agree with the Lord Ordinary's view on *res judicata*. My opinion is that the judgment of a competent Court that a statement of facts is irrelevant to support a claim which is the subject of an action in that Court is *res judicata* to this effect—that a claim thereafter put forward on the same statement of facts, or what is substantially the same statement of facts, can never thereafter be sustained. It is all one whether the Court determines that the statements are insufficient in law or insufficient in fact and not supported by the proof. I am therefore of opinion that the proper form of the judgment on this part of the case is absolvitor.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against, dismissed the action as irrelevant, and decerned.

Counsel for the Pursuer—W. Campbell, Q.C. — T. B. Morison. Agents — Irons, Roberts, & Cosens, W.S.

Counsel for the Defenders—H. Johnston, Q.C.—A. S. D. Thomson. Agent—Henry Wakelin, Solicitor.

Tuesday, March 20.

FIRST DIVISION.

FARQUHARSON *v.* BURNETT AND OTHERS.

Succession—Conditio si sine liberis—Illegitimate Child.

The *conditio si institutus sine liberis decesserit* is not applicable to the children of an illegitimate child.

Succession—Legitim—Lapsed Share.

Held (*following Naismith* v. *Boyes*, May 27, 1898, 25 R. 899; affirmed July 28, 1899, 1 F. (H.L. 79) that a child who has taken a conventional provision under his parent's settlement is also entitled to legitim out of provisions which have lapsed and fallen into intestacy.

Succession — Accretion — Conditio si sine liberis.

A testatrix left her whole estate to A, B, C, and D, "my lawful children, share and share alike." The deed contained no survivorship clause or destination-over. D, though described as one of the lawful children, was in reality illegitimate. B, C, and D all predeceased the testatrix, the two last leaving issue. *Held* (1) that no right vested in D's children; (2) that a child of C was entitled to her parent's share under the *conditio si sine liberis*; but (3) not to any part of the lapsed shares, in respect (*a*) (*following Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191) that the gift to the children was so expressed as to create a severance of their interests, and thus to prevent accretion from taking place *ex lege*, and (*b*) *separatim*, that a child cannot take under the *conditio* any more than the share destined to its parent; (4) that the lapsed shares fell into intestacy, and (5) that A, the surviving child, was entitled to claim legitim out of the amount thus falling into intestacy, in addition to the share destined to herself.

Observed (*per* the Lord President) that *Blair's Executors* v. *Taylor*, July 18, 1876, 3 R. 362, is overruled by *Paxton's Trustees* v. *Cowie, cit. supra.*

This was a special case presented for the opinion and judgment of the Court on questions arising under the mutual disposition and settlement of Archibald Farquharson and Mrs Jane Wilkie or Farquharson his wife. The circumstances as stated in the case were as follows:—"By mutual disposition and settlement dated 30th November 1878, and registered in the Books of Council and Session 18th February 1896, entered into between Archibald Farquharson, residing in Dundee, and Mrs Jean or Jane Wilkie or Farquharson, his wife, the said Archibald Farquharson disponed in favour of the said Mrs Jean or Jane Wilkie or Farquharson, in case she should survive him, in liferent for her liferent use allenarly, and on the death of the survivor of them, to and in favour of the said Mrs Mary Elder Farquharson or Niddrie, spouse of the said David Niddrie, joiner, Cape Town, Cape of Good Hope, the said Annie Stewart Farquharson, William Wilkie Farquharson, carpenter, Victoria Road, Dundee, and Mrs Jane Smith Farquharson or Burnett, spouse of John Burnett, seaman, residing in Glebe Street, Dundee, his 'lawful children,' equally among them, share and share alike, all and sundry, his whole heritable and moveable estate at the time of his decease, and appointed the said Mrs Jean or Jane Wilkie or Farquharson, in case she should survive him, to be his sole executrix; and in the event of her predeceasing him, the said Mrs Mary Elder Farquharson or Niddrie, Annie Stewart Farquharson, William Wilkie Farquharson, and Mrs Jane Smith Farquharson or Burnett, and the survivor or survivors of them, to be his sole executor or executors; and the said Mrs Jean or Jane Wilkie or Farquharson, with consent of her said husband, who thereby renounced his *jus mariti* and right of administration of her estate, disponed and made over to and in favour of her husband the said Archibald Farquharson, in the event of him surviving her, in liferent for his liferent use only, and on the death of the survivor of her and her said husband to and in favour of the said Mrs Mary Elder Farquharson or Niddrie, Annie Stewart Farquharson, William Wilkie Farquharson, and Mrs Jane Smith Farquharson or Burnett, equally among them, share and share alike in fee, all and sundry her heritable and moveable estate of whatever nature or denomination the same might be which should belong or be addebted to her at the time of her decease,

