case it was clear that the petitioner could take no advantage from the winding-up. It was an application by a debenture-holder for a winding-up order in respect of interest due on his debentures. All the other debenture-holders opposed the application. It appeared that the company was still carrying on business; its property consisted of a colliery held under a lease which would have been forfeited if the winding-up order had been granted; and all the other assets were so tied up that it would have been impossible for the liquidator or the creditors through him to touch them. The ground therefore on which the Court held that no benefit could result to the applicant from a winding-up was simply that there were no assets to be affected by the order or to come into the hands of the liquidator. For the reasons stated by your Lordship, it is impossible to suggest that the company with which we are now concerned is in that position. They obtained £16,000 on a sale of ships, and it is not shown that the money is beyond the reach of creditors; they have other property subject to a mortgage, the amount of which is not stated; and further, some of the capital is uncalled. It is therefore not made clear that there are no assets existing for payment of the company debts. That being so, the case of the *Chapelhouse Colliery Company* is not an authority for the present case, except in so far as it lays down the general principle that creditors have a legal right which is not subject to the discretion of the Court.

LORD ADAM was absent.

The Court granted the prayer of the petition.

Counsel for the Petitioners—N. J. D. Kennedy. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Respondents — Sym. Agents—Richardson & Johnston, W.S,

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Thursday, July 12.

FIRST DIVISION.

FORRESTER'S TRUSTEES *v.* FORRESTER AND OTHERS.

Succession — Settlement — Conditio si institutus sine liberis decesserit.

By trust-disposition and settlement dated in 1888, a testatrix, after providing for certain specific bequests to each of her children *nominatim*, and to certain of her grandchildren, including the daughters of her child Margaret, directed her trustees to divide the residue of her estate among her said children. The deed made no provision for the destination of the residue in the event of the testatrix being predeceased by any of her children. The daughter of the testatrix, Margaret, died in 1889 leaving issue. In 1890 the testatrix executed a codicil wherein she referred to the death of this daughter, and disposed of certain specific bequests made to her in the settlement. In 1893 the testatrix died without having made any provision for the disposal of the share of residue appointed by the settlement to be paid to Margaret.

Held that the *conditio si sine liberis* applied, and that Margaret's children were entitled to the share of residue appointed to be paid to their mother.

By trust-disposition and settlement dated in 1888 Mrs Forrester conveyed her whole means and estate to trustees. In the second place, she directed them to deliver a number of specific bequests, consisting mainly of articles of plate, furniture, and jewellery, to each of her seven children by name, and to certain of her grandchildren, and *inter alia* to deliver to her daughter, Mrs Margaret Robson "one-third of my silver and plated articles, so far as not specially bequeathed, . . . one of my bracelets for her daughter Margaret Merry, and another for her daughter Agnes as keepsakes." Lastly, the testatrix directed her trustees "to divide the residue of my estate into seven equal shares, and to pay over one share to each of my said children, excepting my son Robert Forrester, whose share I direct and appoint my said trustees to hold in trust for behoof of his wife in liferent for her liferent alimentary use allenarly, and for her children in fee, payable the said fee to the said children on their respectively obtaining majority, or to the survivors or survivor of them (their mother's liferent having always first lapsed)." The settlement contained no provision with regard to the destination of the shares of residue in the event of any of the children of the testatrix predeceasing her.

One of the daughters of the testatrix, Mrs Margaret Robson, died in 1889, leaving issue.

In 1890 the testatrix executed a codicil wherein she referred to the death of her daughter Margaret, and disposed of some of the articles of plate bequeathed to her by the trust-disposition and settlement. In 1893 the testatrix died without having made any reference to the share of residue appointed by the trust-disposition and settlement to be paid to her deceased daughter.

After the death of the testatrix questions were raised as to the disposal of this share of the residue of her estate, and a special case was presented to the Court by (1) the trustees of the testatrix, (2) her surviving children, and (3) the children of her deceased daughter Mrs Margaret Robson, in order to obtain the opinion of the Court upon the following questions:—"(1) Has the said share of residue in question, destined to the said Mrs Margaret Elizabeth Forrester or Robson, fallen into intestacy, and ought the same to be divided by the first parties as trustees and executors foresaid according to the laws of intestate succession? or (2) ought the said

share of residue to be paid by the first parties as trustees and executors foresaid to the third parties?"

