nor the other, but to make a partial rejection, which they were not entitled to make and which they did make, in a mistaken view of their own rights in the matter. In other words, they attempted to do what they were not entitled to do, either under the Act or at common law. But the fact of their having made this mistake does not involve them in the dilemma in which the Court considered the sellers had placed themselves in the two cases above referred to, and I am of opinion that nothing else has occurred to bar them from now adopting the alternative remedy provided by section 11, sub-section 2, of the said Act, by retaining the whole goods and claiming damages for breach of contract.

On these grounds I think the Sheriff-Substitute's interlocutor of 14th May 1906, with the exception of its findings in fact, ought to be recalled, and decree given for the alternative sum of £26, 18s. 3d. claimed by the pursuers.

LORD JUSTICE-CLERK — I concur with your Lordships in holding that section 30 of the Sale of Goods Act does not apply to this case, and that on the grounds so clearly stated by Lord Low. I am, therefore, of opinion that the interlocutor of the Sheriff must be recalled. Further, I agree with the opinion expressed by both your Lordships that in the circumstances of this case the purchaser of the goods has the right still, retaining the whole of the goods, to claim damages for the disconformity of a portion of the goods to the quality shown by the sample upon which the purchase was made. The case of the *Electric Company*, which was founded on at the debate, was one of an entirely different character from the present. The sale in that case was of a specific article—a machine for developing and transmitting energy by electrical transmutation. The party in that case did not return the machinery. They intimated that they rejected but kept the machine and used it for months. The decision in that case, which seems somewhat doubtful as regards its soundness, has no bearing on this case, which is one in which the disconformity is of some parts of the goods being of inferior quality. The seller suffered no damage by the course which was taken, which was a mistaken course under the Act. The Sheriff-Substitute, on the authority of the *Electric Company* case, held that the buyer was barred from now claiming damages for that part of the goods which were not conform to sample. I concur with your Lordships in holding that the goods were of one "description" in the sense of the Act, and that the section refers to a difference of kind and not of quality—such as in the crockery case, where different articles were sent among those which had been ordered. The case of jute yarn and flax yarn was similar. I therefore agree with the course proposed by Lord Low.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal for the defenders against the interlocutors of the Sheriff-Substitute and the Sheriff of Lanark, dated 14th May and 6th December 1906, and 24th January 1907, Sustain the appeal, and recal the said interlocutors appealed against: Find in fact in terms of the seven findings in fact in the said interlocutor dated 14th May 1906, but omitting from the seventh of said findings the last twenty-six words following the word 're-delivery:' Find in law in terms of the first two findings in law in said interlocutor of 14th May 1906: and further find in law (3) that although the said attempted partial rejection was invalid, the pursuers are entitled to retain all the goods and sue for damages, the defenders having been in no way prejudiced by the said partial rejection of the goods, the value of which has been adjusted at the sum of £26, 18s. 3d.: Therefore ordain the defenders to make payment to the pursuers of the said sum of £26, 18s. 3d., with interest thereon at the rate of 5 per centum per annum from the date of citation till payment, and decern."

Counsel for the Pursuers (Respondents)—Hunter, K.C.—C. H. Brown. Agents—Smith & Watt, W.S.

Counsel for the Defenders (Appellants)—Murray—Mair. Agents—Macpherson & Mackay, S.S.C.

Friday, January 24.

SECOND DIVISION.

[Lord Johnston, Ordinary.

THOMSON'S TRUSTEE *v.* ALLAN.

(See also *Allan* v. *Thomson's Trustees*, May 30, 1893, 20 R. 733, 30 S.L.R. 654.)

Succession — Conditio si institutus sine liberis decesserit—Family Provision.

