either of them without heirs of his body, or failing such heirs, then to the survivor of them, and the heirs of the survivor."

By a codicil annexed to the settlement he appointed a further sum of £1000 to be paid to each of his nieces Eliza and Sarah M'Call, and to two nephews James and John Wallis £3000 each, "in addition to what I have already left them."

By an after codicil, executed after the death of his brother Thomas M'Call, he recalled the bequest of half the residue given to that gentleman and his family, and conferred the whole residue on his brother Samuel M'Call "and the heirs of his body." But he directed a sum of £1000 to be paid to each of Thomas' children alive at his wife's death, except Sarah and Eliza, who had already received that further sum in the first codicil. He also declared this—"My nephew John Wallis being dead, I desire that my bequest to him in the above codicil should be divided thus, £2000 of it to his brother James Wallis, and £1000 of it to his sister Margaret Wallis."

By a third codicil, he substituted for the legacies to his sisters Sarah and Margaret, annuities of £100 each. And he gave to his nephews Thomas and John M'Call additional legacies of £3000 and £1000 respectively.

Having regard to these provisions, I cannot come to the conclusion that the sums of £1000 each, provided to each of the children of his brothers and sisters, are to be held as going to the children of these children, in the event of the children themselves predeceasing the widow, the liferentrix. The testator does not say that they shall so go, although the words used by him in disposing of the residue show that he had distinctly in view the case of his legatees having issue, for he provides for the devolution of the residue on the children of the residuary disponee, failing the father. If he had intended a similar devolution in the case of the £1000 bequests, the probability is that he would have similarly expressed it. Not only so, but he expressly declares that these bequests shall only be payable to the parties favoured in the event of their being alive at the widow's death. This is as nearly as possible an express declaration that if the parties died before the widow these bequests should lapse. He had evidently clearly before him the possibility of their predeceasing the widow; yet he not only does not call their children in that event, but uses words distinctly implying that, unless on their survivance, payment of the bequest shall not be made at all. Doubtless he gives the bequest to his nephews and nieces as such, and therefore it may be fairly held on the ground of relationship; but there is nothing to show that he stood, or considered himself to stand, in any peculiarly parental relation to the tolerably large plurality of objects, to each of whom he bequeaths this £1000 indiscriminately. His deed and codicils, taken together, show conclusively that the arrangements of his settlement partook in no sound sense of the nature of family provisions, but were dictated entirely by personal, if not capricious, selection and preference. The devolution in the second codicil of the bequest to his nephew John Wallis on John's brother and sister in unequal proportions, indicates how careful he was in providing by express directions for every such devolution. To sustain the *conditio si sine liberis* in the two particular cases now in question, would, with any regard to consistency, involve a devolution on children in the case of all the legacies together given to relations in the settlement, for no real difference lies amongst them; and this could scarcely be held. Finally, the residuary disponee was a brother of the testator, whom *in dubio* he will be presumed to favour, rather than a remoter kinsman. On the whole matter, I have come very clearly to the conclusion that these sums of £1000 each must be considered as simple legacies, personal to the parties favoured, and lapsing into the residuary disposition when the parties did not fulfil the condition of surviving the widow.

I am of opinion that the questions put to us should be answered accordingly.

The Court answered the question in the negative.

Agents for the Residuary Legatees—J. & R. D. Ross, W.S.

Agents for J. W. Dennistoun and for George Dunlop and Colin Dunlop junior—J. & F. Anderson, W.S.

Friday, December 22.

SPECIAL CASE FOR JOHN MOINET AND OTHERS (AITKEN'S TRUSTEES) AND OTHERS.

Succession — Vesting — Conditio si sine liberis — *Accretion.*

Where a truster left the residue of his estate to be liferented by his two sisters equally, share and share alike, and, upon the death of either, appointed his trustees to divide annually the produce of the half share of the residue liferented by her "equally among her children, until her youngest child attains the age of twenty-one years," and then to divide "the said half equally among the said children, or survivors of them, then alive—

Held that the *conditio si sine liberis* applied in favour of the issue of children surviving the truster, but predeceasing the liferentrix. But that they were only entitled to the share which their own parent would have taken in his or her own right, and were not entitled to participate in the share of another child, who survived their own parents, but predeceased the time of payment.