Argued for the second parties — The question was whether the *conditio si institutus sine liberis decesserit* applied. That *conditio* only applied where the testator had failed to contemplate the contingency of a child predeceasing him and having issue. Here the terms of the settlement showed that the testatrix, when she made the settlement, had in view the fact that her daughter Margaret had children; and the codicil showed that she was aware of her daughter's death. The inference was that her failure to provide for the disposal of the share of residue appointed to be paid to her daughter in the settlement was intentional — *Carter's Trustees* v. *Carter*, January 29, 1892, 19 R. 408; *Greig* v. *Malcolm*, March 5, 1835, 13 S. 607. The result was that that share of residue had fallen into intestacy, and ought to be divided according to the laws of intestate succession among the surviving children of the testatrix, and the issue of the predeceasing daughter.

Argued for the third parties—As regarded the relationship of the parties, this was a typical case for the application of the *conditio* — *Allan* v. *Thomson's Trustees*, May 30, 1893, 20 R. 733. Nor did the circumstances founded on by the second parties render it inapplicable. The reference to grandchildren in the settlement did not show that the testatrix in disposing of the residue of her estate contemplated the contingency of any of her children dying without issue, and in the codicil she dealt merely with specific articles bequeathed to her daughter to which the *conditio* was inapplicable. There was therefore nothing to show that the testatrix did not desire her daughter's share of the residue to go to her children, and these parties were accordingly entitled to have that share paid to and among them.

At advising—

LORD M'LAREN—This special case raises a question of some general importance, but not, as I venture to think, attended with any serious difficulty. It is rather remarkable, considering the number of questions to which the *conditio si sine liberis* has given rise, that this one should now apparently be raised for the first time. But the case is that the testatrix, while providing in a very usual way for the division of her estate amongst her children, and saying nothing about the contingency of one of these children dying leaving issue, afterwards made a codicil in which she does refer to the death of a daughter who had died between the date of the execution of the will and that of the codicil.

Now, it was argued to us on behalf of the first parties, who are the next-of-kin, that the foundation of the rule of law, known as the *conditio si sine liberis*, is the presumption that the testator has overlooked the contingency of a child dying leaving issue, because it is not supposed that any parent making a will, and not leaving his or her money to go as the law directs, would omit all reference to such a case if he or she had contemplated it. That seems to have been the foundation of the rule of Roman law, and has been generally referred to as underlying the form of the *conditio* which has been received into our law. Then it is argued that if a testator, as in this case, survives a child and makes a codicil, and especially if in that codicil reference is made to the death of the child, the foundation of the rule is taken away, and it must be assumed that there was no intention to give to the issue of the predeceasing child any share of the succession. Reference was also made to the circumstance that some of these children of Mrs Robson, the daughter who died, received some small articles of jewellery as mementoes or keepsakes of the testatrix.

Now, it is quite true that we have admitted this qualification of the *conditio*, that it may be excluded by an express clause dealing with the contingency in question. If a testator, contemplating the case of the death of his immediate descendants, makes a special provision for their issue, then that special provision comes in place of the *conditio* right which would otherwise have come to them. But it appears to me that in order to bring the case within that exception either there must be a substantial provision given to the issue, or if it is unsubstantial, it must be given with such explanations as show that it was not intended that under any circumstances the individual in question was to take more. A testator may give a nominal sum to a descendant for the very purpose of showing that no substantial right was intended to be given; but where the bequest to the grandchild takes the form which we have in this will—"One of my bracelets for her daughter Margaret Merry, and another for her daughter Agnes, as keepsakes"—it is plain that she was not thinking of giving any benefit to the children of her daughter Mrs Robson, but only giving something which they were to retain as a mark of affection. Therefore I cannot admit that the giving of these articles of jewellery as keepsakes can be regarded as a gift or benefit to those children in place of what they might otherwise take in succession to their mother.

