case where there is a reference to agencies actually existing or projected to be established in a particular district. As I read this case there would have been nothing to prevent the trustees even after the death of the testator from benefiting a new agency set up before the funds were divided. And therefore Lord Shaw's dictum, which in any case was *obiter*, does not apply to the question raised here.

LORD SALVESEN was not present.

The Court answered the first and second questions of law in the negative and the third in the affirmative.

Counsel for the First Parties—Hon. W. Watson, K.C.—R. C. Henderson. Agents Melville & Lindesay, W.S.

Counsel for the Second Party — Chree, K.C.—M. P. Fraser. Agents—Ross Smith & Dykes, S.S.C.

Friday, February 22.

FIRST DIVISION.

GREIG'S TRUSTEES *v.* SIMPSON AND OTHERS.

Succession — Trust — Construction — Conditio si institutus sine liberis decesserit— "Family."

A testator divided the residue of his estate into five shares, and directed his trustees "to pay one of said parts or shares to my sister Alison . . . whom failing to her lawful children surviving at my death equally among them; to pay another fifth part or share to my sister J. . . . whom failing to her lawful children surviving at my death equally among them; to pay another of said fifth parts or shares to my sister Agnes . . . whom failing to her lawful children surviving at my death equally among them; to pay another of said fifth parts or shares to the family of my deceased brother J. surviving at my death equally among them; to pay the remaining fifth part or share to the children of my deceased brother G. . . . surviving at my death equally among them."

The sister, J., predeceased the testator leaving issue, and one of her daughters predeceased her but left children. A daughter of the deceased brother J. also predeceased the testator, but left children.

Held, in a special case, (1) that the *conditio si institutus sine liberis decesserit* applied to the bequest of the share to the children of the testator's sister to the effect that the children of her daughter who predeceased her took their mother's share, and (2) that there was nothing in the settlement to take out of its ordinary meaning the word "family," viz., children only, and consequently that the grandchildren of the testator's brother did not take in their mother's place a share in the share of residue bequeathed to the brother's family.

Nathaniel Watt and others, the testamentary trustees of William Greig, *first parties;* (*a*) Walter Simpson, as tutor-at-law of his pupil children by Mrs Murdoch or Simpson, a daughter of Mrs Murdoch, a sister of William Greig, and (*b*) William Murray and others, the children of Mrs Helen Greig or Murray, the only daughter of James Greig, a brother of William Greig, *second parties;* and (*a*) James Murdoch and others, the other children of Mrs Murdoch, and (*b*) James Greig and another, the sons of James Greig, *third parties*, brought a Special Case for the opinion and judgment of the Court upon questions relating to the application of the *conditio si institutus sine liberis decesserit* to the settlement of William Greig, who died on 13th November 1916.

The *trust-disposition and settlement*, which was dated 17th January 1908, after conveying the whole estates of the testator to the first parties, and directing the payment of debts and various legacies, provided —"(Fifth) I direct my trustees to divide, or to realise and thereafter divide, the residue of my means and estate into five equal parts or shares and to pay one of said parts or shares to my sister Alison Greig or Roger, widow of the late James Roger, Liverpool, whom failing to her lawful children surviving at my death equally among them; to pay another fifth part or share to my sister Mrs Jane Greig or Murdoch, wife of David Murdoch, miner, Tranent, whom failing to her lawful children surviving at my death equally among them; to pay another of said fifth parts or shares to my sister Agnes Greig or Paxton, wife of John Paxton, cab driver, Edinburgh, whom failing to her lawful children surviving at my death equally among them; to pay another of said fifth parts or shares to the family of my deceased brother James Greig surviving at my death equally among them; and to pay the remaining fifth part or share to the children of my deceased brother George Greig, who resided at Newcastle-on-Tyne, surviving at my death equally among them."