The late Samuel Aitken, of the firm of Bell & Bradfute, booksellers and publishers in Edinburgh, whose trustees were the first parties to this Special Case, left a trust-disposition and settlement, dated 14th October 1835, with a codicil attached, dated 8th June 1846, whereby he conveyed his whole estate, heritable and moveable. In the first three purposes of this trust, and in the codicil above mentioned, he bequeathed certain legacies to the parties therein named. The remainder of the trust-deed deals with the residue of the estate, and the clauses important to the present question are as follows:—"*Fourth*, I appoint my said trustees annually to pay to my said aunt Janet Aitken during her lifetime, for the suitable maintenance of herself, my sister Priscilla, aunt Elizabeth Aitken, and my grandmother, residing with her, the just and equal one-third part of the free annual produce of the residue of my said heritable and moveable estate, after deducting all taxes, feu-duties, repairs, insurances, and others exigible, and to pay to my said father annually during his

life another just and equal one-third part of said free annual produce of the residue of my said estate, and to pay to my said sisters Margaret and Elizabeth equally, share and share alike, and their children equally *per stirpes*, failing them—that is to say, the children equally to succeed to their mother's share failing the mother—the remaining just and equal one-third part of said free annual produce of the residue of my estate. . . . *Seventh*, I appoint my trustees, upon the death of my father, to divide the third of the annual produce of the residue of my estate given unto him into two parts, and to give annually to said Priscilla Aitken one part, and to the said Margaret and Elizabeth Aitken equally, and their children equally *per stirpes*, the other part. *Eighth*, In the event of my sister Priscilla dying before my father, I appoint my trustees to pay annually to my said father one-half of the third share payable to her, and the other half thereof equally betwixt the said Margaret and Elizabeth Aitken my sisters, and their children equally *per stirpes*. *Ninth*, Upon the decease of the last survivor of my father, sister Priscilla, aunts Janet and Elizabeth, and my said grandmother, I appoint the annual produce of the residue of my estate to be equally divided betwixt my sisters Margaret and Elizabeth during their lives, and upon the decease of either of them, such deceaser's share thereof shall be equally divided among such deceaser's children, and on the youngest child attaining majority, or twenty-one years of age, I appoint my trustees to divide among such children, or survivors of them then alive the one-half of the residue of my estate, and they shall retain the other half for behoof of the surviving sister, to whom the annual produce of such half shall be annually paid; and at her decease such produce shall be divided equally among her children, until her youngest child attains the age of twenty-one years, when the trustees shall divide the said half equally among the said children, or survivor of them, then alive." It was upon this ninth clause that the question involved in this Special Case immediately arose.

The said truster died in 1847; and the last survivor of the parties mentioned in the ninth purpose of the trust-deed died in 1858. So that in that year the residue of the estate came to be distributed in terms of said ninth purpose. The truster's sister Elizabeth (Mrs Harroway) predeceased the date at which the said ninth purpose came into operation, and no question arises as to the one-half of the residue destined to her children. Her children all survived her, attained majority, and received payment of their several shares of the succession. The testator's sister Margaret Aitken was married to John Wright. She survived her husband, and died a widow on 23d September 1870. All her surviving children are of age, and the capital sum of one-half of the residue, which she liferented, is now divisible in terms of the said trust purpose. The proper distribution of this sum is the subject of the question in the present Special Case.

The said Mrs Margaret Aitken or Wright had ten children, of whom three died unmarried and without issue, namely, Jane in 1834, Bertha in 1844, and Alice Gertrude on 13th July 1870,—all therefore predeceasing their mother. Three more also predeceased their mother, leaving issue, viz., Eliza Wright or Lloyd, who died in 1862; Margaret Wright or Vennimore, who died in 1866; and Alexander Wright, who died 23d April 1870. The interests of the children of these three predeceasers were represented by the trustees, the first parties to the case.

The remaining four children of Mrs Wright survived her, and were the parties of the second part to this case. The value of the one-half of the residue, which is the subject of the question herein stated, was estimated at or about £3000. The second parties claimed to be entitled to the whole of this sum, and the trustees, the first parties, conceived that the children of the said second parties' deceased brother and sisters were entitled to a certain share thereof. They therefore humbly submitted to the opinion and judgment of the Court the following:—

"1. Are the children of the said Mr Wright, Mrs Lloyd, and Mrs Vennimore, mentioned in article seven, entitled, in virtue of the implied condition *si sine liberis decesserit*, or otherwise, to a share of one-half of the residue of the truster's estate, liferented by Mrs Margaret Aitken or Wright?

"2. If this question be answered in the affirmative, are the children of the said Mr Wright, Mrs Lloyd, and Mrs Vennimore, respectively, entitled to one-seventh, or to one-tenth only, or otherwise to what share of the one-half of said residue?"

