Thus, up to this time, with the exception of the erroneous description in 1638, which places both Over and Nether Turin in Rescobie, when the parish is mentioned, Over Turin is described as in Rescobie, and Nether Turin in Aberlemno. Sometimes both are merely described as lying in the county of Forfar. The teinds of Nether Turin, which have been transmitted with the lands, are always described as in Aberlemno.

"But in 1704, in a disposition to the ancestor of the respondent, who acquired the property, both Over and Nether Turin are, for the first time, described as in Aberlemno. This seems to have been clearly a mistake, and the Lord Ordinary is disposed to trace it to a misconception of the description in some of the prior titles, as in the Crown charter of 1648, where Over and Nether Turin are only described as lying in the county, but there follows the description of the teinds of Nether Turin, concluding '*jacen infra parochiam de Aberlemno.*' This may have been supposed to apply to the whole subjects. It is remarkable that in the following year, in a summons of transumpt proceeding on this disposition, the respondent's ancestor departed from the description in the deed, and set forth that the sellers had disponed to him Over and Nether Turin, and other subjects there specified, lying within the parishes of Rescobie and Aberlemno. That this was not an intentional variance is made more probable by the fact that in a deed of entail by the same party, in 1722, he again describes Over and Nether Turin as lying within the parishes of Aberlemno and Rescobie. In a Crown charter in 1744, proceeding on the disposition of 1704, the erroneous description in that deed, placing both sets of lands in Aberlemno, is repeated; but in 1750 they are again described, in general terms, as in both parishes. In 1781 Alexander Watson disponed both sets of lands, described as in Aberlemno, to himself and his son. But in a Crown charter following on that disposition, the name of the parish is left blank throughout the deed, possibly indicating that the authorities in Exchequer declined to adopt what they held to be an erroneous description. From that time, however, both sets of lands have been invariably described as lying in Aberlemno.

"Over Turin was included in a locality of Rescobie in 1727. The name occurs twice in the proceedings, both times in conjunction with Milnton of Rescobie. In the decree it is converted into Overtoun, 'By Turine (*i.e.* the proprietor) out of Overtoun and Milntoun of Rascoby.' This is obviously a clerical error. As already noticed, Over Turin was excluded in the next locality in 1786.

"Upon the whole matter, the Lord Ordinary thinks it is proved that Over Turin is in Rescobie, and that the doubt and obscurity in which the point has been involved arises from an error which has crept into the titles. That cannot affect the right of the minister to have the teinds allocated for his stipend.

"The parole evidence makes it clear that the particular tenements condescended on by the minister are comprehended in Over Turin, except that a portion of North Mains is in Aberlemno, and is, therefore, part of the respondent's other lands in that parish.

"3. The minister maintains that, Over Turin being held to lie in Rescobie, it is not valued, being described in the decree of valuation as in Aberlemno. The Lord Ordinary cannot adopt that view. The ministers of Rescobie, Aberlemno and Guthrie were all called to and appeared in the valuation, and also the titulars of the three parishes. The Lord Ordinary has been referred to an unreported case (*Locality of Kilmalie*, 23d December 1826), where the First Division, recalling an interlocutor of Lord Medwyn, found that there was no effectual decree of valuation of certain lands, which it was admitted lay within the parish of Kilmalie—they having been valued as in Kilmanivaig. The Lord Ordinary has examined the extract-decree of valuation in that case, and he thinks there is a material difference between it and the one now in question. The valuation was at the instance of the Duke of Gordon, of his lands in several parishes. The grand decerniture of the Court found and declared the value of the teinds of the lands expressly described as lying in each respective parish. There was thus ground for holding that the description of each parcel of lands, as lying within a certain parish, was made a substantive part of the decerniture. It is different in the present case. The lands are libelled in the summons by the descriptions then prevailing in the titles. In the scheme of valuation they were set down under separate heads, as being in each of the three parishes. Over Turin being entered as in Aberlemno, and its value separately stated at £225, 6s. 8d. Scots, 28 bolls bear, and 52 bolls meal. But in the grand decerniture no parishes are mentioned at all, though the lands are grouped into three sets, corresponding to the division of them in the scheme—the sum total of the value of each set being stated as in the scheme, but not the separate value of each subject.