The Case set forth—"3. The said Mrs Murdoch was alive at the date of the execution of the said will, but she predeceased the testator. She died on 3rd October 1916, survived by three sons and three daughters, who form group (*a*) of the third parties. Group (*b*) of the third parties are the two sons of the said James Greig, the testator's brother, who had died before the said will was executed. 4. The said Mrs Murdoch was also survived by four grandchildren, the children of her daughter Mrs Simpson, who had predeceased the testator. The said Mrs Simpson died on 3rd March 1915. She was therefore alive at the date when the said settlement was made. Her four children are all in pupillarity. Walter Simpson, their father, as their tutor-at-law, is one of the second parties. The testator was also predeceased by Mrs Helen Greig or Murray, the only daughter of his deceased brother James Greig. She died on

20th October 1898, and accordingly was not alive at the date of the will. She was survived by four children, who also survived the testator, and form the group (*b*) of the second parties. The parties are agreed that if the children of the said Mrs Murray are entitled to participate in the residue the share divisible among the said children is one-third of one-fifth. 5. The said William Greig was never married. Apart from his acting executors all the beneficiaries favoured by the said will are brothers and sisters of the testator and their families. He had at one time eight brothers and sisters. One brother predeceased the date of the will without issue. Of the remaining seven the testator was predeceased by a sister Mrs Isabella Greig or Donaldson, who is understood to have died survived by one daughter and two sons. They do not benefit under the will. Another sister, Mrs Margaret Greig or Anderson, survived the testator and has three children. To one of these, John Greig Anderson, the testator left his heritable estate and a legacy of £100, and to another, James Anderson, he left £50. Mrs Anderson and her third child do not benefit under the will. The remaining five brothers and sisters of the testator or their children or families *per stirpes* participate equally in the residue of the testator's estate. The amount of the legacies to the said sons of Mrs Anderson is *in cumulo* equal in value to about a fifth share of the residue, which is estimated at £2650 or thereby."

The second parties *contended* "that on a sound construction of said trust-disposition and settlement they are respectively entitled to the shares of residue which would have fallen to their parents had such parent survived the testator, in respect that notwithstanding the survivorship clause the testator's testamentary directions taken as a whole are of the character of a family settlement; that as among the five participants in the residue there is no evidence of *delectus personæ* on the part of the testator as regards any of the families of his predeceasing brothers or sisters. The children of the late Mrs Simpson contend that the *conditio si sine liberis* applies to this case. The children of the late Mrs Murray contend that they are entitled as institutes to share *per stirpes* along with their uncles in the bequest to the family of James Greig."

The third parties contended that "with reference to the children of the late Mrs Simpson, as the children of Mrs Murdoch were only instituted conditionally to a share of the residue, and that share was destined to the survivors of the conditional institutes, there is no case for the application of the *conditio si sine liberis;* with reference to the children of the late Mrs Murray, that on a sound construction of the said fifth purpose of his said will, the testator instituted only the children of the said James Greig to one-fifth share of the residue of his estate, and further, that the bequest being to the survivors of the class instituted excludes the operation of the *conditio si sine liberis;* and with reference to both branches of the second parties, that the provisions of the said will evince an exercise by the testator of a *delectus personæ* which excludes the second parties from participation in the residue of the estate.

The *questions of law* were—"1. Are the children of Mrs Simpson entitled to the share of the residue of the testator's estate which would have fallen to their mother on survivance? 2. Are the children of Mrs Murray entitled to participate in the residue of the testator's estate?"

