he could. But that is not sufficient for him. He must show that the defendants are doing something which they are bound not to do."

In my opinion the defender is entitled to absolvitor.

LORD SKERRINGTON, and LORD CULLEN, who was the Lord Ordinary in the case, were absent.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender from the conclusions of the action.

Counsel for the Pursuers (Reclaimers)—Dean of Faculty (Murray, K.C.)—Aitchison. Agent—W. Croft Gray, S.S.C.

Counsel for the Defender (Respondent)—Watson, K.C.—Scott. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, February 20, 1918.

OUTER HOUSE.

[Lord Hunter, Ordinary.

M'MEEKAN'S TRUSTEES *v.* M'CLELLAND.

Succession—Accretion—Destination over to Issue of Predeceasers—Rights of Issue in Accresing Shares.

A testator by his trust-disposition and settlement bequeathed the residue of his estate to his brothers and sisters equally, "the issue of predeceasers succeeding equally to their parents' share." He further declared that "none of the shares of residue shall vest in or be paid to the parties specified until the death of my said wife should she survive me." The testator's widow was survived by a brother and sister of the testator and was predeceased by a number of brothers and sisters, some of whom left issue. *Held* that the issue of predeceasing brothers and sisters were entitled not only to their parents' original shares but also to the shares which those parents would have taken by accretion in respect of predeceasing brothers and sisters who died without issue.

Succession—Will—Construction—Division per Capita or per Stirpes.

A testator by his trust-disposition and settlement left the residue of his estate to his brothers and sisters equally, and provided that "the children of any predeceasers of any issue of beneficiaries entitled to . . . shares of residue shall be entitled equally among them to the shares which their parents would have taken if they had survived." A sister of the testator predeceased leaving a daughter and seven grandchildren, the children of a predeceasing daughter. *Held* that the sister's share fell to be divided *per stirpes* between the daughter and the grandchildren and that the daughter was entitled to one half of the share.

David Goodall Houliston and others, trustees acting under the trust-disposition and settlement of the late Andrew M'Meekan, Greenock, *pursuers and real raisers*, brought an action of multiplepoinding and exoneration which dealt with the division of the residue of Andrew M'Meekan's estate, as bequeathed by the seventh purpose of his trust-disposition and settlement in which the testator's brothers and sisters and the issue or representatives of predeceasers were called as *defenders*.

The seventh purpose of the testator's trust-disposition and settlement provided, *inter alia*, as follows:—"The residue and remainder of my whole estate I leave and bequeath to and among my brothers and sisters equally among them, share and share alike, the issue of predeceasers succeeding equally to their parents' share: And I declare that none of the . . . shares of residue . . . shall vest in or be paid to the parties specified until the death of my said wife should she survive me: And I further declare that . . . the children of any predeceasers of any issue of beneficiaries entitled to any of the said legacies or to shares of residue shall be entitled equally among them to the shares which their parents would have taken if they had survived."

The testator was survived by his widow, who died on 30th April 1916.

The testator had ten brothers and sisters, of whom three (Robert, Mrs Jessie M'Meekan or Williamson, and Thomas) predeceased him without issue; two (Mrs Jane M'Meekan or M'Kinnell or Williamson and Mrs Elizabeth M'Meekan or Black or M'Nally) predeceased him leaving issue; two (John and James) survived him but predeceased his widow, leaving issue; one (Mrs Agnes M'Meekan or Logan) survived him but predeceased his widow without leaving issue; and two (Peter M'Meekan and Mrs Isabella M'Meekan or Laird) survived his widow.

On behalf of the brother and sister surviving the testator's widow it was maintained that they were each entitled to three tenths of the residue and that the other four shares fell to be divided among the issue of the four who predeceased leaving issue. The latter contended that the division of the residue should be into six parts, one sixth going to each of the two survivors and one-sixth to each of the families of the predeceasers who left issue.

Of the two sisters who predeceased the testator leaving issue, one, Mrs Williamson, was survived by two daughters, of whom one, Mrs Lewis, survived the date of vesting, and the other, Mrs Bell, predeceased the testator leaving seven children.

The second question raised in the case was whether the share of residue falling to Mrs Williamson fell to be divided among her descendants *per capita* or *per stirpes*. Mrs Lewis maintained that the share of residue destined to the issue of Mrs Williamson fell to be divided into two parts, of which one-half fell to her and the other half to the children of Mrs Bell. Mrs Bell's children maintained that Mrs William-

son's share fell to be divided into eight parts, of which they claimed that they should receive seven parts and Mrs Lewis the remaining part.

