At advising—

Lord President—I do not see any reason for disturbing the judgment of the Lord Ordinary. But I think it right to state my disapproval of the conduct of a law-agent preparing a will in his own favour. It is not the law of Scotland that such a will is null. Such was the law of Rome; but it is not ours. We are told that the testatrix had no near relative save the pursuer, who is her cousin-german; but she seems to have had no favour for his company or conversation, but the reverse. On the other hand, she plainly had a great liking for the defender. And I think he has discharged the duty incumbent on him to satisfy us that the testatrix was able and desirous to make the will in his favour, and that it expresses her free and voluntary intention. I come to this conclusion on the evidence of Mrs Robson and of the defender himself. I think it is very plain that this old lady did know what she was doing; and the testimony of the medical witnesses shows us what her condition was. The defender has, in my opinion, clearly proved that he took the greatest pains to have it manifested that this will was the deliberate and voluntary will of the deceased, and I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas concurred, stating that the defender had acted most cautiously throughout, except in not employing another agent to draw the will.

Lords Ardmillan and Kinloch concurred.

Expenses were given; though there is no invariable rule that in a case of this kind costs must follow. But here the pursuer had every means of making up his mind from the medical evidence on his own side before any was led for the defence. Nor was the allegation of fraud made on the record in any way borne out by the evidence.

Agents for Pursuer—Morton, Whitehead & Greig, W.S.

Agents for Defender—J. B. Douglas & Smith, W.S.

Friday, December 17.

SECOND DIVISION.

M'GOWN'S TRUSTEES *v.* ROBERTSON AND OTHERS.

Trust—Codicil—Conditio si sine liberis decesserit. Circumstances to which the implied condition *si sine liberis decesserit* held applicable.

Misses Janet and Jane M'Gown of Greenock, by trust-deed, left their whole estate to trustees, with directions to divide the same into six equal parts. Two-sixths were to be liferented by their brother Malcolm, and to go to his daughters, and failing daughters to his sons, in fee; and three-sixths were to go in the same way to their brothers John and Duncan, and their sister Margaret, and their daughters and sons, being one-sixth to each family. In regard to the remaining sixth part, it was provided that it was to be held in trust "for behoof of the daughters of our deceased sister Mary M'Gown, spouse of the late George Robertson, merchant in Greenock, equally among them, or the lawful issue of such of them as may predecease the survivor of us, in fee; but, failing daughters or their issue, then the said sixth part or share shall belong to their surviving brothers, equally among them, in fee." Mary M'Gown or Robertson had four children, Susan, Rachel, George, and Archibald. By a codicil the trusters directed "that Susan Robertson shall, in respect of her marriage, have no part of the said one-sixth part or share, but the same shall belong and be paid over to George Robertson her brother: and farther, that Archibald Robertson, also son of our said deceased sister, shall have the part of the said sixth share which would have fallen to his deceased sister Rachel Robertson had she been in life."

George Robertson predeceased the survivor of the trusters, leaving a daughter. Archibald, his brother, now claimed the half of the sixth share which would have gone to George had he survived. It was also claimed by George's daughter, in virtue of the implied condition *si sine liberis decesserit.* She also contended that in no case had Archibald Robertson any right to it.

The Lord Ordinary (Barcaple) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties in the competition, and considered the joint-case for the claimants Archibald Robertson and Anna Maria Adelaide Robertson, and the mutual deed of settlement by Misses Janet and Jane M'Gown, and codicil thereto, Finds that, on a sound construction of the said mutual settlement and codicil, the condition *si sine liberis* applies to the bequest of one-half of one-sixth part of the free residue of the estate in favour of the deceased George Robertson, constituting the fund *in medio;* and that the claimant Miss Robertson, as only child of the said George Robertson, is entitled to take said bequest: Repels the claim of the said Archibald Robertson: Sustains the claim of the said Miss Anna Maria Adelaide Robertson; ranks and prefers her to the whole fund *in medio*, and decerns: Finds the said Archibald Robertson liable in the expenses of the competition: Finds the real raisers entitled out of the fund *in medio* to the expenses of raising and bringing the action into Court: Allows accounts of said expenses to be given in, and, when lodged, remits the same to the auditor to tax and report.