"Where a valuation has been regularly carried through in presence of the titular and minister, and the Court has, from whatever cause, refrained from valuing the lands as lying in particular parishes, the Lord Ordinary thinks it would be adopting a very strict and technical principle to hold it invalid, because it appears that in the course of the proceedings a particular subject has been assigned to a wrong parish. In the absence of positive authority for such a course he does not think himself warranted in adopting it."

Both parties reclaimed.

WATSON and GLOAG for Minister.

CLARK and NEVAY for Mr Carnegie.

The Court adhered, holding that it was still competent for Mr Carnegie to set aside the first localities of Aberlemno, so as to withdraw from the minister of that parish the valued teind of Over Turin, now appropriated for the stipend of Rescobie, and thus escape double payment of the same teind.

Agents for Minister—W. H. & J. Sands, W.S.

Agents for Mr Carnegie—Scott, Moncrieff & Dalgety, W.S.

Friday, February 5.

SPECIAL CASE FOR EXECUTORS OF GENERAL SIR THOMAS MONTEATH DOUGLAS AND OTHERS, FOR OPINION OF COURT.

Special Case—Construction of Testamentary Writings—Conditio si sine liberis—*Legacies—Demonstrative and Taxative—Residuary Bequest. Held*, in a Special Case stated for the opinion of the Court, under 31 & 32 Vict. c. 100, § 63, as to the construction of the testamentary writings of Sir T. M. D., (1) that a legacy of £842 bequeathed to his younger daughter for her own use, and a legacy of £12,000 bequeathed to

her over and above her marriage provisions, lapsed by her predeceasing her father, and did not pass to her only son, to whom a separate legacy of £10,000 was left after his mother's death. *Opinions* by Patton (J.-C.), Lords Cowan and Neaves, that the *conditio si sine liberis* applies only to provisions and not to single legacies. *Opinion* by Lord Benholme *contra*, (2) that legacies to the amount of £33,000 which the testator directed to be paid out of arrears of interest due to him, the amount of which was uncertain and from which less than £20,000 was eventually realised, were general legacies, the direction as to the source of payment being demonstrative, not taxative, and the deficiency of the fund must be made up out of residue—*diss.* Lord Neaves, who held that the fund out of which they were directed to be paid, being patent and contingent, the legacies must abate *pro rata*; (3) that a bequest of "my uniform and all other personalities except such as I may specially bequeath," did not carry the residue of the testator's moveable estate.

The special case was stated as follows:—"1. Sir Thomas Monteath Douglas, hereinafter designated as the testator, died at Stonebyres House, Lanarkshire, on the 18th of October 1868. He is survived by his daughter, Amelia Murray Monteath Douglas, who was married in January 1861 to William Monteath Scott, Esq., younger of Ancrum. His younger daughter, Augusta Emmeline Monteath Douglas, predeceased the testator. She was married, on 4th March 1862, to John Reginald Yorke, Esq., and died on or about 19th February 1863, leaving an only child, Augustus Yorke. Mrs Monteath Scott, and the said Augustus Yorke, as representing his mother, are the next of kin and heirs-at-law of the testator. The testator had a sister, Miss Margaretta Monteath, who predeceased him, having died on 26th June 1865, unmarried.

"2. The testator left a series of holograph writings, written at different times, and contained in four sheets of paper. These writings were found in the testator's repositories, inclosed in an envelope, having written thereon in the testator's handwriting the words—

"'My Will.

"'G. F. Franco, Esq., Amelia Murray Monteath Scott, and Augusta Emmeline Monteath Douglas, my executors.'

The earliest date of these testamentary writings is the 18th of May 1858, and the latest is the 30th of October 1863. The questions submitted to the Court arise on the construction of these writings, which are printed at length in the appendix.

"3. In consequence of the testator having become incapable of managing his affairs, the said William Monteath Scott was, on the 19th November 1867, appointed by the Court to be his *curator bonis*, an office which he retained till the death of the testator.

