equivalent indispensable. If she does not do this her only remedy seems to be revocation of a donation, and a claim against the husband.

Of course I am not now dealing with cases where the wife's act has been obtained by force or by fraud, or where there are grounds for challenging the grant as not her own act and deed. These cases have their own appropriate remedies.

The Court adhered.

Counsel for Pursuers — Kinnear — Guthrie. Agent—J. Duncan Smith, S.S.C.

Counsel for Defender—M'Laren—Blair. Agent —John Latta, S.S.C.

Tuesday, March 20.

SECOND DIVISION.

SPECIAL CASE—GAULD'S TRUSTEES AND OTHERS.

Succession—Conditio si sine liberis.

A testator gave a liferent of all the money of which he might die possessed to his brother, after whose death the capital was directed to be divided equally among the lawful children of the testator's living and deceased sisters "who may be alive at the time." All the children of the sisters survived the testator, but several of them predeceased the liferenter, leaving issue.—*Held* that by virtue of the *conditio si sine liberis* the issue were entitled to the share which their deceased parents would have taken.

George Gauld died in 1852, leaving an "assignation and settlement" whereby he appointed his brother John Gauld his sole executor, and gave him the liferent of all the money of which he might die possessed. On the death of John Gauld the testator provided that the whole money should be "divided equally among the lawful children of my living and deceased sisters who may be alive at the time, share and share alike, namely, the children of the late Mrs Peterkin; the children of Mrs Gauld, in Glenbeg; the children of Mrs Duncan, Corrie; the children of Mrs George, in Mains of Drummuir; and Alexander Carmichael, presently student at King's College, Aberdeen, the surviving son of my late sister Mrs Carmichael."

John Gauld was confirmed executor and enjoyed the liferent provided to him, until his death in 1876.

George Gauld was survived by all the children of his sisters named in his settlement, and by Alexander Carmichael, but James Peterkin, a son of Mrs Peterkin, William Duncan, a son of Mrs Duncan, and the said Alexander Carmichael, predeceased John Gauld, leaving issue.

The question for the Opinion and Judgment of the Court in this case was Whether the children of George Peterkin, William Duncan, and Alexander Carmichael were objects of the residuary bequest by George Gauld in favour of the lawful children of his living and deceased sisters which might be alive at the period then designated.

Authorities—*M'Call* v. *Dennistoun*, Dec. 22, 1871, 10 Macph. 281; *Blair's Executors* v. *Taylor*, Jan. 18, 1876, 3 R. 363, *ante* vol. xiii, p. 217; *Gillespie* v. *Mercer*, Mar. 8, 1876, 3 R. 561; *Hamilton* v. *Hamilton*, Feb. 8, 1838, 16 Sh. 478, 10 Jur. 263; *Rhind's Trustees* v. *Leith and Others*, Dec. 5, 1866, 5 Macph. 104: *Wishart* v. *Grant*, June 16, 1763, Mor. p. 2310; *Wallace* v. *Wallaces*, Jan. 28, 1807, Mor. Clause App. No. 6; *Christie* v. *Patersons*, July 5, 1822, F. C. and 1 Sh. 498; *Robb* v. *Thomson*, July 10, 1851, 13 D. 1326, 23 Jur. 619.

At advising—

Lord Ormidale—The question to be answered in this case relates to the application of the condition *si sine liberis decesserit*, and is attended with some difficulty, arising chiefly I think from what at first sight appears to be a conflict of decisions on the point.

The testator George Gauld, by what is called an assignation and settlement, constituted and appointed his brother John Gauld his sole executor, and assigned to him his whole moveable estate, for the purposes, first, of paying his debts, deathbed and funeral expenses, and, secondly, in order that he, the executor, should have the liferent enjoyment of the residue. And the testator goes on to declare it to be his will, that, after the death of his brother, the capital, after deducting necessary expenses, should be "divided equally amongst the lawful children" who might "be then alive" of his five sisters whom he names, some of them being living and others deceased.

It was assumed in the argument, and rightly I think, that the date to which the testator refers as that when the children of his sisters should be alive is the period of distribution, after the death of his brother the liferenter. The only disputed question was whether, although all his nephews and nieces, that is to say all the children of his sisters, survived the testator, yet as some of them died before the liferenter leaving issue, are the issue to be held entitled, as in place of their deceased parents, to a share oi the testator's estate, in virtue of the maxim *si sine liberis decesserit*.