LORD HUNTER—[*After a narrative of the facts*]—On a consideration of the language of the settlement I think the testator's intention was to give issue of a predeceasing legatee the share which their parent would have taken if he had survived, *i.e.*, not only the original share determined by the number of the class favoured, but any accretion arising thereto from the predecease of one or more members of the class without leaving issue. There is no express provision under which the survivors of the favoured class are to take the shares of predeceasing brothers and sisters. The share which each parent of the issue claiming would have taken would have been one sixth of the residue.

In *Laing* v. *Barclay*, 1865, 3 Macph. 1143, there was a provision as regards children of the testator predeceasing the term of division leaving lawful issue, that such issue "should represent and be entitled to the proportion which would have been payable to their parent." In the course of his opinion Lord Cowan, who delivered the opinion of the Court, said at p. 1150—"Questions regarding the right of accretion have occurred under settlements expressly providing that the share of the child or children predeceasing shall accresce to the survivors equally; and in such cases whatever the form of expression may be, provided only it be clear that the surviving children are to have right of accretion, the issue of predeceasing children to whom their parent's share is either provided in express words or has been held to vest in them under the implied condition can only take the parent's share, the immediate issue alone of the testator having right of accretion through any of the other children predeceasing without issue.... But it is impossible to hold that principle applicable to cases where there is no clause of survivorship, and where, as in the present deed, there is an express declaration of the extent of interest in the succession to be taken by the issue of predeceasing children."

In *M'Culloch's Trustees*, 1892, 19 R. 777, 29 S.L.R. 645, the issue of a predeceasing beneficiary were held entitled to participate in an accrescing share just as their father would have been had he not been disinherited. The circumstances of that case are special. In the course of his opinion, however, Lord M'Laren said that he was not "disposed to assent to the proposition that there is any artificial rule of construction which obliges us to hold where a residue is disposed of among different members of a family that the children of one of the residuary legatees who may die are cut out from what their parent would have taken by accretion."

In the subsequent case of *Neville* v. *Shepherd*, 1895, 23 R. 351, 33 S.L.R. 248, a testator directed his trustees to pay the liferent of the residue of his estate to his daughter and her husband, and at the first term of Whitsunday or Martinmas after the death of the survivor to divide the whole residue, share and share alike, among their children and the survivors or survivor of them. There was a declaration that in the event of all the children having died without leaving issue, and in that event only, payment should be made to certain nephews and nieces.

The testator was survived by his daughter and her husband. They had six children. Four of them survived the testator but predeceased their parents without issue. Two survived their parents, but one of them died before the period of payment, and therefore without having any vested right. It was held that her children were entitled to succeed to the half of the estate which would have fallen to their mother had she survived the term of payment.

In the course of his opinion Lord M'Laren said—"In *Young* v. *Robertson*, 1862, 4 Macq. 337, the scheme of the destination was that the testator made a division amongst a family of grandchildren, and then he proceeded to deal, first, with the case of a member of the family who might die without leaving issue, and then with the case of a member who should die leaving issue. In the first case he gave that person's share to the survivors exclusively, therefore excluding the issue of any other member of the family from participation. But in well-drawn destinations of this kind it is provided that on the death of a child leaving issue the issue shall take the same share which the parent would take if he survived, or as it is sometimes put, the parent's share whether original or by accretion, or again, the principle is sometimes carried out by dealing with the case of a person who shall die childless, and stating that his share shall go to the remaining members of the family and the issue of those who have predeceased."

The above decisions and the opinions which I have quoted appear to me to support the view which I have expressed as to the meaning to be attributed to the language used by the testator.

It was maintained, however, on behalf of a brother and sister of the testator, who survived his widow, that the view indicated is contrary to a series of decisions, the leading example of which is the case of *Young* v. *Robertson*, 1862, 4 Macq. 337. In that case it was held that issue taking their predeceasing parent's share in virtue of the *conditio si institutus sine liberis decesserit* took the share which was in the parent at the date of his death, but not any accretion to which the parent might have become entitled if he had lived till some later period. I have difficulty in seeing how a rule governing a case of implied institution necessarily rules where the institution is express, and the question is as to the extent of the right conferred by the institution. For this reason, and for that stated by Lord M'Laren in his opinion in *Neville's* case, I do not think that the decision in *Young* v. *Robertson* applies in the present case. That case has been founded upon and applied in a number of subsequent cases, to some of which I was referred, *e.g.*, *Graham's Trustee* v. *Graham*, 1868, 6 Macph. 820; *M'Nish, &c.* v. *Donald's*