"4. On 29th November 1861 the testator executed a deed of trust in favour of Sir William Scott of Ancrum, Bart., and the said William Monteath Scott, and certain other parties who have declined to accept in relation to an estate called the Monteath Trust-Estate. This deed was applicable exclusively to the capital of the estate of the late Major Archibald Douglas Monteath, which had been left for the purpose of being invested in land to be entailed. The testator had acquired that trust-estate in feo-simple under an application made to the Court of Session, with the consent of the three next heirs; but he was under an obligation to invest the money in land to be entailed, and the trust-deed referred to was executed with a view to the fulfilment of that obligation. Mrs Monteath Scott and her children are the persons first called to the succession as heirs of entail of the estate falling under this deed, which is of the estimated value of £76,919, or thereby.

"5. The said Mrs Monteath Scott, by antenuptial marriage-contract dated 16th January 1861, entered into between her and her said husband, and to which her father was a party, conveyed to the trustees thereby appointed all funds which she might acquire from her father during the subsistence of the marriage. A copy of this deed is produced and held to be part of this case.

"6. The late Mrs Yorke, by antenuptial marriage-contract dated 3d March 1862, entered into between her and her said husband, and to which her father was a party, conveyed to the trustees thereby appointed the several funds therein specified, and also all other funds which she might acquire during the subsistence of the marriage, 'from her said father or his estate, by gift or bequest, under his will, or any bond or deed of provision to be granted by him, or by succession to him as one of his next of kin or legal representatives,' for the purposes specified in a relative marriage settlement of the same date in the English form, whereby it was declared that the trustees should pay to Mrs Yorke the yearly sum of £300, for her sole and separate use, out of the income of the trust-property, and the residue of the said income to Mr Yorke and his assigns; (2) That the trustees shall, 'after the death of such one of them, the said John Reginald Yorke and Augusta Emmeline Monteath Douglas, as shall first die, pay the whole of the said interests, dividend, and income to the survivor of them, and his or her assigns, during his or her life, and after the decease of such survivor, shall stand and be possessed of and interested in the said several trust-premises, and the interest, dividends, and income thereof, in trust for' the issue of the marriage, as therein mentioned. Copies of the said deeds are produced and held to be part of this case.

"7. For some years before his death the testator had been engaged in a litigation in connection with the Monteath trust-estate, and though the most important matters in that litigation had been decided, there still remained to him a claim for certain arrears of revenue. The exact amount of these arrears has not yet been ascertained; but it is now known that it will be much less than £20,000.

"8. Besides the said arrears of interest, and the sum of £12,500 of Indian Government paper, mentioned in the codicil of 4th September 1862, the testator left a residue estimated at £16,000 or thereby.

"9. In the testamentary writing of 25th February 1862 there is a bequest of £12,000 to Mrs Yorke, "to be paid out of arrears of income due from the Monteath trust-estate, as a legacy to her, over and above any sum or sums for which the testator 'may have become bound in the settlement to be executed with reference to her intended marriage.' The will goes on to provide that 'this sum is to be considered as including the legacy of £1000 left her by her cousin, Major Archibald Douglas Monteath, and which legacy has remained in my hands at the interest of 5 per cent. per annum, which interest has been paid by me up to

the 1st January 1863, and will continue to be paid till such time as the legacy is paid." The above mentioned legacy of £1000 by Major Archibald Douglas Monteath, was paid by the testator during his lifetime to Mr Yorke. It is further explained that by the antenuptial marriage-contract between Mr and Mrs Yorke, the testator bound himself to transfer to the trustees therein named the sum of £15,000 of Government Consolidated 3 per cent. annuities, then standing in his name, being the stock referred to in the testamentary writings of 18th May 1858 and 25th February 1862, and this stock was afterwards transferred by the testator to these trustees.

"The parties interested in the questions at issue, agreeing upon the foregoing statement of facts as correct, desire to obtain the opinion of the Court on the following questions of law arising on the construction of the testamentary writings above referred to:—

"1. Whether the legacy of £842 to Mrs Yorke, contained in the writing dated 18th May 1859, is a subsisting legacy, and is payable to the said Augustus Yorke, assuming that the fund actually exists as a part of the testator's estate?