It is certainly not enough to exclude the application of the maxim that the parties claiming the benefit of it are nephews and nieces of the testator, for the contrary may be taken as settled law; and this was not disputed. The only contested point was whether the testator by referring, as he expressly does, to the children of his sisters who "may be alive" at the period of distribution, has not so limited the objects of his bounty as to exclude all room for that presumed will which is the foundation of the maxim. It is certainly not sufficient to exclude the maxim that the words of the testator are not enough of themselves to effect that which without it could not be entertained, for the very object of the maxim is to supply what is not expressed, but what, in accordance with certain natural and equitable principles, it may be fairly presumed the testator would have expressly provided for had he had present in his mind at the time he executed his settlement the precise circumstances as they afterwards arose in relation to the objects of his bounty. Now certainly there is nothing to indicate in the present case that the testator, would,

if he had dealt expressly with the matter, have left that part of his estate which he destined to the children of his sisters who, although they had survived himself, had died before the period of distribution leaving issue, to the surviving children, to the exclusion of such issue. On the contrary, it is only natural and equitable to presume that the testator would have preferred the issue of such of the children of his sisters who had predeceased the period of distribution as coming into their parents' place, to their surviving aunts or uncles; and in order to admit of this equitable view, it is not necessary that there should be on the part of the testator words directly expressive of such a preference. It is sufficient that there is nothing to exclude the condition which the law presumes, although it is not expressed, that in certain circumstances a child was intended to take, not in its own right, but in the place of a deceased parent, as institute or legatee.

The principles I have now referred to have been repeatedly given effect to by the Court in circumstances which cannot, I think, be distinguished from the present. I refer in particular to the cases of *Wallace* v. *Wallaces*, *Christie and Others* v. *Paterson*, and *Robb and Others* v. *Thomson and Others*. It is true that the second of these cases has been questioned as an authority in some respects, but not, I think, in regard to the general principles with which we are at present dealing; and at any rate the other two cases stand, so far as I am aware, unimpeached. The case indeed of *Wallace* v. *Wallaces* is referred to by the Court in the other two with marked approval, and as its similarity to the present, if not its identity, so far as all the essential circumstances are concerned, appears indisputable, and was not denied, I must hold it to be conclusively in point.

But then the case of *M'Call and Others* v. *Dennistoun and Others* was pressed upon the consideration of the Court as an adverse and the most recent authority. It appears to me, however, that this case when closely examined is distinguishable in its circumstances from the others to which I have referred, as well as from the present, and must be held to have been governed by considerations which have no place in these other cases or in the present. In *M'Call's* case the question related to a specific legacy of £1000, bequeathed, not to the children generally as a class as the testator's sisters are here, but to "each of the children of my late brother Samuel M'Call who shall be alive at the period of my wife's decease, or of my decease in case of my surviving her." Accordingly, I find that the Court in deciding *M'Call's* case dealt with it as relating to a specific legacy bequeathed conditionally upon the legatees' survivance of a certain event. Thus, the Lord President expressly says that he held the application of the maxim *si sine liberis decesserit* was excluded, in respect the legacy was clearly made conditional on each child surviving a certain term; and the other Judges appear to have adopted the same view. But in none of the opinions, and they are reported at considerable length, do I find any observation to the effect that the decisions in the previous cases of *Wallace* v. *Wallaces*, *Christie* v. *Paterson*, and *Thomson's Trustees* v. *Robb*, although all of them are referred to as having been cited in the argument, were to be held as impugned as authorities in the circumstances in which they occurred.

I am therefore, for the reasons I have now stated, of opinion that the question submitted to the Court in the present case ought to be answered in the affirmative.

Lord Gifford—I am of the same opinion. In the present case all the elements combine and coincide which favour the natural and implied condition *si sine liberis decesserit* in family settlements, a condition under which, if the immediate legatee predeceases the term of vesting, leaving lawful issue, such issue will take their parents' share. No such presumption applies in the case of a stranger legatee, but here the legatees are the whole nephews and nieces of the testator described as "the lawful children of my living and deceased sisters." The testator then, in order to avoid any possible mistake, proceeds to enumerate these children by families, as the children of Mrs Peterkin, the children of Mrs Gauld, the children of Mrs Duncan, the children of Mrs George, and the son of Mrs Carmichael. This last child is named, as he happened to be the only child of Mrs Carmichael, who was then deceased, but this does not derogate from the generality of the class who are all called equally, share and share alike, to the succession. Then the bequest is one of residue, which is to divide equally among all the members of the class called, and it is distinguished in this respect from the case of a simple fixed and pecuniary legacy to a nephew or a niece by name, with a condition making the legatee's survivance of a particular date a condition of the legacy. Yet again, the expression used is the whole children of my living and deceased sisters, and the word children, where it is not limited or confined as by the word "immediate" or otherwise, is very easily held to include grandchildren where immediate children have deceased, and where the provision flows from an ascendant or from one *in loco parentis* to the legatees. An uncle holding the position which this testator did to all his sisters' children has always been held as *in loco parentis*, and unless the case of *Wallace*, and a considerable number of cases following it, are now to be overruled, I think that the implied condition *si sine liberis* must be given effect to in the present case, and the question put answered in the affirmative.

Lord Justice-Clerk concurred.

The Court answered the question in the affirmative.

Counsel for First and Second Parties—M'Laren. Agents—Rhind & Lindsay, W.S.

Counsel for Third Parties—Moncreiff. Agent—John Carment, S.S.C.