A testatrix, who had three sets of nephews and nieces, of which the family of B formed one, left a trust-disposition and settlement, by the sixth purpose of which she directed her trustees to invest £2500 for behoof of her niece C B, and to pay her the income during her life, and on her death to pay it equally among her children, and failing such children to pay it in certain unequal proportions amongst G B, J B, and C B B, who with the liferentrix were the whole of her nephews and nieces of the family of B. There was a declaration that, if the liferentrix should predecease the testatrix, the £2500 should form part of the residue of the estate. The residue was directed to be divided equally among a brother-in-law of the testatrix and all her nephews and nieces *nominatim*, and it had been previously held by the Court that the *conditio si institutus sine liberis decesserit* applied to the residuary bequest. The

liferentrix survived the testatrix and died without issue. J. B. predeceased the testatrix leaving a son, who survived the liferentrix.

Held that the *conditio si institutus sine liberis decesserit* did not apply to the conditional bequest to J. B. in the sixth purpose.

Mrs Christina Stephen or Thomson died in 1882 leaving a trust-disposition and settlement, dated 6th April 1878, by which she conveyed her whole estate, heritable and moveable, to trustees.

The sixth purpose of the settlement was — "(*Sixth*) I direct my said trustees at the first term of Whitsunday or Martinmas happening three months after my death, to invest the sum of £2500 for behoof of my said niece Christina Black, and that either on heritable or personal security, or on debenture stock of any company; and they shall pay over to her half-yearly during all the days of her life (if she shall survive me) for her liferent use allenarly the free proceeds or income arising from the said sum of £2500 so invested after deducting all necessary expenses; . . . And I further direct my said trustees to pay over on the death of the said Christina Black the said principal sum of £2500 to any child or children of the said Christina Black equally among them on their attaining majority: . . but declaring that this bequest shall not vest in such child or children till they reach majority; and failing such child or children, or failing their reaching majority, I direct my said trustees to realise and pay over the said sum of £2500 as follows, viz.:—To my said nephew George Black the sum of £1000, to my said niece Jane Black the sum of £750, and to my said nephew Charles Boswell Black the sum of £750: Declaring that if the succession thereto shall open to my said nephews and niece the sums falling to them shall be held to have vested in them at the time of my death: And declaring also that if the said Christina Black shall predecease me, the said sum of £2500 shall form part of the residue of my means and estate. . . "

Christina Black, the liferentrix, having died without issue in 1905, and Jane Black, otherwise Mrs Allan, having though alive at the date of the settlement predeceased the testatrix, but being represented by an only child, Stephen Strachan Allan, a question arose as to the right to the £750 conditionally destined to Mrs Allan. To have this question decided Donald Stewart Campbell, solicitor, Montrose, the sole surviving trustee of Mrs Thomson, raised, in June 1906, an action of multiplepoinding, the fund *in medio* being £694, 3s. 4d., representing the £750. Claims were lodged by (1) James Macaulay and Donald Campbell, trustees of the deceased John Thomson and others, the residuary legatees, and (2) Stephen Strachan Allan, who, founding upon the *conditio si institutus sine liberis decesserit*, claimed the whole fund, but alternatively claimed a share as a residuary legatee. Christina Black, George Black, Jane Black or Allan, and Charles Boswell Black were the whole of the testatrix's nephews and nieces of that family.

The other provisions of the trust-disposition and settlement, so far as necessary, and the circumstances under which the case arose, are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 8th February 1907 repelled the first alternative claim for the claimant Stephen Strachan Allan; ranked and preferred the said claimant on the fund *in medio* in terms of his second alternative claim; and also ranked and preferred the claimants James Macaulay and others, on the fund *in medio* in terms of their claim.

Opinion.—"Under her will Mrs Thomson, who was a widow without children of her own, but who had three sets of nephews and nieces, the children of her brother and two sisters, made three different provisions in which they were interested. Owing to the predecease of one of her nieces, Jane Black or Allan, questions under the *conditio si sine liberis* have been raised with regard to all three of these provisions. Two of these were disposed of in the case of *Allan* v. *Thomson's Trustees*, 1893, 20 R. 733, 30 S.L.R. 654; the third has now to be determined.