"2. Whether the legacy of £12,000 in favour of Mrs Yorke, contained in the writing dated 25th February 1862, is a subsisting legacy; and, if so, whether it is payable to the said John Reginald Yorke, or to the trustees under the antenuptial marriage-contract between him and Mrs Yorke, or to the said Augustus Yorke?

"3. Seeing that the said debt of £1000 owing by the testator to Mrs Yorke was paid to Mr Yorke by the testator,—Whether the said legacy of £12,000, if it is a subsisting legacy, is reduced by that sum?

"4. Seeing that the arrears of interest receivable from the Monteath trust-estate, will not be sufficient to satisfy in full the legacies which the testator directed should be paid out of these arrears,—Whether such legacies, viz. (1) the legacy of £10,000 in favour of Mrs Monteath Scott, contained in the writing dated 25th February 1862; (2) the legacy of £500 in favour of Mr Franco, contained in the writing dated 22d February 1862; (3) the legacy of £500 in favour of James Clarke, contained in the writing dated 25th February 1862; (4) the legacy of £12,000 in favour of Mrs Yorke, contained in the writing dated 25th February 1862 (assuming this last to be a subsisting legacy) and (5) the legacy of £10,000 to the said Augustus Yorke, contained in the writing of 30th October 1863,—are chargeable against the general residue of the testator's estate in so far as the arrears of interest receivable from the Monteath trust-estate are insufficient to meet the same?

"5. Whether the said John Reginald Yorke is entitled, under the codicil dated 27th November 1862, to any, and what, portion of the revenue of the sum of £12,500 invested in Indian Government securities, and for what period?

"6. Whether, under the writing dated 25th February 1862, the said William Monteath Scott is entitled to the residue of the trust-estate? If not, what are the rights of the said William Monteath Scott under the said writing?"

STEWART for executor.

CLARK and MACKAY for Mr and Mrs Monteath Scott.

SHAND and MACLEAN for Mrs Yorke's Trustees.

ASHER for Tutor *ad litem* of A. Yorke.

At advising—

LORD JUSTICE-CLERK—The first question is, whether the legacy of £842 to Mrs Yorke is a subsisting legacy and is payable to Augustus Yorke? Referring to the terms of the legacy as left by the writing of 18th May 1859, we find that it was to be paid out of a sum of money which belonged to the estate of the testator's mother. At the time Mrs Yorke was unmarried, and the legacy was left "for her own uses." She predeceased the testator, and left issue; and the question is whether the *conditio si sin eliberis decesserit* applies? I think that is a question of a very large nature, for it will be necessary to determine whether that condition applies to all legacies left by parents to children by simple bequest, and probably also whether legacies left by parties standing *in loco parentis* are to be similarly dealt with.

There are here several peculiarities. The legacy is left for the individual use of the legatee—the testator is not making a settlement in which he contemplates a provision for her family—the circumstances are such that we can hardly suppose him to have so intended, for after the date of the legacy the legatee was married and provision made for her family in her marriage-contract, and after her death, the testator left a legacy of £10,000 to her only son. Under such circumstances, the question arises unfavourably for the party contending that the condition applies.

At first sight we have to deal with a legacy merely, and Mr Erskine (B. iii, t. 9, c. 9) says—"When a legatee dies before the testator, the legacy is not transmitted to the legatee's executors." The general doctrine therefore is, that legacies do not transmit; and we have here the specialty that the legacy is declared to be for the use of the legatee. We have, however, to deal with the authorities which are applicable to the maxim *si sine liberis decesserit*, a doctrine borrowed from the Roman law, but carried by us farther than carried by it. In that law it seems to have been limited to the case of a testator dealing with his *hæreditas*, and to have led to the assumption that while a testator when childless left his whole property to strangers, he was not to be considered as preferring these to his own children, should he afterwards have any. Therefore, so far as the civil law is concerned, we derive little countenance to extending the principle to such a case as this. But our law has undoubtedly extended its application farther than the Roman law; and I think to the following cases—(1) Where the bequest is manifestly intended not only for the child, but for the children by that child; (2) where the property is so distributed as to make it probable that the testator intended a distribution of his estate; and (3) where the testator is *in loco parentis*. We have been referred to the case of *Wilkie* v. *Jackson*, 14 S. 1121, as extending the doctrine farther, but although in that case the provision given was a legacy, and in the form of an individual legacy it is impossible not to come to the conclusion that the testator was making a distribution of his whole estate, and intended the provision to come instead of the child's legal provision. The case turned on

that specialty. As to the case of *Dickson*, Mr Dickson was in the act of dividing his estate. He gave his eldest son the *universum jus*, and charged it with legacies to his other children. I am not aware of any other case not coming within one or other of the categories I have mentioned.