and nominated the said Archibald Farquharson, in case he should survive her, whom failing the said Mrs Mary Elder Farquharson or Niddrie, Annie Stewart Farquharson, William Wilkie Farquharson, and Mrs Jane Smith Farquharson or Burnett, and the survivors or survivor of them, to be her sole executors or executor.

"The said Archibald Farquharson predeceased the said Mrs Jean or Jane Wilkie or Farquharson. The said Mrs Jean or Jane Wilkie or Farquharson died on the 31st day of December 1895. The said Mrs Mary Elder Farquharson or Niddrie predeceased both the said Archibald Farquharson and the said Mrs Jean or Jane Wilkie or Farquharson, leaving lawful issue, being the second parties. She was survived by her husband the said David Niddrie. The said William Wilkie Farquharson predeceased both the said Archibald Farquharson and the said Mrs Jean or Jane Wilkie or Farquharson without leaving lawful issue, but was survived by his wife, who is still alive. The said Mrs Jane Smith Farquharson or Burnett also predeceased both the said Archibald Farquharson and the said Mrs Jean or Jane Wilkie or Farquharson, leaving one daughter, the said Annie Farquharson Burnett. The said Annie Stewart Farquharson having given up on oath an inventory of the personal estate and effects of the said Mrs Jean or Jane Wilkie or Farquharson, was duly confirmed as her executrix, conform to testament testamentar dated 1st Sepember 1896.

"The said deceased Mrs Mary Elder Farquharson or Niddrie, the mother of the said second parties, is described along with the said Annie Stewart Farquharson, William Wilkie Farquharson, and Mrs Jane Smith Farquharson or Burnett, as the 'lawful' child of the said Archibald Farquharson. The said Mrs Mary Elder Farquharson or Niddrie was not a child of the said Archibald Farquharson, but was an illegitimate daughter of his wife, the said Mrs Jean or Jane Wilkie or Farquharson. As a child the said Mrs Niddrie was brought up with and treated as one of the family. At the age of sixteen she entered domestic service, and at the age of seventeen she became engaged to Mr Niddrie, to whom she was married in 1859, when she was twenty years old. The other sisters learned dressmaking with their aunts, who were dressmakers. During the period Mrs Niddrie was in service she frequently visited her mother's house, and about three months prior to her marriage she returned to her mother's house and lived there until the marriage took place. The first party to the case is the said Annie Stewart Farquharson. The second parties are the lawful children of the said Mrs Mary Elder Farquharson or Niddrie. Two of the second parties, Henry James Niddrie and Emily Ann Niddrie, are still in minority. The third parties are the only child of the said Jane Smith Farquharson or Burnett and her curator.

"The said Archibald Farquharson died possessed of no estate. The estate falling to be administered by the first party, as executrix of Mrs Jean or Jane Wilkie or Farquharson, amounts to the sum of £756, 17s. 7d. This estate belonged solely to Mrs Jean or Jane Wilkie or Farquharson."