"The circumstances are that Mrs Thomson's settlement is dated in 1878. Her niece, Jane Black or Allan, died in 1879. Mrs Thomson died in 1882, and Christina Black, the liferentrix of the sum now in question, survived till 1905, at which date Jane Black or Allan, who was alive at the date of the settlement, but predeceased the testatrix, was represented by her only child, Stephen Strachan Allan, who claims as in her right under the *conditio si sine*.

"Before considering the particular provision of Mrs Thomson's settlement under which the present question arises, it is necessary to refer to the provisions which have already been *sub judice*. Under the fourth head Mrs Thomson directed her trustees to make payment of a considerable number of legacies, both of specific articles and of varying sums of money. Her whole nephews and nieces are included among the legatees, but there were a considerable number of other legatees who were not relatives. The whole of these legacies bore expressly to be "all as mementos of me." The Court in the case above cited determined that the present claimant could not take his mother's legacy under the *conditio si sine*, as it could not be considered as part of a family provision, such as a father would make for his children or an aunt for her nephews and nieces.

"Under the eighth purpose Mrs Thomson directed the free residue to be divided equally among her brother-in-law, John Sharp Thomson, and her whole nephews and nieces *nominatim*, including Mrs Jane Black or Allan. Here notwithstanding the introduction of a brother-in-law to share equally with the nephews and nieces, the Court in the same case held that the *conditio si sine* did apply, and that the present claimant therefore took his mother's share, as the provision was sufficiently of the nature of a family provision.

"But in the sixth purpose of the settlement Mrs Thomson provided that a sum of £2500 should be set apart and invested for behoof of her most favoured niece and namesake Christina Black, a sister of Jane Black or Allan, for her liferent use allenarly, and on her death directed the principal to be paid over equally to her child or children, if any, at majority, under the declaration that the bequest should not vest in them till they reached majority. Failing such child or children, or failing their reaching majority, Mrs Thomson directed the trustees to pay over the said sum of £2500 thus—to her nephew George Black, £1000; to her niece Jane Black, £750; and to her nephew Charles Boswell Black, £750, under the declaration that should the succession open to her said nephews and niece the sums falling to them should be held to have vested in them at the time of her death. I should add that they, with their sister Christina, the liferentrix, formed the whole Black family. Now had this been the sole provision for the Black family there would have been a good deal to say in favour of the application of the *conditio si sine*, but I am unable to give the claimant Stephen Strachan Allan, Mrs Jane Black or Allan's son, the benefit of that *conditio* with reference to the bequest where there is in the same deed another provision, viz., the residue clause, much more in the nature of a family provision, under which by virtue of the *conditio* he has already been held entitled to take his mother's share.

"If, however, I had had any difficulty on the point it would have been entirely removed by the final declaration of the sixth purpose, viz., "that if the said Christina Black shall predecease me the said sum of £2500 shall form part of the residue of my means and estate." In view of this declaration it is quite impossible to hold that the destination-over to the three members of the Black family is in any sense a family provision to which the *conditio* applies. I find, therefore, that the share of the £2500 resultingly bequeathed to Jane Black or Allan has lapsed by the predecease of the testatrix, and I must therefore repel the first branch of the claim for Stephen Strachan Allan.

"But there remains a question which has not yet been argued, and which from the form of the claims it may not be intended to raise, whether Mrs Jane Black or Allan's share of the £2500 falls into residue or into intestacy. Before disposing of the case I should wish to be informed whether the question is to be raised, and if so to hear further argument.

"*Note.*—I understand that parties do not wish to raise this question, and accordingly I pronounced a final interlocutor in the competition."