The second question refers to another legacy of £12,000 to Mrs Yorke, and asks whether it is a subsisting legacy to her husband, Mr John Reginald Yorke, or to her marriage-contract trustees, or to her son, Augustus Yorke? There is this distinction between this and the former legacy that it is not declared to have been for Mrs Yorke's own uses; but there is this which renders it improbable that the testator intended it to subsist after Mrs Yorke's death, at all events in favour of Augustus Yorke, that the testator afterwards leaves to him individually a legacy of £10,000. It is not in the least degree probable that he intended that legacy to be cumulative with the prior one. I am therefore of opinion that the condition *si sine liberis* does not apply to this case more than to the former one. But assuming that Augustus Yorke is not entitled to take, will the marriage-contract trustees be entitled? At first it seems strange that parties not mentioned in the bequest should have a claim, but it is said that as Mrs Yorke was to be married a few days after the date of this legacy, and as the testator knew of her marriage-contract giving over everything to her trustees, he left this legacy to her knowing that it would fall under that trust, and thereby by implication giving it to these trustees. I do not think we can look at it in that light. I do not think it would have been payable to the marriage-contract trustees if Mrs Yorke had survived her husband. I think she could have kept it for herself. If so, it cannot be payable to them now. I therefore reject their claim.

The next question relates to a deduction from the legacy of £12,000. As I have held no legacy to subsist, that question is immaterial. If I had been called on to decide it, I would have held that the deduction fell to be made.

The fourth question is very important. It relates to a series of legacies directed to be paid out of a particular fund. The question as to the legacy to Mrs Monteath Scott stands in a different position from the others, and I will deal with it last. The other legacies are free from specialties. A distinction has been taken between demonstrative legacies and those of a different character. Demonstrative legacies have been spoken of as different from either general or specific legacies, but the real question is, whether the legacies which we have here are of the nature of general or specific legacies? Now, we have not here a legacy of an entire fund bequeathed to different individuals—we have not a distribution of the whole to A, B, and C, or of so much of it to A, so much to B, and so much to C, so that we could look on it as an apportionment of the debt referred to. It appears to me that it is not a bequest of a specific nature—that it is a bequest, not of the debt, but of a sum of money—and that the description of the source from which it is to come is not taxative, but demonstrative. The general principle of our law has been favourable to general legacies. Lord Alvenly in his judgments, founded on presumed intention and the rules of the Roman law, has laid down the proposition in favour of such a presumption, and Lord Eldon has stated it strongly also. Lord Alvenly says that where there is ambiguity as to the intention of the testator, you shall not limit the legacy by assuming that the source mentioned is to be the only source. Here we have a legacy of a sum of money, said only to be paid out of a particular fund. I do not apprehend, if we are to go on the intention of the testator, that he intended to say this sum of £10,000 should be £9320, or £7580, or whatever other sum should be realized. I think it is infinitely more probable that he merely pointed out the arrears of interest from the Monteath trust-estate as the sum from which these legacies were in the first place to be paid. There is also this peculiarity favourable to these legacies being general legacies. We have here no competition between special legatees and residuary legatees, for I venture to anticipate your Lordship's decision on the construction of the deeds that we have here no residuary legatee. Now then, I come to consider the legacy left to Mrs Monteath Scott. The terms of the legacy are, "I hereby revoke the bequest made by me, under date the 18th May 1859, of the sum of £20,000 to my daughter Amelia Murray Monteath Douglas, now Scott, to be paid out of the arrears of income due to me from the Monteath trust-estate, and I hereby reduce the bequest to £10,000." He revokes what he describes as a bequest "of the sum" of £20,000, and he reduces it to £10,000; we have therefore the legacy of the £10,000 given as a sum of money. No doubt he precedes the granting of the original legacy by a narrative of £40,000 which he considers to be due to him; therefore the inductive cause may be said to have been a fund which he expected to receive. But the narrative will not affect the legacy if it was clearly granted; and I do not think that the narrative limits this legacy. On this point I would refer to *Deane* v. *Test*, 9 Vesey, 146, decided by Lord Eldon. It appears to me that the Scotch cases referred to are of the same import,—I mean the cases of *Drummond* and *Finlan*, quoted by Mr Shand.