WATSON and MACLAREN for the first parties.

MILLAR, Q.C., and DUNCAN, for the second parties.

Authorities—*Mackenzie*, Feb. 2, 1781, M. 6602; *Wallace* v. *Wallace*, Jan. 28, 1807, M. Ap. v. "Clause," No. 6; *Thomson's Trs.* v. *Robb*, July 10, 1851, 13 D. 1326; *Macgown's Trs.* v. *Robertson*, Dec. 17, 1869, 8 Macph. 356; *Hamilton* v. *Hamilton*, Feb. 8, 1837, 16 S. 478; *Douglas's Exrs.*, Feb. 5, 1869, 7 Macph. 504; *Sturrock* v. *Binny*, Nov. 29, 1843, 6 D. 117; *Donaldson's Trs.* v. *Macdougall*, July 20, 1860, 22 D. 1527 [and in the House of Lords, under the name *Young* v. *Robertson*, Feb. 1862, 4 Macq. 337]; *Graham's Trs.* v. *Graham*, 6 Macph. 820; *Laing* v. *Barclay*, July 20, 1865, 3 Macph. 1143; *Cockburn's Trs.* v. *Dundas*, June 10, 1864, 2 Macph. 1185; *Thornhill* v. *Macpherson*, Jan. 20, 1841, 3 D. 394; *Wood* (*Richardson's Tr.*) v. *Cope*, March 8, 1850, 12 D. 855; *Newton* v. *Thomson*, Jan. 27, 1849, 11 D. 452; Dig. 35, 1, 102; Code 6, 25, 6; and 6, 42, 30.

At advising—

LORD PRESIDENT—Mr Samuel Aitken's trust-settlement is concerned in the first place, at least after the appointment of some small legacies, with provisions as to the income of the residue, which he appropriates partly to his father, partly to his aunts, sister Priscilla, and his grandmother, and partly to his two sisters Margaret and Elizabeth. There are a number of different heads of the settlement confined to the regulation of this distribution. It is not until the ninth purpose that we find any disposition of the fee of this residue. That is not to take place until the death of the last survivor of his father, sister Priscilla, aunts, and grandmother; and even then the division of the fee is not necessarily to take place, for there is a liferent to his two sisters Margaret and Elizabeth of one-half of the said residue to each, share and share alike. And even after their decease there is a still farther postponement of the division of the half-share of the residue liferented by each until the majority of their youngest child. The ninth clause appoints the annual produce of the residue of the estate to be equally divided between the truster's sisters

Margaret and Elizabeth, and upon the decease of either of them, such deceaser's share to be equally divided among such deceaser's children, and upon the youngest of said children attaining majority, the trustees are appointed to divide among them the one-half of the residue, and to retain the other half for behoof of the surviving sister, to whom the annual produce of such half shall be annually paid. And at her decease such produce shall be divided equally among her children until her youngest child attains the age of twenty-one years, when the trustees shall divide the said half equally among the said children, or survivor of them, then alive.

Now, we are concerned here with that half of the estate which was liferented by Margaret Aitken or Wright, and now belongs to her descendants. The state of her family is described to be as follows:—She had ten children, four of whom survived, and are the parties of the second part to this case. Six predeceased their mother, and of these, two, Jane and Bertha, predeceased the testator himself, and a third survived until July 1870, and then died without issue. The remaining three are all dead, having survived the testator, but predeceased their mother the liferentrix, and have all left issue. The claim made here by the trustees is on behalf of the issue of these three predeceasing children. The question is, Whether these issue are entitled to take the shares which would have belonged to their parents? and that depends upon the construction of the clause which I have already referred to at length. The provision of this clause, with which we have to deal, directs the trustees to divide such share of the residue "among the said children or survivor of them then alive,"—that is, alive when the youngest attains the age of twenty-one years. Now, it must be observed here that this is a general family settlement. This fund is directed to be divided in equal shares among the children of his sister, and there is a clause of survivorship, the result of which is a conditional institution of the survivors in the shares of any children predeceasing the term of division. These circumstances appear to me sufficient to let in the condition *si sine liberis decesserit*, and to contrast this case with the one of *M'Call's Trustees*, just decided. This is in fact, I think, just the very case to subject the condition of survivorship to the other condition of *si sine liberis*. This is quite clear on the terms of the deed. The only difficulty arises from the expression used by the testator as to the disposition of the income accruing between the death of the liferentrix and the majority of her youngest child. It is provided that, upon the death of the mother, the income shall be equally divided among her children, until the youngest attains the age of twenty-one years, and no doubt the use of these words appears to exclude the issue of predeceasing children. But I am quite satisfied that the true interpretation of this provision is, that those who presumptively are to take the fee are in the meantime to share the income. To them, until the period of division comes, the income will be payable, and it would be difficult, I think, to put any other interpretation upon these words.