The claimant Stephen Strachan Allan reclaimed, and argued—The £750 did not fall back into residue, but was carried by the *conditio si institutus sine liberis decesserit* to the reclaimer. The result of the prior case *Allan* v. *Thomson's Trustees*, May 30, 1893, 20 R. 733, 30 S.L.R. 654, was to decide that the settlement viewed as a whole was a family settlement, and that the testatrix had placed herself *in loco parentis* to her nephews and nieces. There was accordingly a presumption that the sixth purpose which provided for a whole family was a family provision. [LORD LOW—But it was only in the event of the liferentrix having no children that the three other members of the Black family were provided for under the sixth purpose.] It was true that they were only conditional institutes, and in *Carter's Trustees* v. *Carter*, January 29, 1892, 19 R. 408, 29 S.L.R. 347, a doubt was expressed as to whether the *conditio* could be implied in favour of the children of a conditional institute, but it was there stated in argument that the *conditio* had never been held to apply in such a case, and no case was cited by the other side, whereas it had been applied in *Rougheads* v. *Rannie*, February 14, 1794, M. 6403; *Grant's Trustees* v. *Grant*, 1862, 24 D. 1211; *Taylor* v. *Taylor*, January 22, 1884, 11 R. 423, 21 S.L.R. 298. Nor was the operation of the *conditio* excluded by the fact that the conditional institutes were called *nominatim* or that the sums were of different amounts—*Bryce's Trustees*, March 2, 1878, 5 R. 722, 15 S.L.R. 412. There were no such words in the sixth purpose indicating a *delectus personæ* corresponding to "as mementos of me" in the fourth purpose, to exclude the operation of the *conditio*, and there was no reason why it should apply more in the residuary clause than here. That all the three sets of nephews and nieces were not mentioned in the sixth purpose did not matter, seeing that they were all provided for elsewhere in the deed—*MacGown's Trustees* v. *Robertson*, December 17, 1869, 8 Macph. 356, 7 S.L.R. 197; *Bogie's Trustees* v. *Christie*, January 26, 1882, 9 R. 453, 19 S.L.R. 363. Where a testatrix had expressed one definite circumstance on the occurrence of which a fund should fall into residue, there was a strong presumption that in no other case was it to do so.

Argued for the respondents James Macaulay and others—Where legacies were not of a family nature, but were gifts out of favour, the *conditio* did not apply—*Allan* v. *Thomson's Trustees* (*cit. sup.*), at p. 736; *Waddell's Trustees* v. *Waddell*, December 2, 1896, 24 R. 189, 34 S.L.R. 142; *Douglas's Executors*, February 5, 1869, 7 Macph. 504, 6 S.L.R. 324. These cases also showed that the fact that the conditional institutes to the £2500 were already provided for under the residue clause created a presumption that other gifts in the deed to them were of a personal nature involving *delectus personæ*. The fact that the reclaimer's mother was only a conditional institute was an indication that the sixth purpose was not a family provision—*Carter's Trustees* v. *Carter* (*cit. sup.*)—as was also the fact that the gift depended on the liferentrix surviving the testatrix. In *Rougheads* v. *Rannie*, *Grant's Trustees* v. *Grant*, and *Taylor* v. *Taylor* (*cit. sup.*), the alternative to the operation of the *conditio* was intestacy.

At advising—

LORD JUSTICE-CLERK—I am very clearly of opinion that the judgment of the Lord Ordinary in this case is right and ought to be affirmed. The testament in this case was considered in a former case by this Division of the Court, and it was decided that a bequest under it of a share of residue fell under the *conditio si sine*, but it was also held that a specific legacy of £250, being a personal bequest for an individual described specifically as a "memento of me," was not of the nature of a family provision to which the doctrine could be held to apply.

In my opinion it would be inconsistent with that judgment if the claim that the sums bequeathed to certain individuals by a destination-over, which by the original disposal went to other people altogether, were to be held to be family provisions. The sum in dispute here was not a share given to a legatee of a fund to be equally shared by the other members of a family. It was a specific sum directed to be paid to an individual person. The bequest had all the characteristics of an ordinary legacy as distinguished from the disposal of the residue, which was expressly ordered to be divided among a class.

There is here no ground for presuming that the testatrix had failed to notice the possible contingency of the person instituted leaving children, and in the absence of such ground there is no reason for bringing in the *conditio* and applying it to the gift. Here the testatrix, having considered the possibility of a sum of £2500 not being taken by those whom it was intended primarily to favour, gave specific directions that it was to be dealt with by paying specific sums of varying amount to individuals named, a mode of disposal in marked contrast to a family provision to a class of persons.