The following were the questions of law—"(1) Are the second parties entitled to any share in the estate of the said Mrs Jean or Jane Wilkie or Farquharson? (2) Are the third parties entitled to any share in the estate of the said Mrs Jean or Jane Wilkie or Farquharson? (3) Are the second and third parties, or either of them, entitled to participate in the shares which would have been taken by the predeceasing children if they had survived Mrs Farquharson, or is the first party, as an individual, entitled to these shares? (4) Have the shares of the estate of the said Mrs Jean or Jane Wilkie or Farquharson, provided by her to Mrs Niddrie, William Wilkie Farquharson, and Mrs Jane Smith Farquharson or Burnett, who predeceased her, or any of these shares, fallen into intestacy? (5) In the event of the fourth question being answered to any extent in the affirmative, is the first party, as the only surviving child of Mrs Farquharson, entitled to claim legitim out of any part of the estate of the said Mrs Jean or Jane Wilkie or Farquharson which may have fallen into intestacy, in addition to taking the provisions conferred on her by the mutual disposition and settlement of her parents?"

Argued for the first party—*On the first question*—The question should be answered in the negative. The *conditio si sine liberis* was not applicable to the children of an illegitimate child. This was as yet an undecided question, except by the Lord Ordinary (Barcaple) in *Martin's Trustees* v. *Milliken*, December 24, 1864, 3 Macph. 326, who held that the *conditio* did not apply. In law an illegitimate child was a stranger, and the *conditio* has never been extended to any case where there was no legal relationship. It was an artificial rule, and would not now be extended to any cases not covered by the previous decisions—*Earl of Lauderdale* v. *Royle's Executors*, May 19, 1830, 8 S. 771; *Hall* v. *Hall*, March 17, 1891, 18 R. 690. The law of Scotland was in general unfavourable to illegitimate children—*Clarke* v. *Carfin Coal Company*, July 27, 1891, 18 R. (H.L.), 63. *On the second, third, fourth, and fifth questions.*—Admitting that the third party Annie Farquharson Burnett is entitled to her mother's share in virtue of the *conditio si sine liberis*, she had no right to participate in the lapsed shares—*Young* v. *Robertson*, February 14, 1862, 4 Macq. 337; *Graham's Trustees* v. *Graham*, May 26, 1868, 6 Macph. 820; *Neville* v. *Shepherd*, December 21, 1895, 23 R. 351; *Ensor's Trustees* v. *Richter*, February 16, 1900, *ante* p. 424. On that assumption the lapsed shares accresced to the first party. Although there was no survivorship clause, accretion took place *ex lege*. This was decided in *Blair's Executors* v. *Taylor*, January 18, 1876, 3 R. 362, which was not overruled by *Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191. That case did not establish a general rule against accretion where there was severance of interests—

Menzies' Factor v. *Menzies*, November 25, 1898, 1 F. 128. On the assumption, however, that the first party was held not to be entitled to the lapsed shares by accretion, these shares fell into intestacy, and the third party was entitled to claim legitim, on the analogy of *Naismith* v. *Boyes*, July 28, 1899, 1 F. (H.L.) 79. That case established the general principle that the acceptance of conventional provisions only precluded the assertion of legal claims against the settlement, and left lapsed shares open to such claims. The present case was *a fortiori* of *Naismith*, for here there was no declaration that the acceptance of the provision should be in full satisfaction of legal claims.

Argued for the second parties—The first question should be answered in the affirmative. The only authority against the application of the *conditio* to an illegitimate child was the opinion of Lord Barcaple in *Martin's Trustees* v. *Milliken*, December 24, 1864, 3 Macph. 326. But in that case the claimant was the child of a brother, and the element of *in loco parentis* was wanting. The principle of the *conditio* was to give effect to the presumable intention of a testator to favour the issue of an institute to whom he was in the position of a parent. There could hardly be a stronger case for presumed intention than the present, where the testatrix had shown her favour for the illegitimate child by classing her among her natural children. Legal relationship was not a *sine qua non* for the application of the *conditio;* the principle on which it was founded was predilection from natural affection—*Douglas's Executors*, Feb. 5, 1869, 7 Macph. 504; *Blair's Executors* v. *Taylor*, July 18, 1876, 3 R. 362. On the other questions they adopted the argument for the third parties.

