legacy left to her. The only ground upon which their claim against the estate could be placed was, that Mrs Margaret Macdonald would have been entitled to the legacy if she had been alive, and that therefore her children are entitled to demand it now.

But I think it is clear on principle, and on the authority of the case of *Rhind's Trustees* quoted to us, that where a testator in such a case as this knew all the facts, and knew that his niece was deceased many years before he deliberated on the disposal of his estate, we cannot hold him to have instituted the predeceasing niece, and that therefore her children cannot take under the *conditio si sine liberis decesserit*.

LORD YOUNG—I am of the same opinion. I do not think it would have been irrational if it had been decided in such cases as this that the word "children" should include grandchildren, and I do not think that it would have been contrary to common sense if we could have held that when the testator left a legacy to the children of his sister he meant that it should also go to her grandchildren. But it has been decided otherwise, and that settles the matter. It would be contrary to the decisions if we allowed this claim.

LORD RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for the Reclaimers—Jameson—Cosens. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Mrs Cameron and Others—H. Johnston — D. Robertson. Agents — Traquair, Dickson, & Maclaren, W.S.

Counsel for Miss Macdonald — Lyell. Agents—D. Maclachlan, S.S.C.

Thursday, December 4.

SECOND DIVISION.

BROWN'S TRUSTEES *v.* BROWNS.

Succession—Heritable and Moveable—Conversion—Intention.

A testator directed his trustees to hold the residue of his whole estate and effects, heritable and moveable, for behoof of his children equally, share and share alike. The rights of daughters were limited to a liferent, with the fee to their children. The trust-deed provided that "the principal of said shares provided to my said sons shall be payable to them respectively in five equal yearly instalments." An annuity was provided for the testator's wife if she survived, and "in fixing the principal sums to be paid to my said sons" the trustees were instructed always to "retain a sufficient sum . . .