case fall within the other category mentioned in the statute, by which a curator incurs no responsibility on account of his consent in respect of any inadequacy of consideration or want of consideration. These words, in my opinion, refer to the consideration which is fixed for the consent. They do not protect the curator if he fails by negligence to obtain that consideration.

As I understood at the debate, the only charge not mentioned in the agreement which took precedence of the bond in question was an annuity in favour of Major Heron for £150. In my opinion there should be inquiry into this matter.

LORD TRAYNER—I concur in the result which the majority of your Lordships have arrived.

The Court adhered.

Counsel for the Pursuer—H. Johnston—Guthrie—Cooper. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Defender — Sol.-Gen. Asher, Q.C.—Graham Murray, Q.C. Agents—Macandrew, Wright, & Murray, W.S.

Friday, December 8.

FIRST DIVISION.

[Lord Wellwood Ordinary.

YOUNG *v.* THE TRUSTEE, ASSETS, AND INVESTMENT INSURANCE COMPANY, LIMITED.

Insurance—Insurance of Deposit with a Bank—Default of Payment—Reconstruction of the Bank.

An insurance company undertook to repay a depositor a sum deposited for a definite period with a bank "after default has been made in payment by the bank." Before the period for payment by the bank had arrived, it had stopped, and when that period arrived the depositor, being unable to get his money, claimed it from the insurance company, who declined to pay, on the ground that default had not been made as the bank was in course of being reconstructed.

Held that default had been made, and that the depositor was entitled to decree against the company for the sum claimed.

Upon 4th June 1890 John Young, Craigmellan, Pollokshields, deposited £500 with the Queensland National Bank, Limited, as a fixed deposit bearing interest at 4½ per cent., repayable in three years.

By an assurance policy, dated 6th June 1890 the Trustee, Assets, and Investment Insurance Company, Limited, Glasgow, guaranteed to Mr Young the payment of the principal sum, and the interest payable thereon, under the following condition:—'1. So long as this policy shall continue in force, and after fourteen days from the expiration of the notice recalling the money from deposit according to the terms of the receipt given for it by the bank, and after the expiration of fourteen days' notice in writing to the company from the assured requiring payment, and after default has been made in payment by the bank pursuant to the notice to them recalling the money, and upon a transfer being made to the company of the deposit note and the money due thereunder so as to place the company in a position legally to sue for such money as creditors of the bank, the company will pay to the assured the principal money for the time being due under the deposit, with any interest then due thereon for any period not exceeding six calendar months preceding the date of receipt by the company of the notice to them, and with subsequent interest up to the day of payment."

Upon 15th May 1893 the said bank stopped payment, and Mr Young being unable, upon 4th June 1893, to recover his £500, with interest amounting to £9, 11s. 1d., claimed the sum of £509, 11s. 1d. from the Insurance Company. The Insurance Company refused to pay unless the receipt for the money and the assignment of the deposit-receipt to them contained the following reservation of liability—"Which sum is so paid to me without any admission on the part of the said company that they are legally liable therefor, and on the express condition that if it shall be hereafter declared by a court of law that they were not liable therefor, the same is to be repaid by me, with interest, in exchange for a reconveyance of the deposit-receipt, or any other obligation or security which may have been substituted therefor."

Thereupon Mr Young brought an action for payment of the said sum of £509, 11s. 1d. against the Insurance Company, who stated in their answers—"The defenders believe and aver that the Queensland National Bank, Limited, after it stopped payment was reconstructed, and is at present carrying on business, and that default has not been made in payment by the bank in the sense of the first condition of the policy above set forth. The pursuer is called upon to state in detail the terms of the reconstruction scheme of the bank. Further, the defenders believe and aver that the pursuer is not in a position to transfer to them the said deposit-receipt and the money due thereunder so as to place them in a position legally to sue therefor as creditors of the Queensland National Bank Limited as it existed at the date of the said policy, and in terms of the said conditions therein."

The defenders pleaded—"(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (2) The defenders are entitled to absolvitor in respect (1) there has not been default in payment by the bank in the sense of the conditions in the said policy; (2) the conditions in the said policy, subject to the limitations of which the same was granted, have not been fulfilled; (3) the

defenders are not due or resting-owing the sums sued for."