Argued for the third parties—No right vested in the second parties. On the second and third and fourth questions it was not disputed that the *conditio* applied to the case of the third party to the extent of entitling her to her mother's share. On that footing there were two lapsed shares, and the third party was entitled to share them equally with the first party. The arguments against that position were (*a*) that there was no accretion; (*b*) that the third party was not entitled under the *conditio* to any more than her mother's share. On (*a*) the argument for the first party was adopted; on (*b*) the *conditio* carried to the child all that her mother would have taken had she been alive, in cases where, as here, there was no survivorship clause—*Mowbray* v. *Scougall*, July 9, 1834, 12 S. 910; *Thornhill* v. *Macpherson*, Jan. 29, 1841, 3 D. 395; *Halliday* v. *Macallum*, Nov. 9, 1869, 8 Macph. 112. All the cases to the contrary cited by the first party (*supra*) were cases where there was a survivorship clause. Alternatively, and on the assumption that it was held that the third party could not take under the *conditio* more than her mother's share, it was argued that the lapsed shares fell into intestacy under the rule of *Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, and that the first party was not entitled to legitim. The claim of legitim was an unwarranted deduction from the recognition of *jus relictæ* in *Naismith* v. *Boyes* (*cit. supra*), and apart from that decision there was nothing to support it.

At advising—

Lord President—The questions in this case arise under a mutual trust-disposition and settlement dated 30th November 1878, executed by Mr and Mrs Farquharson, by which he disponed to and in favour of her, if she should survive him, in liferent for her liferent use allenarly, and on the death of the survivor of them to and in favour of Mrs Niddrie, Miss Farquharson, William Wilkie Farquharson, and Mrs Burnett, his "lawful children," equally among them, share and share alike, his whole heritable and moveable estate, and appointed Mrs Farquharson to be his executrix, and in the event of her predeceasing him he appointed the four children above named, and the survivor and survivors of them, to be his sole executor or executors; and Mrs Farquharson conveyed to Mr Farquharson, in the event of his surviving her, in liferent for his liferent use only, and on the death of the survivor of her and him, to and in favour of the four children above named, equally among them, share and share alike, in fee, all and sundry her whole estate, both heritable and moveable, and nominated Mr Farquharson, whom failing the four children above named, or the survivors or survivor of them, to be her sole executor or executors.

Mr Farquharson predeceased his wife, and she died on 31st December 1895. Mrs Niddrie predeceased both Mr and Mrs Farquharson leaving lawful issue, who are the second parties to the case. William Wilkie Farquharson also predeceased both Mr and Mrs Farquharson without leaving lawful issue, and Mrs Burnett predeceased both Mr and Mrs Farquharson, leaving one daughter, Annie Farquharson Burnett, who (with her curator) is the third party to the case. Miss Farquharson survived both her parents, and was duly confirmed as executrix of her mother. She is the first party to the case.

Mrs Niddrie, although she is described in the mutual disposition and settlement, along with the other three children, as a "lawful child" of Mr Farquharson, was not so in fact, having been an illegitimate child of Mrs Farquharson, but she was brought up as a member of their family by Mr and Mrs Farquharson, and otherwise treated in all respects as one of their children. Mrs Niddrie married, and the second parties are her lawful children.

The whole estate to which the present case relates belongs to Mrs Farquharson.

The first question put in this case is, whether the second parties are entitled to any share in the estate of Mrs Farquharson, and I am of opinion that they are not so entitled. The answer to this question depends upon whether the *conditio si institutus sine liberis decesserit* applies to the

