Harriet Matilda Bruce and Lady Lucy Grant, my grandchildren, or the survivor in liferent, and to such of their children as may be in life at the death of the survivor, equally among them, and failing children to my own nearest heirs in fee, the sum of £12,000." By two subsequent codicils it appears that the testatrix desired to make additions to this sum, for by the first of these an additional £3000, and by the second a further sum of £5000, was transferred to the said trustees, making in all a sum of £20,000. 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 who survived the liferentrix, or whether a portion of it is to be given to the representatives of these children who predeceased Lady Lucy Grant, the survivor. Now, it is thoroughly settled—and I do not think it necessary to go over the list of cases to which we were referred—that words such as we have here do not exclude the *conditio si sine liberis*, and I am therefore of opinion that the *conditio si sine liberis* must be applied to this deed of trust, and that the second parties are entitled to participate in the fund along with the parties of the first part.

Lord Mure concurred.

Lord Shand—I am clearly of the same opinion. It appears to me that this case is ruled by those of *Wallace*, *Thomson*, and *Gauld's Trustees*. No doubt the expressions in the present deed may be somewhat different from those used in the previous cases, but substantially the deeds are the same. It cannot be disputed that if we had had here the institution of a class with a clause of survivorship, then in these circumstances the *conditio* would have been applicable, and practically that is what is done. The only novelty in the present case is the application of the rule to great-great-grandchildren, whereas previously its benefits have not been extended further than to admit the claims of great-grandchildren. I think that the *conditio* should apply in all cases of descendants, however remote, and I agree with your Lordships that the second parties in this case are entitled to its benefits.

Lord Deas was absent.

The Court found that the second parties, as representing their respective mothers, were entitled to participate in the fund along with the parties of the first part.

Counsel for First Parties — Mackintosh — Graham Murray. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Second Parties—Mackay—Dundas.

Counsel for Third Parties — Maconochie. Agents for Second and Third Parties—Dundas & Wilson, C.S.

Saturday, November 4.

FIRST DIVISION.

THARSIS SULPHUR AND COPPER COMPANY (LIMITED), PETITIONERS.

(*Ante* February 2, 1882, vol. xix. p. 379, and 9 R. p. 507; and *Hoggan* v. *Tharsis Company*, July 20, 1882, vol. xix. p. 875.)

Public Company—Companies Act 1867 (30 *and* 31 *Vict. c.* 131), *secs.* 10, 11, 13, 14, 15—*Reduction of Capital — Confirmation Order — Consent of Creditors to Reduction of Capital—Trustee—Consent of Trustee for Himself and Co-Trustees —Consent of "Duly Authorised Agent" of Creditor.*

Section 11 of the Companies Act 1867 provides with respect to reduction of capital that "The Court, if satisfied with respect to every creditor of the company who is . . . entitled to object to the reduction . . . that his consent to the reduction has been obtained . . . may make an order confirming the reduction, on such terms and subject to such conditions as it deems fit." Section 14 provides that "Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the Court may (if it think fit) dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart or appropriating" a sufficient sum to meet such debt.

A company having presented a petition to the Court for an order confirming a resolution to reduce capital, there were produced in process, *inter alia*, (1) consents signed by one of a body of trustees who were creditors, "for himself and his co-trustees;" and (2) consents signed by persons described as duly authorised agents of creditors. These agents were the agents through whom the loans were originally transacted, and were known to be in use to act for the creditors they affected to represent, though no special evidence of their authority to give consent in this instance was produced. *Held* that in both cases there was sufficient evidence that the creditors' "consent to the reduction of capital had been obtained," and that therefore the creditors for whom these persons undertook to act must be held as creditors consenting to the reduction of capital.

Opinions that the mere silence of a creditor to whom a proposed reduction of capital of a company had been intimated would not be held as proof of his consent to the reduction.

Process—Public Company—Reduction of Capital —Period of Addition of Words "and Reduced" to Name of Company which has Reduced its Capital.

Procedure in a petition by a public company for an order confirming a proposed reduction of capital.

This petition for confirmation of a proposed reduction of capital was on 2d February 1882, as previously reported, sisted to await the determination of the action of reduction, at the instance of Hoggan and others, of the resolutions passed

on 9th and 21st November, and registered 1st December 1881, for the purpose of reducing the company's capital with the intention of thereafter increasing it according to the scheme fully described in the report of that action (*ante*, vol. xix. p. 875). Their Lordships of the First Division, on 20th July 1882, after adhering to the interlocutor of the Lord Ordinary (ADAM), by which his Lordship assoilzied the company from the conclusions of that action, recalled the sist of 2d February, and remitted to Mr Charles B. Logan, W.S., "to report on the proceedings, and how far the creditors whose names are entered on the list of creditors have either consented to the proposed reduction or have had their debts or claims discharged or determined.