Upon 8th November 1893 the Lord Ordinary (WELLWOOD) repelled the defences and decerned in terms of the conclusions of the summons.

"*Opinion.*—No maintainable defence to the pursuer's claim is stated on record, and I am not surprised that no argument was forthcoming for the defenders. I shall therefore content myself with saying that in my opinion the pursuer having offered to assign to the defenders all his rights against the Queensland National Bank, and tendered them his deposit-receipt endorsed, is entitled under his policy to payment of the sum sued for.

"The sum deposited with the Queensland National Bank was repayable on 4th June 1893, and the bank was and is admittedly in default. The pursuer is therefore entitled to call on the defenders to implement their guarantee unconditionally. He has no concern with the steps that have been taken to reconstruct the bank. If they are successful, so much the better for the defenders, who will stand in the pursuer's shoes, as it was intended by the conditions of the policy they should do in the event which has happened. But no reason has been suggested why the present condition of the bank should affect the pursuer's claim against the defenders, and I can see none."

The defenders reclaimed, and argued—Default had not occurred in the meaning of the policy. The bank had been reconstructed and new documents of debt granted to pursuer by the bank equivalent to the deposit-receipt held by pursuer, and equivalent to payment. The pursuer was not able to put the defenders in a position to sue the bank legally, as stipulated in the conditions of the policy, because the bank had been reconstructed by authority of the Australian Court, and all proceedings against it stayed.

Counsel for the respondent were not called upon.

At advising—

LORD PRESIDENT—The Lord Ordinary has informed us that he was not surprised that no argument was offered by the defenders. I must do Mr Grierson the justice to say that a slight advance has been made at this stage. He has said all that could be said, but the record itself contains no foundation for the argument which he has stated or suggested. Such an argument might have been available upon a better and different statement of facts.

It is admitted that the bank stopped payment upon 15th May 1893, and that a deposit due to the pursuer upon 4th June 1893 was not then paid. The bank therefore was manifestly in default. I do not see how, *prima facie*, the defenders have any answer to the pursuer's claim. But they say that the conditions of the policy have not been fulfilled. There is nothing upon record to support that statement, and they cannot say more. They have been offered all the rights the pursuer has against the bank, and they do not say what more they want. They say they suspect that the pursuer cannot put them into the same position towards the bank as he occupied, but such a suspicion will not do.

The third plea-in-law for the defenders that they are not due or resting the sums sued for is plainly contrary to the facts of the case.

LORD ADAM concurred.

LORD KINNEAR—I also agree. I think the defence is irrelevant. It is suggested that by the law of Australia the plan for reconstruction of this bank will make the fulfilment of the conditions in this policy impossible, as the defenders cannot take the position of the insured. How that may be I do not know, but there is no averment on record in support of such an argument. All the defenders say is that they believe, but that is not sufficient.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Ure—M'Clure. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defenders and Reclaimers — Dickson — G. G. Grierson. Agents—Simpson & Marwick, W.S.

Saturday, December 9.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

PATERSON'S TRUSTEES *v.* BRAND.

Succession — Will — Construction — "Survivor."

By his trust-disposition and settlement, dated in 1881, a testator directed his trustees to pay to W. B. and R. B., the sons of his half sister, equally between them, the sum of £2500, "declaring that should both or either of them be at present deceased or should hereafter predecease me leaving lawful issue, such issue shall take the share that would have fallen to their parent if in life, equally *per stirpes*, and in default of such issue the same shall fall and accresce to the survivor of the said W. B. and R. B., and the issue of the survivor, whom all failing the same shall fall into and form part of the residue of my estate."

The testator died in 1889. W. B. died in 1867 leaving issue who survived the testator. R. B. was held, under the Presumption of Life Limitation (Scotland) Act 1891, to have died in 1872 without leaving issue.

Held (*diss.* Lord Rutherfurd Clark) that the children of W. B. were entitled to the whole legacy of £2500.

By his trust-disposition and settlement, dated 2nd May 1881, the late Robert Pater-