trial, or to decide anything until we see whether the condition that she should find caution is complied with or not. I therefore refrain from expressing an opinion on the nice and important question whether, caution having been found, this action can be proceeded with. If our order to find caution is not complied with there will be no further proceedings; if caution is found, I would require time to consider whether the action is one which ought to be sent to trial.

LORD TRAYNER—I think that the course proposed by your Lordship in the chair is quite regular. If I thought the pursuer's case irrelevant, or one in which she could not insist by reason of *mora*, I should be for giving effect to that view now. But I think there is no good ground for throwing out this action, and that the pursuer is entitled to an issue. At the same time I think that there are circumstances in the case which warrant the Court in ordering caution to be found as a condition of proceeding.

LORD MONCREIFF—I agree in the course proposed by your Lordship in the chair. I concur with all your Lordships that the case is one in which the pursuer should find caution. With regard to the other point as to relevancy, I think we should dispose of it now. In dealing with this question it is important to notice the stage which the case has reached. The present action is on the verge of trial. In the circumstances I think it would be scarcely fair to the pursuer to make her find caution, and then perhaps after all throw out the case. We have heard a full argument, and have ample means of judging as to the relevancy, and I am of opinion that the case, although not very satisfactorily stated, is sufficiently relevant to be sent to trial.

The Court pronounced this interlocutor:—

"Recal the said interlocutor in so far as it refuses the defender's motion that the pursuer be ordained to find caution for expenses: Ordain the pursuer to find caution for expenses within eight days: *Quoad ultra* adhere to the said interlocutor reclaimed against, and remit to the said Lord Ordinary with power to him to dispose of the expenses of the reclaiming-note."

Counsel for the Pursuer — Anderson. Agents—M'Nab & Machardy, S.S.C.

Counsel for the Defender—C. D. Murray. Agent—Alex. Mustard, S.S.C.

Tuesday, March 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

STUART'S TRUSTEES *v.* STUART AND OTHERS.

Succession—Conditional Institution—Revocation.

A testator bequeathed one-tenth share of the residue of his estate to his niece A, declaring that in the event of her dying without lawful issue at the time of the division of his estate her share should fall and devolve on B. By a codicil executed after A's death he recalled the bequest of one-tenth part of the residue to her, declaring at the same time that the codicil should not infer a revocation of his trust-disposition and settlement, but that the same should stand in full force.

In a question between B and the residuary legatees, *held* that the conditional institution of B was not recalled by the codicil.

By his trust-disposition and settlement Alexander Stuart, builder, Peterhead, conveyed to trustees his whole heritable and moveable estate for certain purposes. With regard to the residue of his estate, he directed his trustees "to hold, apply, and divide the same between and among the persons hereinafter named or referred to, being my own relations, whom I do hereby appoint to be my residuary legatees—[Here followed an enumeration of certain of the testator's nephews and their children with their respective shares]. . . . (*Fifth*) To my niece Mrs Isabella Stuart or Wyness . . . one just and equal tenth part thereof . . . Declaring always, that in the event of any of my said last-named nephews and niece, namely, the said John Stuart, the said Alexander Stuart, and the said Isabella Stuart or Wyness, or any of them, dying without leaving lawful issue at the time of the division of the capital or stock of my said means and estates under these presents, then the share or shares to which they or any of them would have been entitled (had he, she, or they survived the said time) shall fall to and devolve on the said children of the said Peter Stuart equally between and among them." The testator also declared that in the event of any of his nephews or nieces dying without leaving lawful issue alive at the said period of division, then his, her, or their share or shares should become part of his general trust-estate falling for division among the other beneficiaries in terms of his settlement.

By codicil executed after the death of Mrs Wyness, the testator made sundry alterations on his settlement, and on the narrative of her having predeceased him, proceeded—"I recal the bequest of one just and equal tenth part of the residue of my estate . . . conveyed to" her. There followed the declaration "that these presents

shall noways infer a revocation of my said trust-disposition and deed of settlement . . . but that the same shall stand in full force with these additions and alterations thereto."

