appears to me that the sound view is that the testatrix, having in mind and dealing with the bequest made to her brother George, which at the time was a bequest of one-third of the yearly interest of the residue, gives that to his widow. I do not think it necessary to say that the words are inaccurate—they are rather inexhaustive, but it appears to me sufficiently clear that the gift to George Burnett's widow is made to square with the lapsed gift to her deceased husband.

LORD ADAM—The language of this codicil is inaccurate and requires construction. In the first place, the testatrix says that she recals the bequest made to her brother George, and that is an inaccurate way of speaking, because the bequest to her brother had lapsed, and a lapsed bequest requires no recal. Then she describes the bequest to George as a share of the residue, and that is, strictly speaking, inaccurate, because it is not a share of the residue with which she is really dealing, but a share of the revenue of the residue. All this shews that the words of bequest must receive construction, and I do not entertain any doubt that the intention of the testatrix was just to substitute the wife for the husband. When she says that in consideration of her brother George's death she recals the bequest made to him, I have no doubt that she intends to deal with the lapsed bequest and nothing else, and having so dealt with it she ordains her trustees—leaving out the words "being one-third thereof"—to pay over the said share to her brother's widow. I agree that the words "being one-third thereof" are not incorrect, because the share was in fact a third of the yearly interest of the residue with its incidents—that is to say, its capacity for becoming more. At the date of the codicil and the death of the testatrix it was a third.

LORD M'LAREN—I agree substantially in the views expressed by your Lordships, but although it is immaterial I wish to say that I am not sure that I concur with the observation made by Lord Adam that the testatrix is inaccurate in saying that she recals the bequest which she had previously made. If there was any inaccuracy it was only in using the equivalent word "recal" in place of the word "revoke," because I think that when in consequence of the death of one of the original objects of a testator's bounty it is desired to put some other person in his place, it is quite correct conveyancing, and conduces to clearness, to begin by saying, "I revoke the bequest." It has this advantage, that however expressed, it always corrects the testamentary bequest by stating what part of it has been displaced in order to make room for the bequest which the testator is about to bring in.

I agree in other respects that this codicil is not strictly accurate in its language. "A share of the residue" is not what is given, and this cannot be said to be merely an abbreviated mode of dealing with a share given to the mother in liferent and the family in fee, because that is not the scheme of the provision. So we begin with a codicil which is not expressed in strictly accurate terms. But if it had provided simply that the liferent share intended for the brother of the testatrix should go to his widow, or had bequeathed to the widow "the liferent of a third of the residue given to my brother George," I would have held without difficulty that no right of accretion was carried by a bequest in these terms. My first impression of this case differed from the view taken by the Lord Ordinary, but my difficulty has been entirely removed by considering, first, what was pointed out by Lord Kinnear during the discussion, that the reference to the share given to George as a third was descriptive of the interest which he would have taken as at the date of the codicil; and second, that the bequest does not stop there, but goes on—"I ordain my trustees to pay over the said share which my brother George Burnett would have taken had he survived, to his widow." These are very comprehensive words, and although it is true, as is pointed out by the Lord Ordinary, that in some cases a bequest to children of the share which their parent would have taken has been held not to cover accrescing shares in which the parent would have participated, that has been because the general scheme of disposition otherwise showed that that was not the intention of the testator. In the present case the words are adequate to include the whole right and interest which George Burnett would have taken had he survived.

LORD KINNEAR—I also agree with the Lord Ordinary for the reasons his Lordship has given, and for the further reasons your Lordships have added.

The Court adhered.

Counsel for the Pursuer—Mackay—Sym. Agents—Scott Moncrieff & Traill, W.S.

Counsel for the Defenders—H. Johnston—Craigie. Agents—Dalgleish, Gray, & Dobbie, W.S.

Saturday, July 14.

FIRST DIVISION.

ROSS'S TRUSTEES AND OTHERS, PETITIONERS.

Trust—Advances out of Trust Funds for Behoof of Minor Beneficiaries—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 7.

