affecting the validity of that claim, the examination would soon come to be merely a wrangle among the creditors. So in this case, when the one party had exhausted their ingenuity in casting doubt on the claims of the Credit Company, the Company would come and bring a charge against the party who had opposed them; and so it would really come to be a series of duels between the creditors conducted under the name of an examination.

As to the special circumstances of the case, there are three questions recorded, and the line of examination is clearly nothing but an investigation into the merits of the claim. There are elements in those questions which might, had the questions been differently put, have formed a competent line of inquiry. Had it been asked, "You have received money from the Credit Company. What have you done with it?" the question would have been legitimate. But that is a totally different line of inquiry to the one actually taken, and it has a different object in view, for it is not disguised that the object was to find out whether the claim of the Credit Company is well founded. That object is not legitimate, whereas the other was. On that distinct ground the Lord Ordinary has based his interlocutor, and I consider his conclusion the right one.

Lords Deas, Mure, and Shand concurred.

The Court adhered.

Counsel for Creditors (Reclaimers)—Fraser—Rhind. Agent—W. Officer, S.S.C.

Counsel for the Trustee (Respondent)—Maclean. Agents—Lindsay, Paterson, & Co., W.S.

Saturday, November 10.

SECOND DIVISION.

SPECIAL CASE—NAIRN'S TRUSTEES *v.* MELVILLE AND OTHERS.

Succession—Conditio si sine liberis—*Heritable and Moveable—Implied Intention.*

A testator conveyed his estate to his four children in liferent, and further provided that on the decease of the longest liver of them it should be made over to the child or children of the liferenters "who shall then be surviving, *per stirpes*, in four equal portions or shares, the child of each of my said son and daughters, or in the event of there being more than one, the children of each equally among them, receiving one share." One of the testator's grandchildren, an only child, predeceased the liferenters, leaving a family. *Held* that the share of the estate, now entirely consisting of heritage, which would have fallen to him had he survived the liferenters was divisible among all his children, it being clearly the intention in the testamentary deed that an heir-at-law should not succeed to the exclusion of other children.

Observed that a direction in a testamentary deed to divide an estate which consists entirely of heritage among children indicates an intention to realise.

By trust-disposition and settlement executed by James Nairn, residing in Kirkcaldy, dated 14th February 1845, and recorded 4th February 1847, he disponed all his heritable and moveable estates to certain trustees, with sundry exceptions, and appointed his trustees to be his executors.

The third purpose of the trust was "that the rents and produce of the remainder of my said means and estate shall be paid in equal portions to Michael Nairn, my son, Isabella Nairn or Melville, Agnes Nairn, and Margaret Nairn, my daughters, share and share alike, and failing any of them without children, to the survivor or survivors of them equally, share and share alike, declaring that if any of my said son or daughters, Isabella, Agnes, or Margaret, shall die and leave a child or children, the child, and in the event of there being more than one the children, of each equally shall receive the same share of said rents and produce that would have fallen to the parent if alive," &c.

The fourth purpose provided "that on the decease of the longest liver of my said son and three daughters last named, my said trustees shall convey and make over the whole remainder of my said means and estate to the child or children of my said son Michael and my said daughters Isabella, Agnes, and Margaret, who shall be then surviving, *per stirpes*, in four equal portions or shares, the child of each of my said son and daughters, or in the event of there being more than one the children of each equally amongst them, receiving one share, and in the event of any of my said son or daughters last named dying without leaving a child or children, the share destined to the child or children of such predeceaser shall in like manner be divided amongst the child or children of those who shall have issue *per stirpes* as aforesaid."

The truster died on 19th October 1845, leaving no more moveable estate than was sufficient to pay his debts and the expenses of the trust. He left heritage of the value of about £161. 10s. a-year. The first parties in this case were his trustees.

The truster was survived by three of his children, Michael Nairn, Agnes Nairn, and Margaret Nairn. Isabella Nairn or Melville had predeceased him, leaving an only child, the Reverend Charles Melville. After the truster's death the rents of the trust-subjects were collected and paid equally to Michael Nairn, Agnes Nairn, Margaret Nairn, and the Reverend Charles Melville. Michael Nairn died in 1858, and the share of the rents subsequently falling to him had since been paid over to his children equally. Neither Agnes Nairn nor Margaret Nairn was ever married. After Margaret's death, which took place on 1st January 1874, the rents of the trust-subjects were paid equally to Agnes Nairn, the Reverend Charles Nairn Barker Melville, and the children of Michael Nairn. The Reverend Charles Melville died testate on 25th December 1875, and Agnes Nairn died testate on 17th August 1876, and in consequence of her death the residue of the trust-estate fell now to be conveyed and divided in terms of the foresaid fourth trust-purpose.

The eldest son and heir-at-law of the Reverend Charles Melville was Charles James Melville, aged fifteen, who was the second party to this case. His other children, along with their *curator bonis* and factor *loco tutoris*, were the third parties.