On these grounds I would move your Lordships to adhere to the interlocutor of the Lord Ordinary.

I may add that I have had an opportunity of considering the opinion prepared by Lord Stormonth Darling, which goes more fully into the case, and in which I entirely concur.

LORD STORMONTH DARLING—The fund *in medio* in this multiplepoinding consists of the balance of residue, so far as undistributed by the surviving and acting trustee, of the estate of the late Mrs Christina Stephen or Thomson, widow of Mr Charles D. Thomson, solicitor in Montrose. The testatrix died in 1882 predeceased by her said husband, and leaving no family. She was survived by three sets of nephews and nieces. The claimant Mr Stephen Allan is the only child of one of those nieces, Mrs Jane Black or Allan, who was named three times in the settlement of the testatrix—(1) under the fourth purpose for a money legacy (£250); (2) under the destination-over in the sixth purpose, by which in the event of the liferentrix of a sum of £2500 dying without issue, or of such issue failing to attain majority, the trustees were directed to pay over the said sum of £2500 in certain defined proportions among members of the Black family, including £750 to the claimant's mother Jane Black; and (3) under the eighth or residue clause of the settlement, by which the trustees were directed to divide the free residue equally among certain persons by name, these being a brother-in-law and the whole nephews and nieces of the testatrix who were in fact alive at her death.

Now this will has already been the subject of judicial determination. In 1892 the father and administrator-in-law of the present claimant Mr Allan brought an action against the trustees by which he claimed on behalf of his son, who was then a pupil, that the son was entitled, under the *conditio si sine liberis decesserit*, to payment both of the legacy of £250 left to Mrs Allan under the fourth purpose of the settlement and also of the estimated amount of her share of the residue. The case was decided by this Division of the Court on 30th May 1893, with the result that the *conditio* was held to apply to the bequest of a share of residue, and was held not to apply to the legacy of £250. The distinction thus drawn proceeded on the footing, as explained in the opinion of your Lordship in the chair, that the specific legacy in the fourth purpose was a personal bequest of a sum of money for the legatee's own use, as shown especially by the description of all the bequests in that purpose as "mementos of me," but that the bequest of a share of residue being to all the nephews and nieces alive at the death of the testatrix was, on the other hand, of the nature of a family provision to which the *conditio* applied.

In the present case the claimant Mr Allan raises again the question of the application of the *conditio*, although this time it has reference to the sum of £750 conditionally destined to the claimant's mother, Mrs Jane Black or Allan, as the sum set free by the death in 1905 without issue of the liferentrix Miss Christina Black. By the interlocutor under review the Lord Ordinary has decided in effect that, looking to the whole tenor of Mrs Thomson's deed, it is impossible to regard the destination-over to the three members of the Black family, including the £750 to the claimant's mother, as a family provision, and therefore that it has lapsed by her predecease of the testatrix and fallen into residue. Accordingly, he has repelled the first or alternative branch of Mr Allan's claim; he has sustained the second branch; and he has ranked and preferred the claim of the other residuary legatees. In this mode of dealing with the claims I am clearly of opinion that the Lord Ordinary is right.

The former judgment of this Division may not be in terms a decision of this very question, but I am of opinion that it necessarily covers it. For it involves the determination of whether the particular provision founded on is a family provision or not, *i.e.*, whether the testatrix, by the terms of her settlement—for that, according to the case of *Byres' Trustees* v. *Christie*,

9 R. 453, is the only mode in which a testatrix can assume the parental character—has placed herself *in loco parentis* towards this particular claimant. She has done so undoubtedly as regards the bequest of residue, and the claimant will get the benefit of what was left by that provision to the late Mrs Allan. But what is there to show that the destination-over to her of a certain proportion of the sum of £2500 primarily intended for another family altogether (if they had come into existence) was intended as a family provision for the Black family? The unequal division of that sum among the three members of the Black family named has much more the appearance of a division inspired by personal favour than the assumption of the parental character. But, apart from that circumstance, I think that the case of *Greig* v. *Malcolm*, 13 S. 607, which rests on the high authority of Lord Corehouse, shows that the *conditio* proceeds entirely on the presumption that the testator has overlooked or forgotten the contingency of the institute having children, and that where this cannot be said of the settlement in question, the reason for the application of the *conditio* disappears. Now here the clause of residue, as judicially construed, does provide for the claimant taking the share destined to his mother, and I do not think that he can claim more.