share of Mrs Farquharson's estate bequeathed to Mrs Niddrie, to the effect of entitling her children to take that share which never vested in her. The benefit of the *conditio* has never hitherto been extended to the children of an illegitimate child, who are regarded as strangers in law. On this subject I may refer to the cases of the *Earl of Lauderdale* v. *Royle's Executors*, May 19, 1830, 8 S. 771, and *Martin's Trustees* v. *Milliken*, 3 Macph. 326. In the former of these cases Lord Glenlee said—"We are by no means at liberty to follow the same rules as we would do in the case of succession between legitimate children, for the children here could ask nothing but what is expressly given by the will; so that if it had been to them and their heirs, and they had no children, nobody could have taken." In the latter case Lord Barcaple expressed the opinion that the natural son of a brother of the testator must be held, in a question of family settlement, to have been a stranger, seeing that whatever question there might be as to the extent to which the *conditio si sine liberis* had been held to operate, the import of the authorities excluded its extension to such a case, and Lord Cowan expressed his concurrence in this view. The application of the *conditio* has received a large extension in the case of the children of nephews and nieces, to whom a testator has placed himself *in loco parentis*, and it now appears to be the law that he will be held to have placed himself in that position if he calls the nephews and nieces as a related class, and so far as appears, not from individual predilection. It was argued that, by parity of reasoning, where, as in the present case, a testatrix had treated an illegitimate child of her body as a lawful child, and been a party to describing that child as a lawful child of her husband, in their mutual settlement, along with their legitimate children, she must be be held to have placed herself *in loco parentis* to the child so as to let in the application of the *conditio*, although there is admittedly no authority to this effect. It does not, however, appear to me that we would be warranted in now for the first time extending the application of the *conditio* to persons who are not lawful children.

The second question is, whether Miss Burnett, the third party, is entitled to any share in the estate of Mrs Farquharson, and I am of opinion that she has right to the share which Mrs Burnett, her mother, would have taken had she survived Mrs Farquharson. It appears to me to be clear that she has this right by virtue of the *conditio si sine liberis decesserit*.

The third question is, whether the second and third parties, or either of them, are entitled to participate in the shares which the predeceasing children of Mrs Farquharson would have received if they had survived her, or whether the first party as an individual has right to these shares, and I consider that (except in so far as Miss Burnett has right to the share primarily destined to her mother) none of these three parties are entitled to participate in the shares referred to by force of the mutual disposition and settlement, seeing that the gift to the children is so expressed as to create a severance of their interests, and thus to prevent accretion from taking place *ex lege*, according to the principles explained in the case of *Paxton's Trustees* v. *Cowie*, 13 R. 1191. Reference was made in support of the claim to the case of *Blair's Executors* v. *Taylor*, 3 R. 362, but I do not think that that case, in so far as it relates to accretion, can stand with *Paxton's Trustees* v. *Cowie*, which was a decision of the whole Court. The case of *Menzies' Factor* v. *Menzies*, 1 F. 128, was also referred to as supporting the view that there was accretion, but none of the specialties upon which the decision in that case proceeded are present in this case.

With reference to the case of Miss Burnett, I may add that I think that her claim to participate in these shares would have failed upon another ground, viz., that although she has, in my view, right, by virtue of the *conditio si sine liberis*, to the share bequeathed to her mother, she would not by virtue of that *conditio* have been entitled to participate in such lapsed shares, even if these shares had been destined to her mother, failing the persons to whom they were primarily bequeathed — *Vide Graham's Trustees* v. *Grahams*, 6 Macph. 820; *Neville* v. *Shepherd*, 23 R. 351; and the recent case of *Watson and Others* (*Ensor's Trustees*) v. *Richter and Others*, February 16, 1900 (*ante*, p. 424). The rule applicable to such a case was thus stated by Lord M'Laren in *Neville* v. *Shepherd*—"It is settled as matter of legal implication, as distinguished from construction, that a child under the *conditio* never takes more than what is described as the parent's original share—that is, the share which the parent would take supposing everyone in the destination to survive the period of payment."

With reference to the fourth question, I think that the shares of the estate of Mrs Farquharson bequeathed by her to Mrs Niddrie and William Wilkie Farquharson have fallen into intestacy, but that the share bequeathed to Mrs Burnett has passed to her daughter Miss Burnett by force of the *conditio si sine liberis decesserit*, as already explained.