Agnes Nairn having been the longest liver of the truster's children, the trust-estate fell to be conveyed and made over on her death, in terms of the fourth purpose of the trust-disposition and settlement, to and in favour of the child or children of the truster's said children *per stirpes*. The parties who claimed under the fourth trust-purpose to succeed to the fee of the trust-estate were (1) the children of Michael Nairn, and (2) the eldest son and also the other children of the Reverend Charles Melville, and each of said families claimed the one-half of the trust-estate.

A question arose with respect to the share, or one-half of the trust-estate, which would have fallen to the Reverend Charles Melville had he survived the said Agnes Nairn—as to whether, under the fourth trust-purpose, on the death of Agnes Nairn the share vested in his son and heir-at-law the second party to this case? or whether it vested on that event in the whole children of the said Reverend Charles Melville, equally among them?

The following questions were submitted to the Court:—"Does the one-half share of the residue which, under the terms of the fourth purpose of the said trust-disposition and settlement, would have fallen to the said Reverend Charles Melville had he survived the said Agnes Nairn the longest liver of the truster's children, pertain and fall to be conveyed to the said Charles James Melville as eldest son and heir-at-law of his said father? or, Does the said share pertain and fall to be conveyed to the whole children of the said Reverend Charles Melville, equally among them, as at the death of the said Agnes Nairn?"

Argued for the second party—The parties here were agreed that the *conditio si sine liberis* applied, and therefore the share in dispute went to the Reverend Mr Melville's children. But it did not apply equally in favour of all the children without regard to the nature of the property; and the whole estate being heritage, it must, in conformity with the case of *Grant's Trustees* v. *Grants and Others*, July 2, 1862, 24 D. 1211, go to the eldest son.

Argued for the third parties—The case of *Grant's Trustees* was inapplicable, for in that case the beneficiary, whose predecease of the term of vesting gave rise to the dispute, was a single individual named, and he was the sole beneficiary in the provision. In the present case the beneficiaries were a class (the testator's grandchildren *per stirpes*), and were unnamed. The testator had overlooked the contingency that any of the grandchildren might predecease the term of vesting leaving children, but the language of the provision implied that he did not wish one child of a family to obtain any preference over the others. In all the reported cases where the *conditio si institutus sine liberis decesserit* had been held applicable, it had been assumed by all parties that where the provision was in favour of a class (as, for example, children *nascituri*), the whole children of the beneficiary predeceasing the term of vesting were entitled to take equally—*Mowbray* v. *Scougall*, July 9, 1834, 12 S. 910; *Thomson's Trustees* v. *Robb*, July 10, 1851, 13 D. 1326; *Walker* v. *Park*, Jan. 20, 1859, 21 D. 286; *Halliday*, Nov. 9, 1869, 8 Macph. 112. Even in the case of a provision in favour of *personæ prædilectæ*, it was assumed prior to the case of *Grant's Trustees* that the *conditio* operated in favour of the children equally—*Nelson* v. *Baillie*, June 4, 1822, 1 S. 458. Besides, in the present case, which was one of mixed succession, it might be held that there had been a constructive conversion of the heritage, because although there was no direction to sell there was an implied direction to sell, for there was a direction to divide the residue among the children *nascituri* of the testator's four children—a class so numerous that the division could not take place without a sale.

At advising—

Lord Justice-Clerk—This Special Case asks the question, Whether the half share of the residue of the estate of James Nairn which would have fallen to the Rev. Charles Melville had he survived Agnes Nairn, the longest liver of the truster's children, fell to be conveyed to the eldest son of the Rev. Mr Melville as his father's heir-at-law, or to be divided equally among Mr Melville's children?

That is the only question which we have to decide. The facts are simple enough. The testator, after providing for payment of his debts and an annuity to his daughter, by the third and fourth purposes of his trust-deed directs—[*reads as above*].

The Rev. Charles Melville was the child of one of the daughters (Isabella) of the testator. He died before the fund was divisible, leaving a family. The residue is now entirely heritage, and the question arises whether, because of its being heritage, the share which fell to Mr Melville is to go to his eldest son or to be divided among all the children?

There is here no such question as arose in the case of *Grant*, July 2, 1862, 24 D. 1211—in this way, that here there is no question that the children of the predeceased child are to succeed; the only question is whether the share is to go to one of them or to be divided? *Grant* was decided as it was because there was nothing in the will of the testator to show that devolution on children was to be preferred to the succession of the heir-at-law. And secondly, as to the heritage, it was held that the *conditio si sine liberis* did not operate in favour of all the children equally without regard to the nature of the property, but left the heritage to go to the eldest son and the residue to the younger children. This conclusion was arrived at on the same grounds as the first point, the presumed intention of the testator, viz., that the principle *si sine liberis* applied, and that there was nothing in the will to indicate that the heritage was to lose its character.

