of deathbed. Should such a case arise for consideration, we shall have to consider whether the enacting words can receive aid from the preamble, or whether they must be taken as they stand. No such case is raised here, because under the deed of settlement produced and printed the trustees of Mr Coutts have received by deed of gift, assignation, and disposition the sum of £6000 sterling, whereof it is stated the testator handed to them £3200 in cash. That deed of gift is a good title to the money, and may be pleaded in answer to a demand upon the trustees to account. Under the old law the effect of the deed might be taken away by reduction *ex capite lecti*. But here the statute comes in to fortify the title by taking away the right of challenge *ex capite lecti*, and therefore the case of the pursuer under the second plea-in-law entirely fails.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Galbraith Miller. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for the Defenders—H. Johnston. Agent—Andrew Wallace, Solicitor.

Tuesday, December 16.

FIRST DIVISION.

HASTINGS AND OTHERS *v.* CHALMERS.

Public Service — Evidence — Diligence for Recovery of Documents—Report by Police Officer to Procurator-Fiscal—Confidential Communications — Reparation — Illegal Arrest.

A sergeant of police having arrested certain persons, thereafter made two separate reports to the procurator-fiscal relative to the circumstances of the arrest. In an action of damages against the sergeant for illegal arrest an application was made for the recovery of the reports that they might be used in evidence. Motion *refused.*

This was a motion in the Single Bills incidental to an action of damages raised by the pursuers against the defender, who was at the time of the alleged illegal apprehension complained of a sergeant in the Linlithgowshire police. The pursuers had been arrested by the defender upon 4th June 1889, the defender acting at the demand of James Charles, master of the s.s. "Tay," in which vessel the defenders were seamen; and the defender thereafter made two separate reports to the procurator-fiscal relating to the circumstances of the arrest. The motion was for the recovery of these reports, that they might be used in evidence before the jury which was summoned to try the action of damages.

The pursuers in supporting the motion relied upon the authority of *Henderson* v. *Robertson*, 15 D. 292; Dickson on Evidence, sec. 1655 (vol. ii. 907); *Boag* v. *Gillies*, 5 Deas & And. 434.

The defender was willing that the motion should be granted, but appearance was made for the Lord Advocate, who stated that while no harm to the public service was to be apprehended from the recovery of the reports referred to in this instance, yet that he objected upon general grounds to such confidential communications being recovered.

At advising—

LORD PRESIDENT—We refuse this motion on the ground that the reports sought to be recovered are confidential communications by one officer in the public service to his superior officer in the same department.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

Counsel for the Pursuers—W. C. Smith. Agent—W. B. Rainnie, S.S.C.

Counsel for the Lord Advocate—Wallace, A.D. Agent—Crown Agent.

Thursday, December 18.

SECOND DIVISION.

[Lord Trayner, Ordinary.

HAY *v.* TWEDDLE AND OTHERS.

Succession — Vesting — Conditio si sine liberis decesserit.

By *inter vivos* deed two sisters disponed to themselves and another sister in liferent, and to their three nieces *nominatim*, "and the survivors or survivor of them in fee," certain heritable property which only formed a part of the estate of the granters. The deed bore to be granted "for the love, favour, and affection" which the granters had for each other, for their sister, and for their nieces. Infeftment followed in terms of the deed. Thereafter one of the three nieces died intestate without having altered the destination in the deed. She was survived by a son. *Held* that he did not succeed to his mother's share of the fee, as there was no room for the application of the *conditio si sine liberis decesserit.*

By *inter vivos* deed dated 3rd March 1859 two sisters—Mrs Dickie and Miss Crichton —disponed to and in favour of themselves and another sister in liferent, and to their nieces, Julia (Mrs Tweddle), Dorothea (Mrs Howat), and Katherine (Mrs Costine), "and the survivors or survivor of them in fee," certain heritable property in Castle Street, Dumfries. The deed bore to be granted "for the love, favour, and affection" which the granters had for each other, for their sister, and for their nieces. Sasine was duly expede in terms of the said deed, and infeftment taken thereupon on 7th April 1859.

In April 1879 Mrs Howat died intestate without having altered the destination contained in the deed. She was survived by a son, William Howat junior, in pupillarity.

In September 1879 Mrs Costine died, leaving a trust-disposition and settlement by which she directed her trustees to divide the residue of her estate equally *per stirpes* among her brothers and sisters or the survivors of them or the heirs of their respective bodies.

On 14th May 1886 Mrs Dickie, who had survived the other two liferentrices, died. After her death the rents of the heritable property were paid, one-third to Mrs Tweddle, one-third to William Howat junior, and one-third to George Tweddle, as trustee under the trust-disposition and settlement of Mrs Costine.