Argued for the second parties—The first question should be answered in the affirmative. The *conditio* applied in favour of the grandchildren of Mrs Murdoch. The settlement was a family settlement by one *in loco parentis* to those grandchildren. Their mother was no doubt a conditional institute, but the *conditio* applied to a conditional institute as well as to an institute. The conditions for the application of the *conditio* were that there should be a bequest to a class in a family settlement by one *in loco parentis* to the beneficiaries—*Blair's Executors* v. *Taylor*, 1876, 3 R. 362, *per* Lord Justice-Clerk Moncreiff at p. 364, 13 S.L.R. 217. The omission of other brothers and sisters than those called under the will did not exclude the operation of the *conditio*—*Bogie's Trustees* v. *Chrstie*, 1882, 9 R. 453, *per* Lord President Inglis at p. 455, 19 S.L.R. 363. *Waddell's Trustees* v. *Waddell*, 1896, 24 R. 189, 34 S.L.R. 142, was referred to. The clause of survivorship did not exclude the *conditio*—*Grant* v. *Brooke*, 1882, 10 R. 92, *per* Lord President Inglis at p. 94, and Lord Shand at p. 95, 20 S.L.R. 69; M'Laren, Wills and Succession, p. 715; *Aitken's Trustees* v. *Wright*, 1871, 10 Macph. 275, 9 S.L.R. 180; *Gauld's Trustees* v. *Duncan*, 1877, 4 R. 691, *per* Lord Ormidale at p. 694, 14 S.L.R. 446, distinguishing *M'Call* v. *Dennistoun*, 1871, 10 Macph. 281, 9 S.L.R. 176; *Taylor's Trustees* v. *Taylor*, 1884, 11 R. 423, 21 S.L.R. 298; *Campbell's Trustee* v. *Dick*, 1915 S.C. 100, *per* Lord President Strathclyde at p. 108, 52 S.L.R. 78. As regarded the word "family" that word fell to be construed by the general scheme of the deed. It included all descendants in all the *stirpes*—*Irvine* v. *Irvine*, 1873, 11 Macph. 892, 10 S.L.R. 625; *Macdonald's Trustees* v. *Macdonald*, 1900, 8 S.L.T. 226. *Cattanach's Trustees* v. *Cattanach*, 1901, 4 F. 205, 39 S.L.R. 154, was referred to. In the case of the Murrays the *conditio* did not apply, because Mrs Murray died before the date of the will, but remoter descendants than children were included under "family." *Rhind's Trustees* v. *Leith*, 1866, 5 Macph. 104, 3 S.L.R. 91; and *Carter's Trustees* v. *Carter*, 1892, 19 R. 408, 29 S.L.R. 347, were distinguished.

Argued for the third parties—There were specialties in the present case which excluded the *conditio*. In particular there was no *institutus*. Mrs Simpson predeceased the testator and consequently never was an *institutus*; the institutes were the children of Mrs Murdoch surviving at the testator's death; those were group (*a*) of those parties—*Rhind's Trustees* v. *Leith* (*cit.*), *per* Lord Cowan at p. 109, and Lord

Neaves at p. 111; *M'Call* v. *Dennistoun* (*cit.*), *per* Lord President Inglis at p. 284; *Carter's Trustees* v. *Carter* (*cit.*), *per* Lord Adam at p. 411, and Lord M'Laren at p. 412. In *Grant's* case (*cit.*) that special point was not argued. *Aitken's* case (*cit.*) was not inconsistent with *M'Call's* case (*cit.*). *Gauld's* case (*cit.*), *per* Lord Ormidale, at p. 694, proceeded on the authorities prior to *M'Call's* case (*cit.*), which did not raise the present point, *e.g.*, *Wallace* v. *Wallace*, 1807, M. *voce* Clause, App. No. 6, which was just the ordinary case without any specialty, and *Greig* v. *Malcolm*, 1835, 13 S. 607. The presumption was that "family" included only immediate children—M'Laren, Wills and Succession, 771; *Searcy's Trustees* v. *Allbuary*, 1907 S.C. 823, 44 S.L.R. 536; *Cattanach's Trustees* v. *Cattanach* (*cit.*).

At advising—

LORD PRESIDENT—There are two questions of law raised in this Special Case; the first relates to the just construction of a bequest of a share of residue made by the testator in favour of a sister, a Mrs Murdoch, whom failing her lawful children surviving at the testator's death, equally among them. Mrs Murdoch predeceased the testator but was survived by three sons and three daughters and by four grandchildren, the issue of a daughter who predeceased the testator.

The question we have to decide is whether or no these grandchildren are entitled to participate in the bequest of residue and take the share their mother would have taken had she survived. Now if we were to come to the question untrammelled by canon of construction or prior decisions there would be little difficulty about the answer to be given, because the bequest is quite plainly confined to the children of Mrs Murdoch surviving at the date of the testator's death, and does not embrace grandchildren. But then it was argued that the testator here, an unmarried uncle, had placed himself *in loco parentis* to his nephews and nieces, that this was of the nature of a family bequest, that there was not the faintest indication of *delectus personæ*, and hence that the testator must be presumed to have forgotten or overlooked the contingency that some of his nephews or nieces might predecease the term of payment leaving children, and that he would, had he remembered this contingency, have made provision for them. In other words it was contended that the *conditio si sine liberis* applies to the case.