"*Note.*—There was clearly no vesting in the person of George Robertson, who predeceased the last surviving testatrix. The question is whether his only child, the claimant Miss Robertson, is entitled to take in his room? It is not necessary to determine what would have been the rights of parties in this respect if the matter had stood upon the provision as to the sixth share to be held during the life of Robert M'Gown, as it was conceived in the original deed of settlement. The Lord Ordinary thinks that the codicil contains a new and different provision in regard to that share, which must be held to regulate the present question.

"By the deed of settlement that share was bequeathed to the daughters of the trusters' deceased sister Mrs Robertson, or the lawful issue of such of them as might predecease the survivor of the trusters, in fee. Failing daughters or their issue, then the share was to belong to their surviving brothers, equally among them. By the form of bequest the sixth share was given as a *unum quid*, first to the daughters, equally among them, and their issue; and then, failing daughters and their issue, to their surviving brothers, equally among them. Both the daughters and their brothers were to take as a class, and they were to take the sixth share equally among them.

"By the codicil the disposal of this share is entirely changed. The trusters' sister, Mrs Robert-

son, had two daughters, Susan and Rachel, and two sons, George and Archibald. At the date of the codicil Susan Robertson had married, and Rachel had died unmarried. The trusters, by the codicil, declare, in reference to the sixth share in question, that Susan shall, in respect of her marriage, have no part of it, 'but the same shall belong and be paid over to George Robertson, her brother.' The language is inaccurate, but the meaning plainly is that George is to take the half of the sixth share to which Susan would have been entitled if, according to the original intention of the trusters, it had divided between her and her sister, the latter being still in life. The codicil goes on to declare that Archibald shall have the part of the sixth share that would have fallen to his deceased sister Rachel had she been in life. The brothers are not merely brought in to take, to the exclusion of Susan, the surviving sister, and her issue, to whom they were postponed in the original settlement; they are no longer called as a class, and they are not to take one legacy equally between them. They are each called *nominatim* and separately, and they each get a separate and distinct legacy. This is not a mere change of expression. It introduces elements which the law looks to as of primary importance in determining the character of a bequest, and the presumable intention of the testator in the event of the predecease of the legatee. The Lord Ordinary thinks that intention must in the present case be gathered from the separate bequest to each of the brothers in the codicil, and not from the joint bequest to them as a class, and only as conditional institutes, made under different circumstances in the original settlement.

"If this is the mode in which the settlement and codicil are to be read, there does not appear to be any room for doubt that the condition *si sine liberis* must apply. The trusters throughout their settlement are providing for nieces and nephews, preferring nieces, as was natural in their position, but excluding those whom they thought to be provided for by marriage. One of the daughters of their sister, Mrs Robertson, being married, and excluded on that ground, and the other having died, they leave separate but equal bequests to her two sons *nominatim*. This is just the kind of case to which the condition most clearly applies."

Archibald Robertson reclaimed.

GIFFORD and LORIMER for him.

MILLAR, Q.C., and BURNET in answer.

At advising—

LORD JUSTICE-CLERK—I am for adhering to the Lord Ordinary's interlocutor. I think the maxim *si sine liberis decesserit* must apply. It is not the old Roman condition so much as an implied conditional institution of issue. In settlements like the present, containing family provisions, there is an implied will that issue should succeed. The case of *Thomson* v. *Robb* and the older cases shew that such a presumption may arise. There was an ingenious argument by Mr Gifford to show that the issue of sons and daughters of the brothers and sisters of the testatrices called in the prior part of the settlement was excluded. But I should have read every one of the provisions as implying the condition. The provisions are to specific classes. Mr Gifford says there is selection; but the classes are on an equality, except that one family gets two-sixths while the others get one-sixth each, and that nieces are preferred to nephews. There is nothing to show *personæ predilectæ* in the first four classes. In these cases the issue of predeceasing sons and daughters would have taken; and sons' issue would also have come in in the fifth and last class.