In a multiplepoinding raised by Alexander Stuart's trustees with a view to the distribution of his estate, a claim was lodged by the trustees for behoof of Peter Stuart's children to be ranked and preferred to the tenth share of residue destined to Mrs Wyness. A claim was also lodged by the residuary legatees, who pleaded that the share of residue which would have been taken by Mrs Wyness, if she had survived the testator, fell by her predecease to be divided among the residuary legatees.

On 25th June 1898 the Lord Ordinary (KYLLACHY) ranked and preferred the claimants, Stuart's trustees, for behoof of Peter Stuart's children, to the tenth part of the residue originally destined by the truster to Mrs Wyness.

Opinion.—[*After setting forth the provisions of the settlement and codicil, his Lordship proceeded*]—"The children of Peter Stuart say that this revocation makes no difference, the conditional institution in their favour being unrecalled and taking effect. The other residuary legatees, on the other hand, say that the revocation of the primary bequest operates as a revocation of the conditional institution attached to it, and that if the truster had meant otherwise the codicil was unnecessary. They say also that the language of the conditional institution is unfavourable to the theory of its independence (*first*) because of the use of the word 'devolve,' and (*second*) because the conditional institutes take only what the original legatee would have taken if she had lived, and the legacy being revoked, the original legatee, if she had lived, would have taken nothing.

"It appears to me that in all such questions the point to be ascertained is the intention of the testator; and, looking to the scheme of this settlement, the presumptions applicable to a conditional institution, and the fair meaning of the language used, the just conclusion, I think, is that the testator intended no more by his codicil than to express (necessarily or unnecessarily) the lapse of Mrs Wyness' interest under his settlement.

"I am not much moved by the criticism of the language of the conditional institution. The word 'devolve' is certainly not used in its strict sense. If it were, it would denote the transmission of a vested right, and of course there was no vested right here. On the other hand, the suggested limitation to what Mrs Wyness would have taken if she had lived appears to me to be no more than a definition of the *amount* of the interest which the conditional institutes were to take. The point might have had more force if the bequest had been revoked during Mrs Wyness' life.

"Further, I cannot hold that a conditional institution is of the nature of a derivative right. It is really an independent right taking effect contingently, but operating when it does operate as an independent gift. A bequest to A, and if A shall predecease a certain event to B, is not, I apprehend, revoked by a revocation of the gift to A. At least, it is not so unless the intention is otherwise clear; and here I think the intention of the truster may fairly be inferred to be that Peter Stuart's children, and not his legatees generally, were to benefit by any lapse of interests conferred on the members of brothers, as distinguished from sister's families.

"I am therefore of opinion that Peter Stuart's children take Mrs Wyness' one tenth share." . . .

The residuary legatees reclaimed, and argued — The revocation in the codicil applied to the conditional institute as well as to the person to whom the share was originally destined—*Boulcott* v. *Boulcott*, 1853, 2 Drewry, 25.

Counsel for Stuart's trustees were not called upon.

LORD PRESIDENT—In framing his codicil the testator says that his trust-disposition shall stand in full force with these conditions and alterations. Now, it appears from the terms of the clause founded on that he merely takes occasion to revise his settlement—to bring it up to date, so to speak. That is to say, he says, "As my niece has predeceased me, I recall the bequest of one just and lawful tenth part conveyed to her." That I think is the fair reading. I think it is simply a recall for the purpose of simplicity and clearness of this lapsed bequest.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Claimants Stuart and others (the residuary legatees)—Guthrie, Q.C.—Hunter. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Claimants Stuart's Trustees — Campbell, Q.C. — Cook. Agent — Horatius Stuart, S.S.C.

Wednesday, March 8.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

RIACH *v.* WALLACE.

Process—Summons — Amendment — Error in Christian Name of Pursuer.

Where by a clerical error a pursuer was named in the summons "James" instead of "Francis," there being no dubiety as to his identity—*held* (*rev.* judgment of Lord Ordinary) that the pursuer should be allowed to amend his summons by deleting "James" and substituting "Francis."

On 7th October 1898 there was signeted a summons by James Riach, 20 M'Lean