I am of opinion that it does apply, having regard to prior authority and to the principle upon which this well-known canon of construction rests. There were two reasons urged to the contrary—(first) that the children were conditional institutes and not institutes, and that the doctrine applied only in the case of institutes. I am unable to say why on principle that should be so, and that the presumption of oversight should apply in the case of institutes and not in the case of conditional institutes.

Attention was however directed to the doubts expressed by three of the Judges of this Division in the case of *Carter* v. *Carter's Trustees*, 19 R. 408. On examination I am of opinion that these doubts are not well founded, and that the reasoning of Lord Cullen in the case of *Campbell's Trustees* v. *Dick*, 1915 S.C. 100, solves the doubts which were there expressed. That decision appears to me to be directly in point, as is also the decision in *Taylor*, 11 R. 423, where no opinions were delivered, but the question was, I think, decided. It was said to have followed upon the old decision of *Roughhead*, reported in Morrison 6403, where the bequest was "to my five daughters, or such of them as shall be in life . . . at the decease of my said wife and son, and longest liver of them two, if my son dies in minority and without lawful children." Now the son there died in minority and without leaving lawful issue. One of the five daughters predeceased the term of payment, leaving a son. And it was held that this son took his mother's share, in other words that the *conditio* applied. And the report bears that the decision was based upon general grounds.

The second objection urged to the application of the principle here was the condition attached to the bequest, survivorship of the testator. Here again I am unable to see on principle why the *conditio* should not apply merely because you have to look for the children at some particular date, here the testator's death. But our attention was once more directed to the case of *M'Call* v. *Dennistoun*, 10 Macph. 281, as an authority directly in point. On examination of that case it will be found that it differs in certain respects from the case before us, as will appear from a close examination of the opinions of three of the Judges of this Division who took part in the judgment, and also of the opinion of Lord Ormidale in the case of *Gauld's Trustees*, 4 R. 691. Here I think the old case of *Roughhead* again must be pointed to as an authority. But all the law on this subject was admirably summed up by Lord President Inglis in the case of *Grant* v. *Brooke*, 10 R. 92, in words which I respectfully adopt as my own, where he says—"It is in vain to go over again the authorities on the point, for I think it is now thoroughly settled that words such as we have here (a clause of survivorship) do not exclude the application of the *conditio si sine liberis*, and I am therefore of opinion that it must be applied."

My view, therefore, upon this part of the case may be summed up thus—the doctrine proceeds entirely on the presumption that the testator, having overlooked or forgotten the contingency of the institute having children, has left these children unprovided for if they come into existence; and I am unable to discover any good ground on which we can say that the presumption is displaced merely because the children are conditionally instituted, or because they are to be looked for and their identity fixed at a certain particular date.

The second question in this case relates to a bequest of one-fifth share of residue to "the family" of the testator's deceased brother James Greig surviving at his death, equally among them. We are asked to say

what is the meaning of the expression "family" used in this bequest. It appears to me to be used in the ordinary and plain acceptation of the term. It includes a man's sons and daughters, but does not, in ordinary parlance, include his grandchildren. And I see nothing in this will to indicate that we are not to give the words their plain and ordinary signification. I adopt here the opinion of Lord Johnston, expressed in the case of *Searcy's Trustees* v. *Allbuary*, 1917 S.C. 823, as my own, where he says—"I have come . . . to the conclusion that there is nothing to lead me to depart from the ordinary construction of the word 'family,' which is confined to the immediate children of the person named." This view was acquiesced in by the parties in that case, and I can find nothing in this settlement to lead me to think that the testator used the word "family" in any other than the plain and ordinary sense. If so, then James Greig's grandchildren are excluded from participation in the residue.

If these views are sound and commend themselves to your Lordships, I propose that we should answer the first question in the affirmative and the second in the negative.