The fifth question is as to Mr Yorke's claim to the revenue of the legacy of £12,500. I am of opinion that he has no such claim.

As to the sixth question, I have already indicated that the rights of Mr Monteath Scott do not extend to the revenue, but only to articles similar to those enumerated.

Lord Cowan—The only questions to which I think it necessary to advert are—

First, Those which involve the inquiry whether the *conditio si sine liberis* applies to the two legacies to the testator's younger daughter, by whom he was predeceased, viz., the legacy of £842 in the writing dated 18th May 1859, and the legacy of £2000 in the writing of 25th February 1862? and

Second, The fourth question, whether the legacies therein mentioned be chargeable only on the arrears of interest due to the testator through the Monteath trust-funds, or, in so far as that source of payment is insufficient, are chargeable also on the general estate?

1. Had the legacies to Mrs Yorke been of the nature of proper provisions for her, without any other sums being provided for her and her issue under her father's settlements,—there might have been room for the application of the presumption contended for. But neither of the legacies in question are of that nature, whether judged of by their own terms, or by the other provisions settled on his daughter and her issue by the testator. The legacy of £842 is left to his daughter in ex-

press terms "for her own uses;" and the £12,000 is bequeathed to her "as a legacy to her," over and above the sum which he was about to settle on her and her issue, and to bind himself to pay in the settlements to be executed upon her then intended marriage. These legacies have thus in their constitution the form and expression of purely personal bequests, and cannot be regarded as of the nature of provisions settled by the father upon his daughter and her issue. He was, on the contrary, in the act, at the date of the last legacy, of binding himself in suitable provisions to her and her intended husband and their issue. Accordingly, by the antenuptial contract of 3d March 1862, ample provision was made for the issue of his daughter's marriage.

But this was not the only provision made by the General for the issue of his younger daughter. Her death occurred on 19th February 1863; the only issue of her marriage with Mr Yorke being an only child, Augustus, for whose behoof the claim is made for these legacies. She was survived by her father, who did not die till October 1868; and his incapacity to manage his affairs only occurred in November 1867. Intermediately after the death of his daughter, the testator, on 30th October 1863, left to his grandson Augustus the sum of £10,000. The fair inference from this is, that this legacy was intended to come in the room and place of the legacy of £12,000 to his mother, and which had fallen by her predecease. At all events, this subsequent provision for the issue of his daughter is in my opinion sufficient to do away with the presumption on which the *conditio si sine liberis* is founded, even independently of the marriage-contract provision to which I have alluded.

2. The other matter on which I have to remark is that involved in the fourth question stated in the special case. As to this, I have to observe in the first place, that had all the four bequests been in the terms of the writings by which those of them given in February 1862 are expressed, I do not think there would have been much difficulty in holding the legacies demonstrative. On the principles referred to at the debate, and recognised by the authorities, while the fund mentioned as that out of which they were to be paid would have been available to the legatees preferably, its insufficiency to meet the claims on it would not have prevented recourse by the legatees for the unpaid balance on the general estate. The difficulty in this construction is raised by the writing of February 1862, which reduces to £10,000 the bequest made to Mrs Scott by the writing of 18th May 1859, the terms of this latter writing thus referred to being rather taxative than demonstrative.

Had the writing of May 1869 stood alone, I would have been inclined to take the view contended for by the executors, and to have held the terms taxative. I could not, however, extend that construction to the legacies given in February 1862. Taken in their own terms, without reference to the writing of May 1869, the writing of that date conferred on the legatees the security of the general estate as well as of the special fund for full payment to them of their several bequests. And hence, as it appears to me, there arise two questions which require to be considered.