Section 11 of the Companies Act 1867 (30 and 31 Vict. c. 131) provides as follows—"A company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the reduction, and on the hearing of the petition the Court, if satisfied that with respect to every creditor of the company who under the provisions of this Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has been determined, or has been secured as hereinafter provided, may make an order confirming the reduction, on such terms and subject to such conditions as it deems fit."

By section 13 of the same Act it is provided that the creditors who are entitled to object to a reduction of capital are all creditors who at the date fixed by the Court as the date at which objection should be lodged, "are entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company."

Mr Logan reported that at 31st December 1881, the date fixed by the Court for a list of such creditors to be lodged, the petitioners had lodged a list of all the creditors entitled to be entered on the list of creditors in terms of section 13, and that no person had thereafter, in terms of an interlocutor of the Court appointing any creditors not entered on the list to claim to be so entered or to be excluded from being entitled to object to the reduction of capital, claimed to be entered on the list. He reported therefore that the list of creditors of 31st December might be held to be complete, and be dealt with as a full and correct list. The creditors of the company as appearing in that list were of four classes':—

1. Creditors holding debenture bonds by the company .	£355,600	0	0
2. Creditors for sums deposited with the company on loan .	31,950	0	0
3. Creditors holding bills of exchange . . .	40,300	0	0
4. Creditors on open account .	34,051	10	3
	£461,901	10	3

With regard to the second of these classes—those for sums deposited with the company on loan—Mr Logan reported that they had all consented to the proposed reduction (two consents being given by persons "acting for behoof of creditors"). With regard to the third class—creditors on bills of exchange—Mr Logan reported that all such bills had been retired. With regard to the fourth class—creditors on open account—he reported that they had been paid. With regard to the first class—that of creditors holding debenture bonds—he reported that there were in all 246 such creditors, and that the total amount of debt due them was £355,600. Of these 246 creditors fourteen had not given their consent. The debenture bonds they held amounted in all to £9300.

The Companies Act 1867, by section 14, provides for the case of creditors who do not consent to the proposed reduction of capital, as follows:—"Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the Court may (if it think fit) dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart or appropriating in such manner as the Court may direct a sum of such amount as is hereinafter mentioned—that is to say, (1) If the full amount of the debt or claim of the creditor is admitted by the company, or though not admitted is such as the company are willing to set apart and appropriate, then the full amount of the debt or claim shall be set apart and appropriated." . . .

Mr Logan accordingly reported that a sum of £9300, with a sum sufficient to meet the interest thereon until the expiry of the bonds (of which one was to endure till 1st June 1884, while the others were to expire at 1st February 1884), ought to be set apart and appropriated for behoof of the debenture-holders, and to be applied as the debentures fell due. Of the remaining debenture-holders Mr Logan reported that certain of them holding bonds amounting to £3200 had been paid off, and that there remained 218 who held bonds to the amount of £343,100, and whose consents had been produced to him. With regard to these 218 consents, however, he made the following explanation:—"Of these, consents representing a debt of £149,800 are signed by the creditors themselves; consents representing a debt of £36,600 are signed by one of a body of trustees for himself and his co-trustees; and the remainder, representing a debt of £156,700, are signed by persons described as 'duly authorised agents of debenture-holders.' No evidence of the authority of such agents has been produced, and it has been explained that in most of these cases the creditors are bodies of trustees whose signatures there might be some trouble in obtaining, and the agents who sign are solicitors and others known to act for them, and through whom the loans were originally transacted. Looking to the terms of the statute, which requires that the consent of the creditor is to be obtained, I think it right to bring this point specially under your Lordships' notice, that it may be determined whether the consents of agents are to be held sufficient. In connection with this I have been asked to explain that all the holders of debentures had been offered, either verbally or by circular, payment of their bonds on 1st February last, if that was preferred to giving consents, but holders of bonds to the extent of £3200 only took payment at that time. The discharged bonds for that amount have been exhibited to me." In conclusion, and on the assumption that these consents were valid, Mr Logan reported that on consignation in bank, in such manner as the Court might direct, of the

sum of £9300, together with interest, required to be appropriated to the bonds held by those creditors who had not consented to the reduction as already explained, the order confirming the proposed reduction might be granted, and that the petitioners would fall thereafter to lodge a minute in terms of section 15 of the Companies Act 1867, which provides, *inter alia*, that the "Registrar of Joint Stock Companies, on production to him of an order confirming the reduction of the capital of a company, and the delivery to him of a copy of an order and of a minute (approved by the Court) showing, with respect to the capital of the company as altered by the order, the amount of such capital, the number of shares into which it is divided, and the amount of each share, shall register the order and minute, and on the registration the special resolution confirmed by the order so registered shall take effect."