Then with reference to the argument founded on the codicil, everything depends in such cases upon the purpose for which reference is made to the death of a legatee. If in the codicil the lady had begun by referring to the death of her daughter, and then had dealt with her share of the succession—dealing with it, it may be, incompletely—probably we should have held that the *conditio* was displaced, and that the vacant share must be disposed of in the precise manner prescribed by the codicil, even although that might lead to the exclusion intentionally or unintentionally of one of the objects who might be expected to be favoured. But then she only refers to the death of her daughter Maggy —that is, Mrs Robson—for the purpose of

disposing of three articles of silver plate which she had left to her in the same deed in which she gives the other articles which she describes as keepsakes. Of course these were articles which could not be divided. If they went to a class they could not be enjoyed specifically by that class, and could only have been enjoyed by being sold, and that would not be consistent with the lady's intention in making the gift. And so she wishes these articles to be retained in her family; she makes them over to other members of the family—two to sons and one to a daughter—and it is significant that these silver things are not given to the children of Mrs Robson. I cannot think therefore that when she was disposing of those silver articles she was thinking at all of the contingency of the death of her daughter, and the necessity which would then arise of making a suitable provision for the issue. The argument would not have been very strong even if she had provided that the pieces of plate should go to Mrs Robson's children, because she would have been merely continuing what she had given as a keepsake to her daughter's decendants. But when they take no benefit whatever under this codicil, it is difficult to see that the mere reference to her death, for the purpose of conferring a benefit upon other members of the family, can be taken as meaning a displacement of the *conditio si sine liberis*. The rule has received in some cases liberal extension, and I think while this case is in some respects distinguishable from all previous cases—I mean it raises a new point—yet to hold the *conditio* excluded here would be contrary to the spirit and tendency of all the recent decisions on this subject. It was not disputed at the bar that if the will had directed a division amongst the family without naming them, the application of the *conditio* would be clear, but in the case of children I can hardly think that the question of succession is to depend on whether they be named or unnamed, because if they are named that is merely for the purpose of distinguishing the different benefits which each is intended to receive. In this case the children are not all left on the same footing. One of the sons gets only a liferent, and therefore it was necessary to name them all, not as I think for the purpose of putting them on the footing of the legatees who were only intended to take personal benefit, but simply for the sake of clearness in distinguishing the interests which each was to receive in the division of the residue of the estate. My view, therefore, is that neither on the ground of small bequests being given to Mrs Robson's daughters, nor on the ground that in the codicil reference has been made to Mrs Robson's death, can we find sufficient reasons for excluding the application of the *conditio si sine liberis*, and that we ought to answer the second question in the affirmative.

Lord Kinnear—I am of the same opinion. I think the case when fully considered is really a very strong one for the application of the *conditio si sine liberis*. The testatrix directs her trustees to divide the residue of her estate into seven equal shares, and to give one share to each of the children whom she has named in a previous part of the will. There is no gift over to the survivors of the children or to anyone else in case any one of those seven children should die before the testatrix. The question then is, whether the share of a predeceasing child is to go to the children of that child by virtue of the *conditio*, or whether we are to hold that in so far as regards that share of the estate the testatrix has died intestate?

Now, I should be very sorry to say anything inconsistent with the doctrine to which we gave effect in the case of *Carter's Trustees* v. *Carter*, which was established by the previous case of *Malcolm* v. *Greig*, or at all events which was very clearly expounded by Lord Corehouse in *Malcolm* v. *Greig*. There can be no question that the presumption which arises from the failure of the testator to advert to the contingency of one of his legatees dying leaving issue, may be rebutted by evidence, in the will itself, of the contrary, and there can be no stronger evidence to defeat the presumption, as Lord Corehouse says, "than a clause in the settlement by which the testator does make a provision for the issue of predeceasing legatees, because," as his Lordship says, "it incontestibly shows that he had them in view when he made the substitution." But then there is no provision in this will from beginning to end for the issue of predeceasing legatees. There are several specific legacies in favour of the grandchildren of the testatrix, and there is a provision in favour of the children of one of her sons to take effect during the lifetime of the son himself; but there is no provision for the issue of the predeceasing legatees at all that I can find. That is to say, I find nothing in the will which shows that the testatrix contemplated the contingency of one of her children dying before herself and leaving issue, and that she made some provision in contemplation of that contingency inconsistent with the presumption we are now asked to apply, and therefore I see nothing in the will itself to tend in any degree to defeat the presumption.

The question which arises on the application of the codicil is of a somewhat different kind. It is quite clear that the testatrix then had in her mind the fact that her daughter Margaret had died, and she could hardly have been ignorant of the fact that she left children for whom she had made, indeed, specific legacies in her will. I think the sole effect of the codicil is that the testatrix provides for a different destination of certain silver plate, which she had left to her daughter Margaret, leaving the will in so far as regards the general estate of the testatrix exactly where it was before.