In these circumstances Mrs Bessie Burnside or Crichton or Hay, as trustee under the will of her deceased husband Horatio Augustus Crichton, one of the beneficiaries under the trust-disposition and settlement of Mrs Costine, brought an action against Mr Tweddle, Mrs Tweddle, William Howat junior, and his father William Howat, as his tutor, in which she sought, *inter alia*, to have it declared that Mrs Costine was at the time of her death vested in and heritable proprietrix of one-half of the heritable property before mentioned.

The pursuer pleaded—"(1) The share of the property referred to in the summons which was destined to Mrs Howat having upon her death passed to the other fiars, decree in terms of the declaratory conclusions of the summons should be pronounced."

To this action William Howat, as tutor-at-law for his son William Howat junior, lodged defences, and pleaded—"(3) The said William Howat junior, as heir-at-law of his mother the late Mrs Howat, acquired right to her share of the property in question in virtue of the *conditio si sine liberis* implied in the destination in the disposition of 1859."

On 28th June 1890 the Lord Ordinary (TRAYNER) pronounced the following interlocutor:—"Finds that the deceased Katherine Hay Crichton or Costine was at the time of her death vested in and heritable proprietrix of one-half *pro indiviso* of all and whole the subjects described in the conclusions of the summons: *Quoad ultra*, continues the cause, and grants leave to reclaim.

"*Opinion.*—By *inter vivos* deed dated 3rd March 1859 the now deceased Mrs Dickie and her sister Miss Crichton, then *pro indiviso* proprietors of certain heritable subjects in Dumfries, conveyed the same to themselves and another sister in liferent, and to their nieces Julia, Dorothea, and Catherine *nominatim*, 'and the survivors or survivor of them in fee.' On this conveyance the infeftment followed in favour of the whole disponees for their respective rights of liferent and fee, the instrument of sasine being recorded on 7th April 1859. Dorothea (afterwards Mrs Howat), one of the fiars, died in April 1879 without leaving any testamentary writing disposing of her estate, and without having altered the destination in the disposition above referred to. The defender William Howat is her son. Katherine (Mrs Costine), another fiar, died in September 1879 leaving a trust-settlement disposing of her whole estate, heritable and moveable, and the pursuer represents one of Katherine (Mrs Costine's) residuary legatees. The first question, and the only one to be decided at this stage of the case is, whether William Howat is entitled to one-third of the subjects conveyed by the disposition of 1859 as heir of his mother? It is admitted that he cannot successfully claim any share of the subjects under the destination in that conveyance as it stands, for that destination is in favour of three disponees named, 'and the survivors or survivor of them' alone. But he maintains that that destination is to be read as implying a conditional institution in favour of the heirs of each fiar to the share which each fiar took under it.

"I am of opinion that this is not a case for the application of the *conditio si sine liberis, &c.* So far as I know, this is the first case in which it has been sought to add the implied condition to the destination in an *inter vivos* deed on which infeftment had followed. I do not say that this may not be competent, but it appears to me that such a case presents more difficulty in the way of implying the condition than the usual case of a testamentary or *mortis causa* deed. Passing over that difficulty, however, I think there is no room for the implied condition in this case for several reasons—(1) The conveyance of 1859 is not of the nature of a universal or family settlement, but is a deed of gift of a special subject. (2) It is not a gift in favour of a class, but in favour of persons named and individually chosen by the granters. (3) The gift is destined not only to the persons named, but to the 'survivors or survivor of them,' thus making the survivors or survivor the conditional institutes to a predeceaser, to the exclusion, so far as expressed, of the predeceaser's heirs, and 'it is not likely that when one conditional institute is expressed another should be implied'—*per* Lord Justice-Clerk Moncreiff in *Blair's Executors*, 3 R. 365. (4) There is no reason to suppose that the granters of the conveyance had any intention of benefiting the issue of the disponees, because such issue had no existence at the date of the conveyance, and might never exist; while (5) there is reason to believe, from the 'love, favour, and affection' which was the inducing cause of the conveyance, that the granters meant precisely what they said, viz., that on the death of any one of the disponees the surviving disponees should take the benefit by accretion of the predeceaser's share.

"It is unnecessary to examine the cases cited by either party. But it appears to me that the reasoning of the Lord Justice-Clerk in the case of *Blair's Executors*, which I adopt, is for the most part directly applicable to this case, and is adverse to the defender.