There was, however, another question raised, which requires a little more attention. The first two deceasers among Mrs Wright's children predeceased the testator, and therefore, when he died, there were only eight children of Mrs Wright's in existence. The first two predeceasers cannot therefore be taken into account at all, and there were therefore only eight who had any prospect of succeeding. But of these eight, one died so recently as 1870, and those three who died, leaving issue, all predeceased their mother, the liferentrix. Alice, the one who died in 1870, without issue, was the last to die, and the question arises, Whether the share of Alice goes to the four surviving children only, or whether the issue of the three predeceasers are entitled to come in for a share? Now, the principle upon which the cases of *Young* and *Graham* were decided, appears to me to be quite applicable to the present case. It was there held that, while under the *conditio si sine liberis* the issue of a predeceasing child were entitled to take the share which their predeceasing parent would have taken in his or her own right, they were not entitled to participate in the share of another predeceasing child, which was to go under a clause of survivorship to those who survived a certain specified period.

Here no child can take in his own right unless he survive the term of distribution, and it is to defeat this result that the *conditio si sine liberis* is introduced and applied. In the case of a child predeceasing the date of distribution, the share of that child shall go, according to the provisions of the deed, to the survivors, unless there is any principle of law to prevent it. Now, What does the deed say? That this fund shall be divided "among the said children, or the survivors of them then alive." If, then, the *conditio si sine liberis* were made to apply to Alice's share at all, it could only be in favour of Alice's own children, had she left any. But the proposal here is to apply it in favour of the issue of other children who predeceased both Alice and the liferentrix. Now, that is an application of the *conditio si sine liberis* for which I have heard no authority at all. I am therefore of opinion that the children of Mrs Loyd, Mrs Vennimore, and Alexander Wright are, each family of them, entitled to one-eighth part of half the residue, and that the four surviving children of Mrs Wright are entitled to one-eighth part in their own right, and also to one-fourth of the one-eighth which would have gone to their sister Alice, in virtue of their survivorship. The judgment of the Court, if your Lordships agree, will have to be framed in accordance with this view.

Lord Deas—The only difficulty that exists in the case is about the share of Alice; but, on the whole, I agree with your Lordship. I think in the case of *Graham's Trustees* I did not express any difference of opinion from the decision in the second branch of the case of *Young* v. *Donaldson*. The ground of my judgment in the case of *Graham's Trustees* was rather that the special terms of the deed took it out of the ruling of the previous case of *Young*.

Lord Ardmillan—I have no difficulty on the first question in this case, and think there is no need to repeat the views which your Lordship has already expressed.

Upon the remaining question we could not, in my opinion, decide otherwise than proposed by your Lordship, without going directly in the face of the decisions, or of the principle at least established by the decisions of the House of Lords in the case of *Young* v. *Donaldson*, and of this Court in *Graham's* case. In both of these cases it seems to me that the principle followed was that the survivance of the term of payment regulated the division. If the child or nephew does not survive the

term of payment, then he or his issue takes nothing, but for the *conditio si sine liberis*. But here it is not the survivance of the term of payment that is founded on as regulating the distribution; but, where neither party has survived that date, the children of the first predeceaser claim a share in the portion which would have gone to the other predeceaser who survived their parent, but died without issue before the term of payment came. It is impossible to contend, without shaking the authority of these two decisions, that this claim can be sustained.

Lord Kinloch—This case must be decided on the same general principles as are applicable to that of *M'Call*, just determined. I am of opinion that in this case an opposite result is to be arrived at, and the *conditio si sine liberis* given effect to.