A testator after providing that his widow should have a liferent of the residue of his estate, directed his trustees to hold the residue for behoof of his children, and after the death of the longest liver of himself and his wife, to

divide the same equally among his children, but declaring that such division should not take place until the youngest of his children had attained majority, and that the children's provisions should not become vested interests until the said term of division. In the event of any of the children dying before the period of division leaving lawful issue, such issue were to take their parent's share, and failing such issue the share of the predeceasing child was to accresce to the survivors.

The testator was survived by a widow and three children. At the date of the widow's death none of the children had attained majority. Thereafter the trustees petitioned the Court for authority to apply the income of the estate, which amounted to about £78 per annum, for behoof of the children, who had no other means of maintenance. The Court *granted* the petition, *holding* that the income being undisposed of fell to be treated as part of the capital of the estate, and that the testator's children as a family having the sole interest in the trust fund, the Court had power, under section 7 of the Trusts (Scotland) Act 1867, to grant the authority craved.

David Ross died on 5th March 1893 survived by a widow, a son born in 1875, and two daughters born respectively in 1877 and 1885.

Mr Ross left a trust-disposition and settlement whereby he conveyed his whole means and estate to trustees. After providing for payment of debts and expenses, and that the annual produce of the residue of his estate should be paid to his widow under the declaration that she should be bound to maintain and educate the children of the marriage until they should be able to maintain themselves, the testator further provided as follows:—"That my trustees shall hold the residue of my whole means and estate, heritable and moveable, for behoof of the children that may be born of the marriage between me and my said wife, and shall, after the death of the longest liver of me and my said spouse, or in the event of her surviving me, after her entering into a second marriage, divide and apportion my whole estate and effects, heritable and moveable, equally among my whole children to be born of the marriage between me and my said wife, but declaring that such apportionment and division shall only then take place provided the youngest of our children alive at the time shall have attained the age of twenty-one years, and if not, shall be postponed until the youngest of the survivors of them shall attain that age, with power nevertheless to my said trustees, with the consent and approbation of my said spouse in the event of her surviving me—her consent, nevertheless, not being necessary after she has entered into a second marriage—to advance to my son or sons such part of their provisions as to my trustees shall seem proper for apprenticing them or otherwise fitting them out in life, which advances shall form preferable claims against and be deducted from his or their proportion of the residue of my said estate payable to him or them; declaring that the provisions to my said children shall not become vested interests in them until the term of division of my said estate above mentioned; but declaring, nevertheless, that in the event of any of my said children dying before the said term of division, and leaving lawful issue, such issue shall be entitled to their parent's share, and the same shall be divided equally among his or her issue alive at the period of payment or conveyance, and failing such issue, the share of such child deceasing shall fall and accresce to the survivors, and be payable to them on the same condition as their original shares."

The testator's widow died on 27th April 1894, and thereafter the trustees, acting under the trust-disposition and settlement, and the two minor children of the truster, presented a petition, in which they stated that the estate in their hands consisted of moveable property to the value of about £2600, and that the annual income thereof, which amounted to about £78, was the only fund available for the maintenance and education of the children. They therefore craved the Court, in the exercise of their equitable jurisdiction, to authorise and appoint them to apply the whole, or such part as they might think proper, of the income of the trust-estate for behoof of the testator's children.

After intimation the Court remitted to Mr A. H. Cooper, W.S., to inquire and report. Mr Cooper reported that the income of their father's estate was the only fund available for the maintenance of the children except their mother's estate, which amounted to less than £100. He pointed out that the children were without guardians for the purpose of the application, and that the next-of-kin were not called.

At the hearing reference was made to the cases of *Mackintosh* v. *Wood*, July 5, 1872, 10 Macph. 933; and *Latta*, June 5, 1880, 7 R. 881. Reference was also made to the 7th section of the Trusts (Scotland) Act 1867, whereby it is provided as follows:—"The Court may from time to time, under such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined, either absolutely or contingently, to minor descendants of the truster, being beneficiaries having a vested interest in such fund, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries or any of them, and that it is not expressly prohibited by the trust-deed, and that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be prejudiced."