But then there is the codicil. I think the Lord Ordinary's opinion as to the construction of the codicil is sound. The provision in the settlement was that, in the event of daughters and their issue predeceasing, the surviving brothers should take. Here there was manifestly a right of accretion to Archibald. But we cannot fall back on the settlement, for the codicil made an entirely different disposition, and it is imposible to import into it the survivorship or accretion clause. The codicil must be held as revoking that clause. The question then arises, does George's child come in under the maxim *si sine liberis decesserit?* I think she does. The mention of lawful issue in the clause regarding the daughters of Mrs Robertson cannot have any effect except the reverse of the pleading. I think George was to come into Susan's place; and the application of the maxim is strengthened by the fact that Susan's children would have taken.

LORD COWAN—I am of the same opinion. I have always held, under the case of *M'Kenzie* v. *Holt*, that where the characteristics there referred to occur—where classes are called though issue are not the children of a predeceaser take by force of the implied will of the testator. After referring to the cases of *M'Kenzie* v. *Holt* and *Thomson* v. *Robb*, his Lordship said—We have here the case of five families of the testatrices, brothers and sisters, two-sixths of the residue being provided to one family, and one-sixth each to the other families. The principle under the settlement would have been that the children should take under the implied will of the testatrices. The use of the word "issue" in dealing with the share left to the daughters of Mrs Robertson removes all doubt in the present case, for I think the brothers were called by the codicil in place of the sisters, and that it is necessary that their issue should take as the daughters' issue would have done. Having in the codicil narrated the bequest as contained in the settlement, the testatrices declare that "Susan (*reads*). Just in the same way as Susan and her issue were to take so George is to take, and so as to Rachel and Archibald.

LORD BENHOLME—I concur. I think this case is to be decided on the codicil alone, that is, I think the special bequest in the original settlement to sons was recalled, as well as the bequest to daughters; and a new arrangement is made giving one-twelfth to each. The only question between the two parties is the alleged right of accretion. On that Archibald Robertson stands. If he fails he is out of Court. The principle of accretion never can apply when two brothers have a legacy independent of each other. If so, the competition must be decided against the surviving brother.

The other principle of *si sine liberis decesserit* ought not to have been contested between them. If it does not operate that is in favour of parties who are not here, and as to them it is a judgment in absence; but I am not deterred by that consideration from deciding that question as between the parties before us. The inclination of the law is to support the claim under the maxim *si sine liberis*, although the limit of that maxim is not very

firmly fixed in our law. In the case of nephews and nieces it applies, but it is not so clearly fixed when individuals are called *nominatim*. A distinction has been taken between persons called by name, others being passed by, and a whole class called. I should rather have favoured the issue of the person called by name, but that has been held detrimental to his issue. That may be the law, but it is not satisfactory. If parties were picked out as *personæ predilectæ*, being nephews or nieces, the presumption would naturally be that they intended to provide for children, but that case of *Hamilton*, which presses on my mind, has raised a distinction. Without saying that my mind is clearly made up on this subject, I think there is enough in the grounds first stated for the decision of this case.

Lord Neaves concurred.

Agent for Archibald Robertson—D. J. Macbrair, S.S.C.

Agent for Miss Robertson—William Mason, S.S.C.

Saturday, December 18.

FIRST DIVISION.

RINTOUL & CO. *v.* THE PORT EGLINTON STORAGE CO.

Issue—Expenses—Procedure—Fraud—Reclaiming Note. An issue which charged fraudulent impetration of a delivery order for wheat having been withdrawn, as also one against the parties based on a charge of statutory fraud in regard thereto; and a single issue having been substituted radically different, and charging fraud at common law—*held* that the issue approved of being not a mere variation, but radically different from those disallowed, a reclaiming note was the proper procedure; and the expenses of reclaiming must be allowed to both defenders.