Mr Samuel Aitken, the testator, died unmarried. His settlement is made in favour of his nearest relatives, and is a very marked expression of a conscious obligation to make a suitable provision for these. The primary direction of the settlement, after payment of debts and certain small legacies, is to divide the annual produce of the testator's entire estate into three equal portions. One of these is to be paid to his aunt Janet Aitken during her lifetime, to be applied for the maintenance of herself, the testator's sister Priscilla, his aunt Elizabeth Aitken, and his grandmother, all of whom seem to have resided together. Another was to be paid to the testator's father during his life. The remaining third was to be paid "to my sisters Margaret and Elizabeth equally, share and share alike, and their children equally *per stirpes* failing them; —that is to say, the children equally to succeed to their mother's share, failing the mother." Various provisions follow as to the effect to be produced, on this division of the annual proceeds, by the death of these various parties. And the ninth provision bears—"Upon the decease of the last survivor of my father, sister Priscilla, aunts Janet and Elizabeth, and my said grandmother, I appoint the annual produce of the residue of my estate to be equally divided betwixt my sisters Margaret and Elizabeth during their lives; and upon the decease of either of them, such deceaser's share shall be equally divided among such deceaser's children; and on the youngest child attaining majority, or twenty-one years of age, I appoint my trustees to divide among such children, or survivors of them then alive, the one-half of the residue of my estate; and they shall retain the other half for behoof of the surviving sister, to whom the annual produce of such half shall be annually paid; and at her decease such produce shall be divided equally amongst her children, until her youngest child attains the age of twenty-one years, when the trustees shall divide the said half equally among the said children, or survivors of them then alive." An after codicil confers some personal legacies, which do not affect the present question.

A controversy now arises as to the shares of three children of Margaret Aitken or Wright, who predeceased their mother, the liferentrix of one-half of the residue, leaving issue. The liferentrix now being dead, the question is, Whether the shares of these three children have passed to their issue, or have devolved on their surviving brother and sisters?

I am of opinion that the former of these is the true legal conclusion in the case. The fund was settled, evidently by way of provision, on the mother in liferent, and her children, or the survivors, in fee. I consider this to be precisely the case in which the law holds it to be the implied will of the testator that children should succeed to their parents' share in preference to surviving brothers and sisters. The children of the testator's sister were favoured as a class, and with no individual preference of one over another. Their maintenance was very clearly the chief subject in view—first through means of their mother's liferent, and afterwards through division of the produce amongst the children till the youngest attained twenty-one. I have no doubt that, under the provisions of the settlement, all the children surviving the mother shared in the annual division, even though some of them should die unmarried before the youngest attained twenty-one, simply because so the will of the testator prescribes. If any of them died before their mother, I have equally little doubt that the implied will of the testator must be held to carry their share to their children, in preference to the surviving brothers and sisters. I consider this to be a very clear and ordinary exhibition of the application of the *conditio si sine liberis*. Its application arises out of the simple fact that the testator was here providing for certain near relations as a class, and providing for them out of the feeling of a moral obligation so to do; in which case all the presumptions of affection are in favour of the children of any one of them taking in room of the parents, and not being excluded for the benefit of their surviving uncles and aunts.

I am therefore of opinion that the first question put to us must be answered in the affirmative. But a subordinate question has been raised before us, viz.—Supposing the children to come in place of their parent, whether they are entitled to any more than the parent's proper share as one of ten children, and are not excluded from all participation in the shares belonging (as assumed) to three children who predeceased their mother without issue. Of these three children, two, Jane and Bertha, predeceased the testator; the third, Alice, lived till 1870. It is argued that the shares of these predeceasers, or at all events the share of Alice, passed by accretion to the brothers and sisters surviving the widow, exclusive of the children taking under the *conditio si sine liberis*. And reference has been made to some recent authorities as deciding that children so taking only take the parent's proper share, and not that which accresced by survivorship to the parties alive at the date of vesting.

I am of opinion—though in this having the misfortune to differ from your Lordships—that there is no good ground on which to limit the right of the children as is proposed; and that the present case does not afford *termini habiles* for applying the doctrine of the authorities referred to. In these other cases the right was given to certain individuals *nominatim*, and the share of a predeceaser without issue accresced by virtue of an express provision in favour of survivors. Thus, in the leading case of *Donaldson's Trustees*, the provision was that the estate of the testator was to be paid or accounted for "after the death of the last liver of me and my said wife, equally to and among John Macdougall, lieutenant in the Honourable East India Company's Service, at Madras; William Macdougall, indigo planter at or near Calcutta, sons of my late niece Mrs Catherine Donaldson or Macdougall; Young or Thomson, wife of Dr

Thomson, physician in Perth; Young or Richardson, wife of Dr Richardson, physician or surgeon in the Honourable East India Company's Service in Bengal; and Eliza Young, lately residing in Perth, now wife of Allan Cuthbertson, accountant in Glasgow, all children of the late Mrs Elizabeth Donaldson or Young, equally or share and shares alike, and to their respective heirs or assignees; declaring that if any of the residuary legatees shall die without leaving lawful issue before his or her share vest in the parties so deceasing, the same shall belong to, and be divided equally or share and share alike, among the survivors of my said grandnephews and grandnieces equally." Another grandnephew, Thomas Young, was afterwards added to the number of those thus specifically called. Thomas Young died before the widow, leaving a son, John Sawford Young; and whilst it was held that by force of the *conditio si sine liberis* the son became entitled to his father's own proper share, it was decided that the share of another grandnephew, William Macdougall, who had predeceased without issue, went by force of express destination to the survivors at the date of the widow's death. It was so determined in conformity with a series of previous decisions, of which some Judges doubted, but which was held to fix the point beyond the reach of argument.