Counsel for the petitioners were heard in the Summar Roll on Mr Logan's report. No appearance was made for Hoggan and others, the pursuers of the action of reduction, who had appeared by minute on 27th January 1882 and obtained a sist of the petition as previously reported. On the question whether consent to a proposed reduction of capital could be validly given by an agent professing to act for a creditor, so as to satisfy the requirements of section 11 of the statute, it was contended that it is sufficient that the consent be given by one known to act for the creditor in similar matters, and professing to act for him. In this case the consents were given by persons who had acted for the creditors in negotiations for these very loans to the company, which made the case a strong one. The rule in England at first was that after notice a creditor must come forward and object to the reduction, or otherwise his consent was assumed to have been given, and though a more strict rule was now followed, it was still held sufficient that consent should be given by some-one known to be acting for the creditor. The practice there seemed to be for counsel to appear in Court and give consent for the creditor, and the signature of the agents in this case was to a similar effect, and should be held sufficient—Buckley on The Companies Acts, p. 439; *Credit Foncier of England*, L.R., 11 Eq. 356; *Patent Ventilating Granary Company*, L.R., 12 Chan. Div. 254.

At advising—

Lord President—The only point upon the report of Mr Logan which admits of doubt is that which is brought specially under our notice in that part of his report in which it is stated that one consent is signed "by one of a body of trustees for himself and his co-trustees," while the remainder of the consents produced are signed by persons described as "duly authorised agents of debenture-holders." Now, the statute requires the consent of creditors to a proposed reduction of capital, and it provides by sec. 11 that "the Court, if satisfied that with respect to every creditor of the Company who under the provisions of this Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has been determined, or has been secured as hereinafter provided, may make an order confirming the reduction, on such terms and subject to such conditions as it deems fit." It further provides by sec. 14 that "where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the Court may (if it think fit) dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart or appropriating, in such manner as the Court may direct, a sum of such amount as is hereinafter mentioned," *i.e.*, a sum sufficient to cover both principal and interest of the debt due. The words of the statute are very strong, and the question might be raised whether it can be said that the creditor is to be held a non-consenting creditor when he merely remains silent, or whether in order that it may be said his consent has not been obtained there must be intimation by him of objection and of his refusal to consent. I confess that I think there would be great difficulty in holding that the creditor must take action in order to place himself in the position of being a creditor not consenting; on the contrary, I think that in the absence of evidence of his consent it would probably be held that his consent had not been given.

I think, however, that there is sufficient evidence in the two cases before us of the consent of the creditors. Mr Logan mentions that one of a body of trustees signs one of the consents on behalf of himself and his co-trustees. I think with regard to that case that the signature of one of a body of trustees to such a consent may very fairly be held by the Court as an expression of the consent of the whole trustees, since no one in the position of such a trustee would willingly put himself in a position of such personal responsibility as the signature to such a document without authority would involve.

With regard to the other consents, which are signed by persons described as duly authorised agents of the debenture-holders, it must be observed that Mr Logan explains to us that in these cases the signatures are those of persons known to act for the debenture-holders, and through whom the loans were originally transacted. I think that if there is a difficulty in getting the signature of the parties themselves we have all that is necessary in the consents signed by these agents. Therefore in the circumstances of this case I am for holding that sufficient consents have been produced.

Lord Mure—As to the first point, I think that if one of the body of trustees gives his consent for himself and the other trustees, there is a fair presumption that the whole body of trustees are consenters.

As to the consents signed by the agents, I understand not only that the document containing their consents bears that they sign as duly authorised agents of the debenture-holders, but also that they have satisfied the reporter that they are so, and that they are the persons through whom the loans were transacted. It would have been better if the parties had signed the consents, but looking to the circumstances and to the English cases referred to, I do not dissent from the view your Lordship has taken.