The pursuers, who are merchants and commission-merchants in Glasgow, on 19th October 1868 sold to John Craig, miller and grain-merchant, Glasgow, 500 bolls of American spring wheat at 25s. 3d. per boll; and on the same day gave a delivery order for the wheat, the price being payable by bill at two months. The following were the principal averments of the pursuers.

"The pursuers were induced to agree to the said sale, and to give the said delivery-order to the said John Craig by false and fraudulent concealment on the part of the said John Craig. It was not true that he required the said 500 bolls of wheat for the purposes of his business. At the time of the purchase the said John Craig was utterly insolvent, and he knew that he was so. He had resolved to stop payment, and had taken measures for this purpose, and he purchased the pursuers' wheat knowing that he was unable to pay for it, and without intending to pay for it. He did not purchase the wheat in the ordinary course of business; but he did so, although he intended immediately to stop payment, for the purpose of handing over the wheat in security or satisfaction of prior debts owing by him to the defenders, the Port Eglinton Storage Company, or to John Edgar Poynter, the sole known partner of that company, as a partner or as an individual, or to the defender Robert Reid. These defenders, for themselves or others, were prior creditors of the said John Craig, and he had no means of paying their debts from his own funds, and thereupon the said John Craig procured the pretended sale of the pursuers' wheat, and the delivery-order therefor, for the fraudulent purpose of handing over the same to the said defenders, without paying the pursuers the price thereof. For some time prior to the pretended sale by the pursuers, the said John Craig had resolved to suspend payment, and to compound with his creditors by payment of a composition, and with this view he had advised with various parties, and in particular with Mr John Gourlay, accountant, Glasgow."

The pursuers further averred that Craig, having thus fraudulently got the delivery-order, handed the same to John Edgar Poynter, who caused it to be presented at the ship for delivery of the wheat, unindorsed, and without any intimation of any alleged interest therein by Poynter. "At the same time," they said "the defender Craig caused an intimation-note to be delivered to the defender Angus, requesting him to receive the said wheat in name of the defender Robert Reid, designing him as of No. 72 Great Clyde Street, but who was then unknown to the defender Angus, and was and is the defender Poynter's clerk or manager. These arrangements were made with the view of concealing from the pursuers, and at the ship, the fact that the wheat was being delivered to another party than Craig, so as to prevent the operation of their right of stoppage before or during delivery, and with the view of securing the storage with the defender Angus in name of Reid, for behoof of his employer the other defender Poynter." They alleged that "the said defenders gave no value therefor to the said John Craig, and the whole of the defenders, excepting Robert Angus, fraudulently combined to get delivery of the wheat, and to defeat the pursuers' rights. The defenders Poynter and Reid fraudulently obtained the delivery-order, and in virtue thereof fraudulently caused the wheat to be stored with the said Robert Angus."

The pursuers maintained that the delivery to Poynter and Reid was contrary to the Act 1696, c. 5, as Craig became a notour bankrupt within sixty days of the delivery; and they also contended the delivery was reducible at common law. They accordingly sought to have the contract reduced, and the wheat returned to them, or a sum of £1000 as damages. And their issues as adjusted in the Outer-House were:—

"(1) Whether the said delivery-order was fraudulently impetrated and obtained from the pursuers by the said John Craig, to the loss, injury and damage of the pursuers?"

and

"(2) Whether the said delivery-order was, on or about 19th October 1868, delivered to the defenders, the Port-Eglinton Storage Company, John Edgar Poynter, or Robert Reid, or for their behoof, and whether the said defenders, or any of them, obtained possession of the said 500 bolls of wheat within sixty days of the notour bankruptcy of the said John Craig, in security or satisfaction of a prior debt owing to them by the said John Craig, in contravention of the Act 1696, cap. 5, to the loss, injury, and damage of the pursuers?"

Against these issues all the defenders reclaimed,