With respect to the fifth question, I consider that the first party, as the only surviving child of Mrs Farquharson, is entitled to claim legitim out of the two shares which have, in my judgment, fallen into intestacy, in addition to taking the provisions conferred upon her by the mutual disposition and settlement of her parents. This appears to me to result from the views expressed in *Naismith* v. *Boyes*, 25 R. 899, 1 F. (H.L.) 79, in which it was held that a declaration by a testator in his settlement that certain provisions which he made for his wife and children were to be in full of all claims by them for terce, *jus relictæ*, legitim, or otherwise, was to be construed as excluding such claims in so far only as conflicting with the settlement, and that

his widow, who had accepted her provisions, was entitled in addition thereto to terce and *jus relictæ* out of such heritage and moveables as fell to be disposed of as intestate succession. This case appears to me *a fortiori* of the present, inasmuch as there is not in the mutual settlement of Mr and Mrs Farquharson any express condition that the children should be put to their election between the testamentary provisions made for them and their legal rights, though no doubt they would, even in the absence of such an express condition, have been bound to make such election where their claiming any legal right would disturb to any extent the dispositions of the settlement.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court pronounced this interlocutor—

"Answer the first question in the case in the negative: In answer to the second question, say that the third party Miss Burnett has right to the one-fourth share which her mother Mrs Burnett would have taken if she had survived Mrs Farquharson: In answer to the third question, say that the second parties are not entitled to participate in the shares which would have been taken by the predeceasing children if they had survived Mrs Farquharson; that the third party Miss Burnett is entitled to the share bequeathed to her mother Mrs Burnett, and that the first party and third party Miss Burnett are entitled to participate in the shares which have fallen into intestacy: In answer to the fourth question, say that the shares of the estate of Mrs Farquharson bequeathed by her to Mrs Niddrie and William Wilkie Farquharson have fallen into intestacy: In answer to the fifth question, say that the first party, as the only surviving child of Mrs Farquharson, is entitled to claim legitim out of the parts of the estate which have fallen into intestacy, in addition to the provisions bequeathed to her by the mutual disposition and settlement of her parents: Accordingly, find the first party entitled to five-eighths of the free residue of the estate of the said Mrs Farquharson, and the third parties entitled to three-eighths thereof, and decern."

Counsel for the First Party—Salvesen, Q.C.—Adamson. Agents—W. & J. L. Officer, W.S.

Counsel for the Second Parties—Young—W. Thomson. Agents—Nisbet & Mathison, S.S.C.

Counsel for the Third Parties—Greenlees—Grainger Stewart. Agents—Turnbull & Herdman, W.S.

Friday, March 16.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BOAG *v.* TEACHER.

Public-House — Licensing Authority—Application for Certificate—Death of Applicant Pending Application — Sisting of Other Member of Applicant's Firm in Place of Deceased Applicant — Supplementary Application Lodged after Date of Meeting—Home Drummond Act (9 *Geo. IV. c.* 58), *secs.* 7, 9, *and* 11—*Public-Houses Acts Amendment* (*Scotland*) *Act* 1862 (25 *and* 26 *Vict. c.* 35), *secs.* 1, 4, 8, *and* 10.

An application for "renewal in applicant's name" of a public-house certificate was duly and timeously lodged by "A for A & Sons," the firm of which he was a member. Between the last day for lodging applications and the date of the general meeting of the magistrates for granting and renewing certificates A died. At the general meeting B, a partner of the firm of A & Sons, craved the magistrates to sist him as a party to A's application, and tendered a supplementary application in name of "B, a partner of A & Sons, for behoof of said firm." The magistrates, at an adjourned meeting held on the following day, sisted B as a party to the application lodged by A, allowed the supplementary application to be received, and directed public intimation thereof to be made in certain newspapers ten days previous to a date, fifteen days later, to which they adjourned the meeting. Advertisement was made accordingly, and thereafter at the second adjourned meeting a public-house certificate was granted to "B (trading under the firm of A & Sons)" for the premises referred to in the applications lodged. It did not appear whether it proceeded upon the original application as amended or upon the supplementary application. In an action for declarator that the magistrates had acted *ultra vires*, and for reduction of the certificate granted—*held* (1) that the original application having been made on behalf of the firm of A & Sons, did not fall upon the death of A, that the magistrates were entitled to sist B, another partner of that firm, as a party thereto, and to grant him a certificate thereon, and that consequently the certificate having been so granted was valid and effectual; but (2) that it would not have been competent for the magistrates to grant a certificate upon the supplementary application in respect that it did not comply with the statutory requirements as to being lodged fourteen days before the general meeting, and that this objection could not be obviated by adjourning the meeting for fifteen days before granting the application.