Trustees, 1879, 7 R. 96, 17 S.L.R. 25; *Henderson* v. *Hendersons*, 1890, 17 R. 293, 27 S.L.R. 247; *Cumming's Trustees* v. *White*, 1893, 20 R. 454, 30 S.L.R. 459; *White's Trustees* v. *Chrystal's Trustees*, 1893, 20 R. 460, 30 S.L.R. 463; and *Bowman* v. *Richter*, 1900, 2 F. 624, 37 S.L.R. 424. I propose to refer in detail only to the case of *Cumming*, which appears to me most nearly to resemble the present case. A testator there had provided in certain events that the residue of his estate should fall and belong to a grandniece's sister and four brothers *nominatim* equally amongst them, and in the event of any of them dying without leaving lawful issue the share of the predeceaser should "go and be divided among the survivors;" but should the predeceaser leave issue, "then such issue shall be entitled to succeed to their parent's share equally among them, in the same manner and as fully as if such parent had survived." It was held that the issue of predeceasing brothers took no part of the share of a brother who had died leaving no issue. Lord Trayner said—"A child who is called, either expressly or under the implied condition *si sine liberis*, *&c.*, to take a parent's share is entitled only to the parent's original share, and not to any participation in a lapsed or accrued share. This is necessarily so in a case like the present, where there is a clause of survivorship. The survivors take the share of a predeceaser, and the children of a predeceaser cannot take what is specially destined to another beneficiary." The present case is distinguishable from *Cumming's* case, inasmuch as there is no clause expressly giving the survivors of the testator's brothers and sisters the shares of those who predecease without leaving issue.

The second question raised in the case was whether the share falling to one of the testator's sisters, Mrs Williamson, fell to be divided *per stirpes* or *per capita* among her descendants. Mrs Williamson predeceased him leaving two children. One of her children is the claimant Mrs Lewis. Her only other child, Mrs Bell, predeceased the testator leaving seven children surviving. For Mrs Lewis it is maintained that the one-sixth share of residue to which the issue of Mrs Williamson are entitled, if the opinion I have expressed above be sound, falls to be divided equally between her and the children of Mrs Bell. The latter, however, maintain that the one-sixth share should be divided into eight parts, of which they should receive seven parts and Mrs Lewis the other part. I confess that I have difficulty in following this argument. Under the destination the division would fall to be made *per capita* where all the claimants stand in the same degree of relationship to the legatee whose share they take. The Bell family, however, only take as representing their deceased mother. It would certainly appear to be an anomalous result that Mrs Lewis would have taken one-half if Mrs Bell had survived the period of vesting, but only takes one-eighth on account of Mrs Bell's having died leaving seven of a family. There is nothing in the language of the deed to indicate that that was the testator's intention, and I shall therefore repel the claim.

Counsel for the Pursuers and Real Raisers—Gentles. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Claimants Mrs Agnes M'Dowall or M'Meekan and Others—Garson. Agents—Oliphant & Murray, S.S.C.

Counsel for the Claimants Peter M'Meekan and Mrs Isabella M'Meekan or Laird—R. C. Henderson. Agents—Scott & Glover, W.S.

Counsel for the Claimants Andrew M'Meekan's Trustees and Others—Gentles. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Claimant Mrs Mary Jane or Jeanie Williamson or Lewis—Wilton. Agents—Gray, Muirhead, & Carmichael, S.S.C.

Counsel for the Claimant Mrs Margaret Elizabeth Bell or Skimming and Others—A. M. Mackay. Agent—Alexander Wylie, S.S.C.

Counsel for the Claimant Mrs Agnes M'Kinnell or Woods—A. M. Stuart. Agent—C. Strang Watson, Solicitor.

Counsel for the Claimants Andrew Black and Another—Pitman. Agent—W. Leslie Christie, W.S.

Counsel for the Claimants Mrs Janet M'Meekan or M'Meekan and Others—Greenhill. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Claimants William Paterson and Others—Maclaren. Agent—John N. Rae, S.S.C.

Friday, February 28, 1919.

SECOND DIVISION.

[Lord Sands, Ordinary.

BALFOUR-KINNEAR *v.* BALFOUR-KINNEAR.

Process — Res Noviter — Divorce — Proof Closed—Recal of Witnesses.

In an action of divorce on the ground of adultery counsel for the defender after proof had been closed tendered a minute averring *res noviter veniens ad notitiam*, viz., that the evidence of two of the pursuer's principal witnesses was deliberately false, and known by them to be false, and that the defender did not know and could not have discovered this when the evidence was led. The defender craved that he should be allowed to add this minute to his defences, to open up the proof in order that the two witnesses might be recalled and examined thereon, and to lead additional evidence in proof of these averments if necessary. The Lord Ordinary (Sands) refused the crave contained in the minute and subsequently assoilzied the defender. The pursuer having reclaimed, counsel for the defender moved in terms of the foregoing minute. The Court, without delivering any opinions, pronounced an interlo-