division of the funds and otherwise, being regulated thereby; and so far as this application may not be disposed of by your Lordships prior to the rising of the Court for the autumn vacation, to remit the same to Lord Ordinary on the Bills during the vacation, or to the Sheriff of Lanarkshire, with full powers."

R. V. CAMPBELL for the petitioner.

LORD PRESIDENT said that the sequestration must still be conducted under the Act of 1839, subject to the supervision of the Accountant in Bankruptcy. But the terms of the prayer were far too general, and could not be granted. The Court, however, would give an order for notice to creditors to lodge claims, in order that the sequestration might proceed, and, *quoad ultra*, would supersede consideration of the petition. The petitioner must also give notice by letter to those creditors whom he knew.

Agents for Petitioner—Maitland & Lyon, W.S.

Thursday, July 18.

SECOND DIVISION.

SPECIAL CASE—CHARLES COWAN, ESQ. AND OTHERS, AND A. COWAN'S TRUSTEES AND OTHERS.

Legacy—Will—Construction.

Terms of will *held* sufficient to carry a sum of £2500 held by trustees for the testatrix in liferent and her issue in fee, with power to the testatrix to test and dispose of the capital sum in contingencies which happened.

This was a Special Case presented by the trustees, as parties of the first part, of the late Alexander Cowan. The third purpose of the trust was as follows. "I direct my said trustees, at the first term of Whitsunday or Martinmas after my death, to set apart for each child of my marriage with the said Helen Brodie or Cowan (Mr Cowan's second wife), the sum of £4000 sterling, which provision of £4000 my said trustees shall hold for the benefit of each such child in liferent, and of his or her issue in fee; but declaring that notwithstanding the force of said direction, my said trustees shall, out of the said provision of £4000, pay to each of the children of my present marriage the sum of £1500, upon and in the event of each such child attaining the age of twenty-five years complete, it being my intention that in the event of his or her attaining that age, each of my said children shall have the sum of £1500 of his or her provision at their own disposal; and I do hereby direct and appoint my said trustees to hold the capital sums of the said provisions, subject to the payments to be made therefrom at the age of twenty-five, liable to the power of division and apportionment thereof by each child among his or her issue, and in the event of any such child dying without issue, he or she, after attaining the age of twenty-one years complete, shall be entitled to test upon the said capital sum, and to dispose thereof as he or she shall think fit, to take effect only in case of such child having no issue as aforesaid." The deed provides lastly—"In case there shall be any surplus of my means and estate remaining after fulfillment of all the purposes before set forth, my said trustees shall make payment of such surplus or residue to the whole of my lawful children of my former and present marriage, equally among them, share and share alike, the shares of said surplus being entirely at the disposal of the children participating therein, and to be payable to them upon their attaining respectively the age of twenty-five years complete."

Miss C. J. Cowan, Mr Cowan's youngest daughter by his second marriage, died unmarried in January 1872, aged twenty-nine. She left a holograph will in the following terms:—"I, C. J. Cowan, do bequeath all my property to my full brothers and sisters, and, with the exception of personal effects, do give to each full brother an equal portion, and to each unmarried full sister an equal portion, and to each married full sister the interest for life of an equal portion, and, at the death of said sister, the principal to go to her children. The rest of my property, personal effects, I leave to my unmarried sisters, to be kept and disposed of as they think best. I appoint my two brothers, George and Alexander Oswald, to be my executors.

"C. J. COWAN."

The parties of the second part were the full brothers and unmarried sisters of the said deceased Miss C. J. Cowan, and the trustees under the marriage-contract of her two married sisters, and the executors nominated by Miss C. J. Cowan in her will. Both parties were agreed that the sum of £1500 was carried by Miss Cowan's will.

The question submitted for the opinion of the Court was, Whether the provision of £2500 (the balance of the provision of £4000 directed to be set apart for each child of the second marriage) fell to be dealt with by the parties of the first part as part of the residue of the trust-estate of the late Mr A. Cowan, or fell and belonged to the parties of the second part under the terce of the late Miss C. J. Brown.

KEIR, for parties of the first part, contended that Miss Cowan had a mere liferent with power to test, and that the words "all my property" were not sufficient to carry the said provision.

PEARSON for parties of the second part.

Cases referred to—*Hislop*, 12 S. 413; *Grierson*, 4 D. 939.

The Court, without hearing counsel for parties of the second part, unanimously held that the question should be answered in favour of the parties of the second part, on the authority of the case of *Hislop*. They held that Miss Cowan having the power to test and dispose of the capital sum of £4000, she had used words which included the sum of £2500, and that they were not called on to decide whether the fee had vested in her or not.

Agent for First Parties—John M. Bell, W.S.

Agents for Second Parties—Menzies & Coventry, W.S.

Thursday, July 18.

SPECIAL CASE FOR LIEUTENANT JOHN DUNBAR, 21ST FUSILIERS, AND OTHERS (MRS SCOTT'S TRUSTEES.)

Legacy—Construction.

A testator, by trust-disposition and settlement, directed her trustees, in case of her not having advanced money during her lifetime to purchase a captain's commission for John Dunbar, to make payment to him of a sum of £2000.