LORD SKERRINGTON—In his book on Wills and Succession (3rd ed., 1894) Lord M'Laren laid down the law as follows, vol. i, sec. 1303:—"No case has been found in which the benefit of the *conditio* has been extended to the issue of a deceased legatee who was himself a conditional institute; and where a testator has provided for the contingency of the death of an original legatee by means of a clause of conditional institution, it is a reasonable inference that he intended such conditional institution to be exhaustive, so that on the death of both the legatees the legacy should lapse." With all respect to this high authority, I am unable to agree either with his reasoning or with his statement of the import of the decided cases. The *conditio* is a rule of positive law introduced for the purpose of remedying a presumed omission on the part of a testator to bear in mind that a relative for whom he wishes to provide may predecease leaving issue. Such an omission would, I think, be less likely to occur when a testator was considering the case of a primary beneficiary, such as an only son, than when he was providing for conditional institutes in whom his interest was more remote and whose succession he regarded as more or less unlikely. In other words, if it is permissible for the law to apply the *conditio* to a bequest in favour of a son with the result of defeating a gift-over to a charity, *a fortiori* is it allowable to apply the same remedy in the case of a grandchild conditionally instituted by the testator but with every hope that the gift might never take effect. As regards the decisions, there were three in which, as I read them, the *conditio* was applied in favour of the child of a person who was himself only a conditional institute, viz., *M'Kenzie* v. *Holte*, (1781) M. 6602; *Rougheads* v. *Rannie and Others*, (1794) M. 6403; and *Taylor's Trustees*, (1884) 11 R. 423. There is a fuller report of the last-mentioned case in 21 S.L.R. 298. These decisions were followed recently in *Campbell's Trustees* v. *Dick*, 1915 S.C. 100.

Another, and as it seemed to me a more formidable argument against the competency of invoking the *conditio* in the present case was founded upon the contention that Mrs Simpson, the mother of the claimants who appeal to the *conditio*, was not herself instituted, because the gift is in favour of the children of Mrs Murdoch surviving at the testator's death, whereas Mrs Simpson, one of Mrs Murdoch's children, predeceased him. If this question had arisen now for the first time it might have been difficult to extend the benefit of the *conditio* to Mrs Simpson's children. Fortunately however, as it seems to me, the question is concluded in the only way in which the limitations of an artificial rule of law can be settled, viz., by authority. In construing a will every word used by a testator must if possible receive its due effect. Accordingly it would not be sound reasoning to argue that two bequests in similar though not identical terms must necessarily produce the same result. A different principle seems to me to apply to an anomalous rule according to which there is introduced into a will, but only with regard to a certain class of bequests, a condition which is not expressed and which cannot be implied upon any legitimate theory of construction. Moreover, as the name itself implies, the *conditio* is properly invoked for the purpose of qualifying a gift-over to a third party, but by an extension no less arbitrary than the rule itself it is equally applicable though there is no competing right except that of the testator's heirs in intestacy. It would indeed be surprising if the learned Judges who were the authors of this example of judicial legislation had drawn a nice distinction between a bequest expressed to be in favour of "my children and the survivors of them," and one expressed to be in favour of "the survivors of my children." And yet in the latter form of bequest no one can be an institute unless he is also a survivor. In the case of *Grant, &c.*, v. *Brooke, &c.*, (1882) 10 R. 92, Lord President Inglis (page 94) said—"The question is whether the words 'to such of their children as may be in life at the death of the survivor' necessarily limits the disposal of the fee to those children who survived the liferenter, or whether a share of it is to be given to the representatives of those children who predeceased—that is to say, whether the *conditio si sine liberis* applies or not. It is in vain to go over again the authorities on the point, for I think it is now thoroughly settled that words such as we have here do not exclude the application of the *conditio si sine liberis*, and I am therefore of opinion that it must be applied." The Lord President did not go on to explain the distinction between the case then before him and *M'Call* v. *Dennistoun*, (1877) 10 Macph. 281, in which the same Division of the Court had held the *conditio* to be inapplicable. Presumably he was satisfied with the explanation of the latter case given

by Lord Ormidale in *Gauld's Trustees* v. *Duncan, &c.*, (1877) 4 R. 691. Both these decisions were cited in *Grant's* case. *M'Call's* case must, I think, be regarded as a special one, in which, as Lord Deas who took part in the decision stated there was sufficient in the deed "to show that the testator did not intend children to come in place of their parents." Lord Moncreiff's view of *M'Call's* case was apparently to the same effect—*Bruce's Trustees* v. *Bruce's Trustees*, (1898) 25 R. 796, at p. 801. It must, however, be conceded that a direct gift in favour of persons surviving at a particular time may more readily be construed as one in which the *conditio* is intentionally excluded than a gift in favour of "a class and the survivors of them." On the other hand, it is, in my opinion, settled that the mere difference of phraseology is not itself of crucial importance.