The more recent case of *Graham's Trustees* differed as to the terms of the deed, which were very peculiar; but involved the same specialty of a destination to parties called *nominatim*, with an express conditional institution in favour of the survivors.

In the present case there is nothing of this kind. The provision is not in favour of individuals called *nominatim*, with an accretion expressly declared in favour of survivors at a particular date. It is in favour of a class, and of the survivors of that class alive at a period mentioned. The survivors take in their own right, not by virtue of any declared accretion of a predeceaser's share. The predeceasers without issue were simply in the position of never having right at all under the terms of the instrument. Thus, Alice Wright, who predeceased her mother, had no right given her by the deed, and no right accresced from her to any one. Whether she survived any of her brothers or sisters or not seems to me utterly immaterial, for the survivorship of the deed was not of one of the brothers or sisters over the others during the life of the mother; it was survivance of the mother herself. The death of Alice gave no right to her surviving brother and sisters. They only acquired right by surviving the mother, and their right was then a direct one in their own persons by virtue of such survivance. All this, I think, arises directly out of the terms of the deed; and it is by these, I think, the case must be ruled, as I think it is on the difference of phraseology in these material respects that the decisions in the other cases must be held rested. The difference of phraseology is, in such a case, the all in all. The present case, as I view it, does not comprise any question as to the share of a predeceaser without issue, for no such share ever existed. The entire question lies between the survivors taking in their own right and the children of predeceasers claiming to take in room of the parent. Whenever the children are found entitled to take, there is, to my mind, no doubt as to what it is they shall take. It is just the equal share which the parent, if surviving, would have taken with the actual survivors. There is no question as to an accresing share, for no accresing share has existed.

In this view, I think the second question should be answered to the effect of declaring that the fund must be divided into seven shares, equally appropriated to the four surviving children, and the issue *per stirpes* of the three who predeceased leaving children.

Agent for the First Parties—John Auld, W.S.
Agent for the Second Parties—John T. Moubray, W.S.

Friday, December 22.

JAMES WYLIE *v.* THE HERITABLE SECURITIES INVESTMENT ASSOCIATION (LIMITED).

Process—Sheriff-court — Removing — Competency — Bond and Disposition in Security—Rights of Creditors—Power to Remove.

Where there were inserted in a bond and disposition in security two clauses, the one entitling the creditors, upon any of the monthly instalments of the loan falling into arrears for two months, to remove the debtor and his tenants from the possession and occupancy of the subjects, and to enter into possession of them themselves, and that one month after intimation of their intention to do so, made by letter under the hand of their manager, without any warning or legal process whatever; and the other clause, declaring that upon the same failure to pay for two months, and one month intimation, as aforesaid, "all interest in and right and claim to the said property competent to the debtor should be forfeited *ipso facto*," and the creditors should be entitled to sell forthwith, "without farther premonition or other process of law," any law or practice to the contrary notwithstanding:—

Held (diss. Lord Ardmillan), on appeal, in a summary petition for removing in the Sheriff-court, founded upon the first of these clauses, against the debtor, who was in the natural possession of the subjects, that the action was incompetent in the Sheriff-court, because decree in the removing could not be given without deciding that the obligation in question was valid and effectual, and without determining several other questions of heritable right which were proper subjects of a declaratory action in the Court of Session; and because it was incompetent for private parties to invest a judge with a jurisdiction against the law.

Opinion by Lord Cowan, that it is illegal for parties by private paction to dispense with the established executorials of the law, and that therefore the clause in question was illegal and invalid.

Opinion by Lord Benholme, that the action was incompetent in the Sheriff-court as an "extraordinary removing."

On April 18, 1867, James Wylie, grocer and spirit merchant in Armadale, near Bathgate, granted to the Heritable Securities Investment Association (Limited) a bond and disposition in security over his premises there for the sum of £550 sterling. By this bond and disposition he bound himself, his heirs, executors, and successors