I agree with Lord M'Laren in his observations as to the effect of the codicil. I think the will stands exactly where it did,

and that Margaret Robson's children take the share originally destined to her mother by virtue of the condition.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court answered the second question in the affirmative.

Counsel for the First and Second Parties — C. S. Dickson — Younger. Agents — Campbell & Smith, S.S.C.

Counsel for the Third Parties—Jameson —Burnett. Agents—Clark & Macdonald, S.S.C.

Friday, July 13.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

BURNETT *v.* BURNETT'S TRUSTEES.

Succession — Settlement — Codicil — Construction.

By trust-disposition and settlement dated in 1883 a testatrix appointed her trustees to pay over the yearly interest of the residue of her estate to C. J. B., G. B., and S. M. B., equally among them, and to the survivors and survivor of them, and at the death of the survivor to divide the residue among persons named. By codicil dated in 1890 the testatrix, on the narrative that G. B. had died since the date of her trust-disposition and settlement, recalled the bequest made by her therein to him of a share of the residue of her estate "being one-third thereof," and ordained her trustees to pay over the said share which would have fallen to G. B. to his widow.

The testatrix died in 1890 and S. M. B. in 1893.

Held that the right of G. B.'s widow was not restricted to one-third of the income of the residue, but that upon S. M. B.'s death she was entitled to share the income equally with C. J. B.

By trust-disposition and settlement dated 3rd August 1883, Miss Mary Erskine Burnett, after providing for payment of debts and expenses, certain legacies, and an annuity, in the last place appointed her trustees "to pay over the yearly interest or profits arising on the whole remainder and residue of my estate . . . to my brothers Charles John Burnett, George Burnett, and Stuart Mowbray Burnett, equally among them . . . and to the survivors and survivor of them . . . but for their liferent use allenarly." At the death of the survivor of the liferenters the trustees were to divide the residue among three nieces of the testatrix who were named.

By codicil dated 12th March 1890 Miss Burnett, after recalling the direction contained in her settlement as to the payment of an annuity, and giving other directions with regard thereto, provided as follows—"And considering that since the date of my said trust-settlement my said brother George has died, I do hereby recall the bequest made by me therein to him of a share of the residue of my estate, being one-third thereof, and ordain my trustees to pay over the said share which would have fallen to the said George Burnett, had he not so predeceased me, to Mrs Alice Stuart or Burnett, his widow, and with these alterations thereon I hereby confirm my said trust-disposition and settlement in every other respect."

Miss Burnett died in April 1890, and after her death a third of the free yearly interest of the residue of her estate was paid to each of Charles John Burnett, Stuart Mowbray Burnett, and Mrs Alice Burnett, until the death of Stuart Mowbray Burnett in January 1893.

After the death of Stuart Mowbray Burnett Mrs Alice Burnett claimed payment of one-half of the yearly interest of the residue of Miss Burnett's estate, and this claim not being admitted by Miss Burnett's trustees Mrs Alice Burnett raised an action against the said trustees, of whom Charles John Burnett was one, concluding for declarator that, in virtue of the provisions of Miss Burnett's settlement and relative codicil, she was entitled, from and after the death of Stuart Mowbray Burnett, to the yearly interest arising on the residue of Miss Burnett's estate, along with the said Charles John Burnett, equally between them, during the joint lives of herself and Charles John Burnett, and for decree ordaining the defenders to make payment to her of the said yearly interest equally and share and share alike with the said Charles John Burnett during their joint lives.

The action was resisted by Miss Burnett's trustees, who pleaded—"(3) On a sound construction of said trust-disposition and settlement and relative codicil, the pursuer is only entitled to one-third of said yearly interest.

On 14th March 1894 the Lord Ordinary (KYLLACHY) found, decerned, and ordained in terms of the conclusions of the summons.

"*Opinion.*— . . . I think the question is not without difficulty; but it is after all simply a question as to the truster's intention, and I have come to the conclusion that according to the just construction of the codicil of 12th March 1890, the pursuer Mrs Burnett is entitled to be put exactly in the same position as her husband would have held if he had survived. That is to say, she takes up not only the original share but also the accruing share to which under the settlement her husband would have succeeded.

I do not think that much help is to be derived from the analogy of the law applicable to conditional institution of children, either expressed or implied. The cases on that subject no doubt establish a rule of construction which, whether artificial or not, is well settled. But it is not a rule which I should desire to extend, and in the present case it is, I think, enough to say that