I presume that this decision is right, though I observe that Lord Curriehill had doubts, and the conclusion I have come to in this case in no way affects that of *Grant*. In the present case the whole tone of the settlement implies that the whole children as a class were to take; and secondly, that so far as the residue took the form of heritage, it was the intention of the testator that it should be sold and divided. This is quite clear from the fourth purpose of the trust.

Nothing could be more clearly expressed than that the last thing the testator intended was that the eldest child should succeed to the exclusion of the rest. The testator says expressly to the contrary; and this, I think, is quite enough for the decision of the case. The case of *Grant* is in

some respects the converse of the present. The conception of it was that the heirs were to succeed, and one strong thing against the contention of Robert Grant's children was that nothing was said about his heirs in regard to the Denham Green property. Here it is exactly the reverse.

But there is another ground upon which the same result is arrived at; and that is, that it is impossible to divide the heritage into four parts, of which each child is to receive a share. I think this is as clear an indication of an intention to realise as I have seen. We have more than once held that an heritable subject will not be divided, but that when such an estate is to be divided among children this is an indication of an intention to realise.

On these grounds I answer the question put to us to the effect that the share falls to be conveyed to the whole of the children.

Lord Ormidale—The question in this case is whether the eldest son and heir of the Reverend Charles Melville, who was the grandson of the testator, is entitled exclusively to the property in dispute, or whether all his children are equally entitled to it?

It is assumed by the parties that the *conditio si sine liberis* applies. It is upon this assumption that the case is submitted to the Court for opinion and judgment; and it is on this footing alone that the Court is asked to answer the disputed question. I have not therefore considered the question of the application of the *conditio* at all, but assumed that it does apply, the opposite view being excluded by the terms of the case.

Assuming, then, that the *conditio* applies, the question which remains is whether the whole of the property in dispute must be held to pertain and belong to the eldest son and heir-at-law of the Reverend Mr Melville, or to him and the other children of that gentleman equally among them. Now, in connection with this question it must be kept in view that the testator has himself declared that the property should go, in the first instance, to his own four children equally, and on their decease to their children in four equal portions. He has indicated no predilection in favour of the eldest son and heir. This being so, I cannot avoid the conclusion that the second alternative of the question submitted must be answered in the affirmative. I come to this conclusion, although not without some difficulty, in respect of what I think I am entitled to imply and infer to have been the intention of the testator; and I come to this conclusion without impinging on the authority of the case of *Grant* v. *Grant's Trustees*, July 2, 1862, 24 D. 1211, and without having any desire to do so. In that case there was no such manifestation of the testator's intention as we have in the present case, for there, contrary to what there is here, the testator's predilection was indicated in favour, not of children generally, but of the heir.

The result is that, in my opinion, the second alternative of the question submitted in this Special Case ought to be answered in the affirmative.

Lord Gifford—I am of the same opinion. This case is not parallel to *Grant*, and I have no intention to disturb the decision in *Grant's* case in the least. What are the circumstances here? The estate is entirely heritage, and is disposed of thus—The four children of the testator were the liferenters, and the grandchildren were the beneficiaries. It is assumed that each of the four children might have families, more than one child each, and the provision is that the estate should go to them, not as heritable and moveable, but it is expressly stated "the child of each of my said son and daughters, or in the event of there being more than one the children of each equally among them, receiving one share." Here the governing principle of succession is equal division among children. Nothing is said about great-grandchildren, but the same must apply to them as to grandchildren.

Upon that short ground—the intention of the testator and the ordinary rule of law—I am of opinion that the question must be answered as your Lordships propose; and I must say that I think the case of *Halliday*, November 9, 1869, 8 Macph. 112, quoted by the counsel for the third parties, is much in point.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find that the one-half share of the residue in question falls to be conveyed to the whole children of the Reverend Charles Nairn Barker Melville, equally among them, as at the death of Agnes Nairn; and appoint the expenses connected with the Special Case to be paid out of the estate, and remit to the Auditor to tax the same and to report; and decern."

Counsel for Second Parties—M'Laren. Agents—Watt & Anderson, S.S.C.

Counsel for Third Parties—Black. Agents—Morton, Neilson, & Smart, W.S.

Saturday, November 10.

SECOND DIVISION.

THE CONSOLIDATED COPPER COMPANY OF CANADA (LIMITED) AND LIQUIDATOR *v.* PEDDIE AND OTHERS.

Public Company—Settlement of List of Contributories—Allotment of Shares—Suspensive and Resolutive Condition.

An allotment of shares of a limited company, the prospectus of which had borne that mines were to be purchased for the purposes of the company, was made in the following terms:—"Sir,—I beg to inform you that you have been allotted shares in this company. Undernoted you will find statement showing disposition of the amount of deposit paid by you. . . . After this payment no further call will be made till the deputation of directors shall have reported on the mines. If the board resolve not to purchase the mines, the money will be returned to the shareholders without deduction." The applications for shares had been unqualified by any condition or contingency. The mines were not purchased, and the money was returned to the applicants. In a