"I think this is a hard case for the

defender. His mother could have conveyed to him the third share of the subjects which she took under the conveyance of 1859. What she would have done had the necessity for some act on her part with the view of excluding her sisters and benefiting her own nominees been before her mind it is not possible to say. She would very probably have preferred her son to her sister, or her sister's representatives; but she might also have preferred her husband to her son. But having done nothing to alter the destination in the deed of 1859 it must now regulate the rights of parties, and in my opinion it excludes the defender."

The defender reclaimed, and argued—The *conditio si sine liberis* should be read into the clause of this deed whether the fee vested at the date of granting or on the expiry of the liferent. The granters here placed themselves *in loco parentis* to their nieces. The conveyance was in the nature of a provision for children, therefore the *conditio si sine liberis* applied. The *conditio* was not excluded because the gift was not in favour of a class, or because the gift was not contained in a settlement of the granter's whole estate—Bell's Principles, secs. 1704 and 1776; Menzies' Conveyancing, p. 462; Bell's Conveyancing (3rd ed.), 922; *Montrose* v. *Robertson*, November 21, 1738, M. 6398; *Rougheads* v. *Rannie*, February 14, 1794, M. 6403; *Grant's Trustees* v. *Grant*, July 2, 1862, 24 D. 1226 (*per* Lord President M'Neill); *Bogie's Trustees* v. *Christie*, January 26, 1872, 9 R. 456-457 (*per* Lord President Inglis and Lord Shand).

Argued for the pursuer—There was no room in this case for the application of the *conditio si sine liberis*. The view of the Lord Ordinary was supported by the authorities. Each fiar had an immediate fee in one-third, and an eventual fee in the whole—Bell's Conveyancing (3rd ed.), 946; *Bisset* v. *Walker*, November 26, 1799, M. App., "Deathbed," No. 2, and Ross' Leading Cases; *Douglas' Executors*, February 5, 1869, 7 Macph. 504; *Blair's Executors* v. *Taylor*, January 18, 1876, 3 R. 362 (*per* Lord Justice-Clerk Moncreiff, p. 365); *M'Call* v. *Dennistoun*, December 22, 1871, 10 Macph. 281; *Gillespie* v. *Mercer*, March 8, 1876, 3 R. 561.

At advising—

Lord Justice-Clerk—In 1859 these two sisters conveyed a certain heritable property to themselves and another sister in liferent, and to three nieces, specially named, and to the survivors or survivor of them in fee. Infeftment followed immediately thereafter. One of the fiars died in 1879 without leaving any settlement. She was survived by a son, and the question which is now before the Court is, whether that son is entitled to succeed to his mother's share, or whether that share goes to his mother's sister under the survivorship clause? It is contended on his behalf that the *conditio si sine liberis* applies, on the ground that the testators acted as *parentes* to the nieces in making this settlement, that it is a family settlement, and that accordingly children of predeceasing fiars are entitled to the share left to their parent.

It is a peculiarity of this case that it does not relate to a *mortis causa* settlement, but to a deed *inter vivos* followed by infeftment. Whether under any circumstances the doctrine of the *conditio si sine liberis* could apply to such a case may be a question, but it is one which does not require to be decided in this case in the view I take of it. The deed here does not present the characteristics of a settlement to which the *conditio* applies. It relates not to the general estate of the donor, but only to a distinct piece of property. It is therefore unlike the case of a general family settlement. It does not give to a class, but only to certain specified persons selected by the donors. This militates against the idea that the donor is taking the parental position in making the gift. There is also a special conditional institution by which the donors destine any share given to one of the donors to pass to the survivors or survivor of the persons named when any of them shall die. This fact is unfavourable to the idea of implied intention conditionally to institute some other class for benefit.

On these grounds, which are substantially those given by my brother Lord Trayner, who decided the case in the Outer House, I am of opinion that the interlocutor should be affirmed.

Lord Young concurred.

Lord Rutherfurd Clark—I agree with your Lordship that the judgment of the Lord Ordinary should be affirmed. I think the deed contains a destination to which we must give effect, and it is on that ground I proceed.

The Court adhered to the interlocutor reclaimed against and found the pursuer entitled to expenses.

Counsel for the Defender and Reclaimer William Howat—Graham Murray—Wilson. Agents—Somerville & Watson, S.S.C.

Counsel for the Pursuer and Respondent —J. A. Reid—A. S. D. Thomson. Agent Marcus J. Brown, S.S.C.

Thursday, December 11.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

RIXON *v.* EDINBURGH NORTHERN TRAMWAYS COMPANY AND OTHERS.

(*Ante*, March 1, 1889, vol. xxvi. p. 405; 16 R. 653.)

Company—Shareholder—Title to Sue—Contract—Fraud—Ultra vires—Reduction.

A company incorporated by a private Act for the construction of a tramway, with a nominal capital, which was never