LORD LOW concurred.

LORD ARDWALL was absent.

The Court adhered.

Counsel for Claimant, Stephen Strachan Allan (Reclaimer)—Cullen, K.C.—A. M. Mackay. Agents—Mackintosh & Boyd, W.S.

Counsel for Pursuer and Real Raiser, and for Claimants James Macaulay and Others (Respondents)—Chree—Duncan Miller. Agents—Jack & Bryson, S.S.C.

Wednesday, January 29.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

GILMOUR *v.* CRAIG.

Reparation—Landlord and Tenant—Diligence—Rent, when Due, and Payment—Arrestment for Rent Used on Afternoon of Term Day upon Tender of Rent by Cheque only—Relevancy.

A tenant brought against his landlord an action of damages for wrongous sequestration on averments that he, the tenant, had, at 2·30 p.m. of the term day, sent a cheque in payment of the rent to the landlord, who had declined to accept it; that his agent had again sent it at 3·15 p.m., but the landlord had thereupon taken out a summons for sequestration, and at 4·10 p.m. executed the warrant obtained thereon; that at 4·40 p.m. the landlord's agent called on his agent and said the cheque was of no use, refused to cash it and withdraw the summons, and also refused to receive the rent in cash save on payment of the expenses of the summons; that the cheque was returned next day. The defender maintained that the case was irrelevant, (1) in the Outer House, on the ground that after noon of the term day the rent was in arrear and the landlord entitled to do diligence; and (2) in the Inner House, on the ground that the tenant's conduct amounted to a refusal to pay the rent, which entitled the landlord to do diligence.

The Lord Ordinary *allowed* an issue and the Court *adhered.*

Per Lord Salvesen (Ordinary)—"I am prepared to hold that payment of rent is just like any other payment falling to be made on a specified day, and as to which the debtor is not in default if payment be made at any time during the day; although, on the other hand, the debt is due in the sense of being demandable by the creditor when the day arrives."

On 19th November 1907 Thomas Hyslop Gilmour, grocer and wine merchant, 24 Cadzow Street, Hamilton, raised an action against William Godfrey Craig, hotelkeeper, County Hotel, Hamilton, his landlord, to recover £500 as damages for wrongful use of diligence, he having sequestrated for rent.

The pursuer pleaded, *inter alia*—"(1) The defender having wrongfully and oppressively sequestrated the effects of the pursuer, is liable in reparation."

The defender pleaded, *inter alia*—"Payment of rent having been refused by the pursuer, and the same having been past due before sequestration was executed, the defender is not liable in reparation."

The *facts* as averred are given in the opinion, *infra*, of the Lord Ordinary (SALVESEN), who on 15th January 1908 approved an issue in the ordinary form.

Opinion—"This is an action of damages for alleged wrongful sequestration. The material facts as averred by the pursuer are, that on 11th November 1907, when a half year's rent of £20 was due by him to the defender, he sent his foreman to the defender about 2·30 with a cheque on the Clydesdale Bank, Hamilton, for £20, which the defender declined to accept; that at 3·15 p.m. his agent again sent the cheque to the defender along with the letter quoted in condescendence 4 (*v. infra*), and that the defender, while the cheque was still in his possession, caused to be prepared and presented a summons for sequestration for rent under the Debts Recovery Act 1867 on which he obtained the usual warrant to inventory and sequestrate the pursuer's goods in his premises, and that this warrant was executed at 4·10 p.m. About 4·40 p.m. the defender called on the pursuer's law agent with the letter before referred to and said the cheque was of no use to him, and on being asked to cash the cheque and with-