(1) Having regard to the state of the testator's succession, and to the fact that his testamentary writings contain no general legacies whatever, while there is of undisposed residue an amount exceeding £16,000,—it appears to me consistent with what may be held the intention of this testator, that the terms which he employed in February 1862, when he revoked the bequest of £20,000 to Mrs Scott, and reduced its amount to £10,000, should be taken as expository of his true intention. All the bequests would thus be held as given, *not* "out of the Monteath trust-fund" simply, but bequests generally given as of so much amount directed to be paid out of that fund; and thus, on the principles referred to, demonstrative. But

(2) Supposing that the legacy of May 1859 of £20,000, reduced in February 1862 to £10,000, must be held taxative, because of the expressions used in the former of these writings,—the other three legacies being on their own terms held demonstrative,—it occurs to me that the practical result would then be the same. For in that case I am inclined to think that Mrs Scott's legacy must, first of all and preferably, be paid out of the Monteath trust-fund,—the balance only remaining to be the security to the other three legatees besides their claim on the general estate. These legatees having a claim on the general estate could not, I apprehend, be allowed to rank on the Monteath trust-fund along with Mrs Scott, so as to diminish the amount payable to her. I am not satisfied that the principle, applicable to debts secured over separate estates of the debtor, may not be fairly applied to the case of legacies, so very peculiarly left by the testator as those must be held to have been, on the supposition which I have made.

Altogether, however, I have formed a clear opinion that, having regard to the state of the General's succession as left by him, and the terms of his several testamentary writings, his intention must have been that the legacies bequeathed by him should be all fully paid out of his general estate. With so large an undisposed of residue, I think it would be doing violence to his intention to hold otherwise. He could not but have intended that the special legatees whom he favoured, should be fully paid where so large an amount of funds was left to go as intestacy to his heirs *in mobilibus*. Had there been general legatees to compete with the special legatees, a different principle of construction might have been admissible. But, as matters stand, I cannot help thinking it would be an over refinement, to limit the claim of the special legatees because of the insufficiency of the special fund, by applying to the terms employed in these bequests recondite rules of interpretation, which, after all, are given by jurists solely with the view fo reaching the testator's true intention.

On all the other questions stated in the special case, the views which I entertain so entirely accord with those of my brethren that I consider it unnecessary to do more than to state this concurrence.

Lord Benholme agreed, but with more hesitation, and stated that he would have preferred to follow the civil to the English law on such a point, but he had been unable to find any distinct authority.

Lord Neaves dissented, holding that the English rule and decisions only applied to cases where the legacy was left out of a present and existing fund; that the fund in this case was contingent, depending on the result of a litigation; and that it was reasonable to believe the testator had given these particular legacies on account of his expectation of receiving a large amount of arrears

from the Monteath trust-estate, and intended their amount to be diminished if these arrears should turn out less than he anticipated.

It may be mentioned that the Lord Justice-Clerk took occasion to point out the advantage in point of despatch of the new form of procedure by Special Case. The testator died on 18th October 1868. The case, involving several difficult points of law, owing to the ambiguous terms of Sir T. Douglas's testamentary writings, was presented to the Court on 13th January 1869, and decided on the 5th February, three months and a-half after the opening of the succession. Under the old form, of a multiplepoinding, the case would probably have extended over several years.

Agents—A. Howie, W.S., J. Mylne, W.S., M'Ewen & Carment, W.S.

Tuesday, February 16.

FIRST DIVISION.

HANNAH *v.* HANNAH.

Heir-at-law—Essential Error—Reduction ex capite lecti—*Renunciation of Legal Rights—Proof—Law Agent.* An heir-at-law *held*, on a proof, not entitled to reduce, on the ground of essential error,—(1) a disposition; (2) a deed of renunciation of his right of succession engrossed on the disposition, and signed by him.

David Hannah senior died at Girvan on 13th March 1866, leaving a trust-disposition and settlement dated 9th March, whereby he disponed to his grandson David Hannah—eldest son of the pursuer, David Hannah junior, who was eldest son and heir-at-law of the testator—certain heritable subjects in or near Girvan. The testator directed payment of certain legacies, and appointed one-half of the residue to go to the pursuer. The pursuer, who at that time resided in England, arrived at Girvan a day or two after his father's death. After the funeral, the pursuer and the other relations met, along with Mr Murray, solicitor, Girvan.