The truster had died without purchasing a commission, but after purchase in the Army was abolished. *Held* Lieutenant Dunbar entitled to receive payment.

This Special Case was presented by Lieutenant Dunbar as party of the first part, and the parties of the second part were the trustees of the deceased Mrs Cuninghame or Scott. By the second purpose of Mrs Scott's settlement she directed "that my said trustees shall make payment at the first term of Whitsunday or Martinmas after my death of certain legacies, and, *inter alia*, to John Dunbar, my nephew, the sum of £18,000 sterling, and failing the said John Dunbar, to his child or children, and, further, in the case of my not having advanced money during my lifetime to purchase a captain's commission in his regiment for the said John Dunbar, I direct my trustees to make payment to him of a further sum of £2000 sterling for that purpose."

Mr Scott died on 8th February 1872. Purchase in the army was abolished by Royal Warrant in April 1871, which took effect on 1st November 1871.

The question submitted for opinion was whether Lieutenant Dunbar was entitled to receive payment of the said sum of £2000, directed in the second purpose of Mr Scott's trust-deed to be paid to him.

MARSHALL and WATSON, for the first party, maintained that as the condition had become impossible, and the fund was not destined for the benefit or maintenance of Lieutenant Dunbar, he could not demand payment.

SOLICITOR-GENERAL and MUIRHEAD for the second party.

Authorities referred to—Skinner's Trusts, 1860; White and Tudor's Leading Cases, vol. ii. p. 266; *Kippen*, Nov. 24, 1871; Erskine's Institute, 2. 2.

At advising—

LORD JUSTICE-CLERK—In this case the question is, whether the legacy of £2000, which was left under certain expressions in the trust-deed, is to be paid to Lieutenant Dunbar. The legacy proceeds upon this inductive statement:—"In the case of my not having advanced money during my lifetime to purchase a captain's commission in his regiment for the said John Dunbar." Now, it stated in the case that a royal warrant for the abolition of purchase was issued on 20th January 1871, to take effect on 1st November 1871. The testatrix died on 8th February 1872. It was argued, that although the money was left to Lieutenant Dunbar for the purpose of purchasing a commission, that that was not a condition of his receiving the legacy, or, at all events, that if it was a condition, it was now impossible to fulfil the condition, which must therefore be held *pro non scripto*. It was further maintained that no party had a patrimonial interest in the condition being carried out, and the case of *Skinner's Trustees* was referred to. On the other hand, it was contended that the money was only to be paid by the trustees for a certain purpose, and should not now be paid, as that purpose could not now be fulfilled.

In deciding this case, I am not disposed to proceed on any general principle. I can understand that a case might arise in which, trustees being bound to pay money for a particular purpose, the legacy might fail because the purpose failed, and the benefit could no longer be taken by the legatee. But the circumstance, which is conclusive to my mind is that the testatrix executed a codicil so late as 10th May 1871. At that time there was a proposal to abolish purchase in the army, and the royal warrant abolishing it was issued in July of that year. We may presume that she intended that the legacy should be paid whether she survived the abolition or not.

But I have considerable doubt if the legatee could have said before the abolition of purchase that he would take the legacy and not fulfil the condition attached to his receiving her money.

LORD COWAN—This case radically depends upon the intention of the testatrix, and the words of bequest which she has used, keeping in view the rules of legal construction which have been recognised by the Court. The words used here are peculiar. A great deal of argument was advanced to show that the legacy was not made under a condition, but was intended merely to be paid for a certain purpose. Viewed either as a condition or a purpose, I do not think that the argument of the trustees should prevail.

Viewed as a condition, if the condition becomes impossible, the legacy is good, and the condition flies off.

Viewed as a purpose, it raises a more delicate question. The purpose may be so wrought into the substance of the bequest that, unless it can be carried out, the bequest fails. If the purpose be such that the legatee only is concerned in it, then the purpose ceases to have any effect. It was on this principle that the case of *Kippen* was decided. If in that case there had been attached a condition that the annuity was to be alimentary, we would not have sanctioned the principle. But we held that, as it was in the power of Miss Kippen to sell her annuity as soon as she had got it from the trustees, she was entitled to get from them the purchase-money of an annuity. Here I would have said that the trustees were bound to pay the legacy even if the legatee had obtained a captain's commission before the testator's death. But the abolition of purchase took place in the lifetime of the testatrix, and she allowed her settlement to remain untouched. I think we may therefore presume that her intention was that she wished her legacy to be paid by her trustees.

Lord Neaves rested his opinion upon the fact of the testatrix having survived the event that rendered implement of the condition impossible; and, not having altered her will, her intention was that Lientenant Dunbar was to get the money.

LORD BENHOLME concurred.

The Court unanimously answered the question in the affirmative. They held that the trustees, having been directed to pay and not to purchase (the bequest having been made entirely for the benefit of the legatee) and the purpose having become impossible without the fault of the legatee, the condition was to flee off, and the legacy stand good.

Agents for Lieutenant Dunbar—Russell & Nicolson, C.S.

Agent for Mr Scott's Trustees—A. Stevenson, W.S.