For these reasons I reject the argument that the gift is in a form which excludes the *conditio*. There remains the question whether the nature of the gift and the relation of the parties bring the present case within the class to which according to the authorities the condition is applicable. As to that I feel no doubt, nor can I discover any indication of a contrary intention in the language or context of the clause.

As regards the primary meaning of a bequest to the "family" of a person indicated by a testator, I agree with the opinion of Lord Johnston as Lord Ordinary in *Searcy's Trustees* v. *Allbuary*, 1907 S.C. 823, at p. 828. I may also refer to the judgment of Jessel, M.R., in *Pigg* v. *Clarke*, (1876) 3 Ch. D. 672.

LORD HUNTER—Looking to the language employed by the testator in making the gifts to his brothers and sisters and their families I have difficulty in seeing that the *conditio si institutus sine liberis decesserit* applies in favour of grandnephews and grandnieces. The effect of the application of the *conditio* is, as stated by the Lord Chancellor in *Young* v. *Robertson*, 4 Macq. 337, "that if a legacy be given to an individual and he either predeceases the testator or dies before the period appointed for vesting, leaving children, the legacy does not lapse but the children are substituted in the place of the legatee." The children take what was in the parent at the time of the death of the parent. In the present case the testator has made no mention of the children of his brothers and sisters as a class. They are neither instituted nor conditionally instituted. He has specially selected as conditional institutes of the legatees the members of their families alive at the period of vesting. I should have thought that by the form of words the children of predeceasing nephews and nieces were expressly excluded and that there was therefore no room for the operation of an implied condition. There appears, however, to have been a similar difficulty in applying the *conditio* in the case of *Grant, &c.*, v. *Brooke, &c.*, 10 R. 92, and as it was not held to be an obstacle in that case I am not prepared to dissent from what I understand is your Lordships' view.

I concur with your Lordships in holding that there is no ground for extending the word "family" to other than children.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court answered the first question in the affirmative and the second question in the negative.

Counsel for the First and Second Parties—Sandeman, K.C.—J. A. Inglis. Agents—M. T. Brown, Son, & Co., S.S.C.

Counsel for the Third Parties—Constable, K.C.—W. T. Watson. Agent—G. W. Tait, S.S.C.

Tuesday, February 26.

FIRST DIVISION.

[Lord Cullen, Ordinary.

FRAME *v.* TAYLOR.

Reparation—Master and Servant—Workmen's Compensation—Bar to Action—Workman Accepting Payments of Half Wages—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 6.

An employee of a forage company was on 15th January 1917 run down and injured by a motor driven by a third party. Immediately after the accident he made a claim of damages against the third party and raised an action against him on 17th May 1917. The company, being aware of their employee's circumstances, and agreeing with him that he had a good claim against the third party, paid him half wages from 20th January to 14th March, when it was agreed that those payments were to be continued on the footing that if the employee recovered damages in his action he would refund the payments made to him. Receipts as for compensation under the 1906 Act were then taken from the employee for the payments already made and for subsequent payments, which bore that the payments were received in terms of the agreement. The company was in the habit of paying regular employees half wages when they were off ill. No claim for compensation was ever presented. In the action by the employee the third party pleaded that the employee having recovered compensation under the Workmen's Compensation Act 1906 was barred by section 6 of that Act from recovering damages. *Held* (*rev.* Lord Cullen, Ordinary) that the payments were not payments of compensation under the Workmen's Compensation Act 1906, and that the pursuer was not barred from suing.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts, section 6—"Where the injury for which compensation is payable under this Act was caused under