Lord Shand—Taking the language of sec. 11, I am satisfied with respect to these creditors that

their consent has been obtained. I agree with your Lordships in thinking that a creditor's silence does not presume his consent in this matter, and if there were no evidence of actual consent I think we could not hold from mere silence that consent had been obtained. But looking to the fact that the consents are signed professedly with authority, and that in the second case the agents who sign them were the agents who acted for the creditors in the negotiation of the loan and the advancing of the money, I think that we have sufficient evidence of consent in the present case. There may be other cases in which it will be necessary to be more critical, but I am satisfied with the evidence in this case.

Lord Deas was absent.

This interlocutor was pronounced:—

"The Lords . . . settle the list No. 7 of process [that of 31st Dec. 1881] as the list of creditors entitled to object under sec. 13 of the Companies Act 1867: Find that they, the creditors in the said list, have all consented or had their debts paid with the exception of fourteen creditors holding twenty-eight debentures amounting to £9300: Appoint the petitioners to consign in the Bank of Scotland the sum of £1010 to secure the said sum of £9300, and interest thereon till paid at the rate of 5 per centum, in name of the reporter Mr C. B. Logan, repayable, with interest accrued thereon, on the order of the reporter, which he is empowered to grant for the amount of any one or more of the said twenty-eight debentures, with corresponding interest, on production to him of such debenture or debentures duly discharged."

Thereafter a minute having been lodged as required by sec. 15, above quoted, the Court on 4th November 1882 pronounced this interlocutor:—

"The Lords . . . . confirm the reduction of capital as set forth in the petition; approve of the minute No. 33 of process; authorise the registration of this order and of the said minute by the Registrar of Joint Stock Companies; fix this date as the date down to which the words 'and reduced' shall be added to the name of the company [under sec. 10]; and appoint this order and the said minute to be advertised once in the *Edinburgh Gazette;* and decern."

Counsel for Petitioners—Mackintosh—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, November 4.

FIRST DIVISION.

DOUGLAS *v.* M'CREADIES.

Bankruptcy—Petition for Sequestration—Title to Sue—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 16 *and* 170.

Decree for the expenses of an action was allowed to go out in name of the agent of the pursuers, who were successful in the action, as agent-disburser. Thereafter, the expenses not having been paid, and the defender having become notour bankrupt, the pursuers presented a petition, which was signed on their behalf by the same agent, for sequestration of his estates and for the appointment of a judicial factor pending the election of a trustee. The debt alleged in their affidavits to exist was the amount of the expenses for which decree had been given in their agent's name. *Held* that the pursuers were not divested of their title to present such a petition by the mere fact that the decree for expenses had gone out in their agent's name.

Observed that it would have been otherwise had the petition been presented after diligence had been done on the decree by the agent.

Judicial Factor, Interim Appointment of, pending Election of Trustee.

Observed that the interim appointment of a judicial factor pending proceedings for sequestration is not matter of course, but ought only to be made when the Sheriff is satisfied of the necessity thereof, and that it is incumbent on the petitioner for such an appointment to make specific averments of the danger to the bankrupt estate which makes the appointment necessary.

On 29th June 1882 the Second Division of the Court pronounced an interlocutor in an appeal for the pursuers in an action at the instance of William M'Creadie and John M'Creadie against James Douglas, by which interlocutor the Court sustained the appeal for the pursuers John and William M'Creadie, found Douglas liable in the expenses of the appeal and a portion of those in the Inferior Court, and authorised the Sheriff of Dumfries and Galloway, before whom the case had originally depended, to decern for the amount of these expenses as taxed. The amount as taxed was £112, 6s. 2d., and the Sheriff on pursuers' motion gave decree therefor in name of William Ross Garson, the M'Creadies' agent, as agent-disburser. Thereafter, on 27th July 1882, Douglas was rendered notour bankrupt as the result of the diligence of certain creditors on a promissory-note granted by him.

In September 1882 the M'Creadies presented this petition in the Sheriff Court of Dumfries and Galloway at Stranraer, in which they asked the Court to grant warrant to cite Douglas to appear and show cause why sequestration of his estates should not be granted, and further to appoint a judicial factor on his estate in terms of section 16 of the Bankruptcy (Scotland) Act 1856, which provides that "it shall be competent for the Court to which a petition for sequestration is presented, whether sequestration can forthwith be awarded or not, on special application by a creditor, either in such petition or by a separate petition, with or without citation to other parties interested as the Court may deem necessary, or without such special application, if the Court think proper, to take immediate steps for the preservation of the estate either by the appointment of a judicial factor . . . or by such other proceedings as may be requisite; and such interim appointment or proceedings shall be carried into immediate effect; but if the same have been