The pursuer alleged—"Mr Murray told the pursuer that he had a will made by his father, which he wished to read. He did not read over the whole of it, but only such parts as he selected, and then produced a long paper which had previously been prepared by him, and which he proceeded to read to the pursuer. This document, which, so far as the pursuer recollects, purported to be a deed approving of his father's settlement, the pursuer was asked by Mr Murray to sign, but he refused to do so. He had never seen Mr Murray before this occasion, and this was the first intimation given to the pursuer that any one wished him to subscribe such a deed.

"(8) Thereupon Mr Murray, without consulting the pursuer, or obtaining his consent, wrote out another and shorter document on the back of the said trust-deed and settlement, and said that the pursuer would surely sign it, as it was for his good and for the good of all to do so. He also stated that the deceased was in his senses when he subscribed the will. The said defender, John Hannah, and other parties in the room, intervened, and said to the pursuer that Mr Murray was a very honest man, and that they were sure he would not ask the pursuer to sign anything but what was right. The pursuer, induced by the persuasions of the defenders, and on the faith of these representations, and being led by them to believe that it was a mere formal document, necessary on the death of a person leaving property, and that it was for his own interest to do so, signed the writing on the back of the will. He had no idea that by so doing he was giving up anything he was by law entitled to, and was not aware that the object of the document was to deprive him of the heritable estate in question; and if he had been aware of this he would not have signed the deed.

"(9) The said writing signed by the pursuer on the said 17th of March 1866, by which he now finds, upon inquiry, that he is supposed to have renounced his legal rights, runs as follows:—'I, David Hannah, eldest son of the within designed David Hannah, hereby ratify and approve of the within written trust-disposition and settlement in all particulars, and renounce my right of succession as heir-at-law to the heritable estate of my deceased father, David Hannah, on the ground of deathbed, or any other ground competent to me in law.—In witness whereof, this minute, written by William Murray, solicitor, Girvan, is subscribed by me at Girvan, upon the 17th day of March 1866 years, before these witnesses, the said William Murray and John Scott, farmer, Bridgehouse, Whitehorn.

(Signed) DAVID HANNAH.

(Signed) W. Murray, *witness.*

(Signed) John Scott, *witness.*'

"(10) This minute of ratification and renunciation was signed by the pursuer in ignorance of its true intent and legal consequences. He had no knowledge of the law of deathbed, and of his consequent legal rights. From his being long resident in England before his father's death, he had no one near at hand who could have informed him of his legal rights, before coming to Scotland. After he came, no time was given to him to consult any one on the subject, except Mr Murray, on the occasion above referred to, who, acting on the employment and in the interest of the defenders, advised and persuaded the pursuer to sign the document in question, and that without informing the pursuer of what his legal rights were, or what was the true nature and object of the document."

The pursuer now sought reduction of the trust-disposition and deed of renunciation on the head of deathbed, on the ground of essential error.

The defender alleged—"When the pursuer came to Girvan he was informed generally of the terms of the settlement which his father had made, and after the funeral the whole deed was read over to the pursuer by Mr Murray, and its nature and import fully explained. At the same time, Mr Murray informed the pursuer of his legal rights as heir-at-law, and that he would be entitled to set aside the deed on the ground of deathbed, if he thought proper to do so. The pursuer fully considered the whole circumstances, and expressed his approval of the deed, and his readiness to ratify the same, and to renounce all right of challenge competent to him. Accordingly, at the pursuer's request, and to carry out the pursuer's intention openly expressed before the whole family, Mr Murray wrote upon the deed itself the minute of ratification and renunciation which is quoted in article 9th of the pursuer's condescendence. It was read over to the pursuer, its terms and nature explained, and it was thereupon executed before witnesses in common form. Besides the formal ratification executed by the pursuer, there was also a minute signed, on the 17th March, by the whole members of the family, including the pursuer, agreeing to abide by the settlement of the deceased as the rule of succession to his heritable estate."