At advising—

LORD M'LAREN—Our power to grant this application depends on the authority given to the Court by the Trusts (Scotland) Act 1867, which in form relates only to

advances out of capital. But as the income of this estate is unappropriated, of course as each year's income accrues it is the duty of the trustees to add it to the capital to increase the amount of the residue. It is the right and duty of trustees to accumulate undisposed of income with capital, and therefore I think this application is quite within the scope of the Act of Parliament which deals with the unappropriated capital of trust-estates.

Now, not to repeat the words of the clause, the conditions of a valid application to the Court are that the class of children—the family of children—must have an interest in the trust fund, and that no other persons can show an interest under the deed. If these conditions exist, the Court may grant the trustees power to make advances from the capital of the estate, even though the interest of any individual child may be contingent, because it is so put in the statute. The object of this remedial provision is to avoid the difficulty which arises, where, owing to the existence of a clause of survivorship as between children, it would not be held that a right to an absolute share vested in each child at the testator's death. But the statute recognises that provided the children as a family have the sole interest in the fund, and that there are no other funds applicable to their maintenance, power to apply this common fund may be granted. Now, I think we have before us exactly the case which the Act contemplates. There is no destination-over in this deed, and if the children were all in minority the only persons who could claim this fund would be the next-of-kin. These are the children themselves, and although in the case I am putting they are all dead, their collateral relatives do not take as next-of-kin in their own right, but as representing the children. This was established in the case of *Lord* v. *Colvin*, 23 D. 111, and the principle was recognised in the very carefully considered judgment of the House of Lords in *Gregory's Trustees* v. *Alison*, 16 R. (H. of L.) 10, and it appears to me to be quite unnecessary to call the next-of-kin of the children for whose behoof this application is made. The same considerations render it unnecessary to appoint a curator *ad litem*, because according to the report which is before us there is no other source of maintenance open to these children. The application is for their benefit, and my opinion, which I understand your Lordships agree with, is that it would be unnecessary to appoint a curator *ad litem* except for the protection of some interest in the children themselves. I am therefore of opinion that we may now grant the power craved.

LORD KINNEAR—I entirely agree in all that Lord M'Laren has said.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court granted the prayer of the petition.

Counsel for the Petitioner — Burnett. Agents—Fraser, Stodart, & Ballingall, W.S.

Saturday, July 7.

FIRST DIVISION.

BAXTER, PETITIONER.

Nobile Officium—Appointment of Auditor to the Court of Session ad interim.

Edmund Baxter, W.S., Auditor of the Court of Session, presented a petition to the Court of Session stating that he was at present seriously unwell, and that in the present state of the Session it was of serious importance that the work of the office should be carried on, and praying the Court to make such an interim appointment as they might think fit.

Counsel referred to 1 and 2 Geo. IV. cap. 38, sec. 38, and to Mackay's Manual of Practice (1893), p. 83, which contained a list of other offices to which the Court had made *ad interim* appointments.

The Court *appointed* Mr Ellison Ross, S.S.C., to discharge the duties of Auditor until the third sederunt-day of next Session.

Counsel for the Petitioner — Mackay. Agent—Charles Baxter, W.S.

Tuesday, July 17.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

CURRIE *v.* ALLAN AND CAMPBELL.

Ship—Perilous Position of Ship at Quay—Obstruction by Vessel Lying Outside and Refusing to Move—Right to Cut Other Vessel's Ropes.

A steamship lying in a perilous position at a quay was unable to sail because another vessel lying outside had the ropes mooring her to the quay stretched across said ship. During the whole of one night it was impossible for the outside and smaller vessel to sail with safety, and in the morning when she might possibly have made the attempt some of the crew still refused to go to sea. The master of the inside vessel after repeatedly requesting the master of the outside one to move, and having given warning of what he would do, cut the ropes and sailed away. The crew on board the other ship with difficulty got on shore, while the vessel was driven on to the opposite coast and there stranded, sustaining considerable damage.

Held that it lay with the master who had cut the ropes to justify what he had done, that he had failed to do so, and that the owners of his vessel were liable in damages for the loss sustained by the one cut adrift.

Observed that a man is not entitled to