HOUSE OF LORDS.

Thursday, November 22.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lord Dunedin, Lord Atkinson, and Lord Parmoor.)

MACDONALD (M'DOUGAL'S TRUSTEE) *v.* HEINEMANN AND OTHERS.

Succession—Conditio si sine liberis decesserit—Parent Forfeiting his Spes successionis.

A testator gave an alimentary liferent of the residue of his estate to a sister M. M. and to her husband J. M., and directed that on the death of the longest liver the residue should be divided among their children. He excluded, however, the leases of certain farms he cultivated, with the stocking thereon, with regard to which he provided—"I direct that the leases of . . . shall be made over to the said M. M. in liferent, and at her death to the said J. M. also in liferent, and at the death of the longest liver of them to such of her sons as she may appoint by any writing under her hand in fee, and failing such appointment, then to her eldest son in fee, and if he shall not accept of the same, then to the next eldest son who shall be alive at the death of the said M. M. and her husband, and so on to her sons in succession in fee, and if all the sons shall refuse or die, then to the daughters in succession in fee, and such son or daughter so succeeding to the said leases . . . shall be debarred from participating in any other share or portion of my means and estate." M. M. and her husband declined the provision in their favour with regard to the leases, and by agreement between them, the trustees, and the children these were assigned and made over to a son. This son predeceased his mother.

Held that the son's children could claim no share of the residue of the trust estate, inasmuch as the son could never have taken any share, and consequently there was no institute to whom the *conditio si sine liberis decesserit* could be applied.

On 22nd July 1915 Duncan Macdonald, farmer, Urlar, Aberfeldy, sole surviving trustee of the late Alexander M'Dougal, farmer, Granton Mains, brought an action of multiplepoinding and exoneration, which dealt with a third part of the residue of the trust estate. Mrs Ida Margaret Macdonald or Heinemann and others, the children of the deceased Robert Burdon Macdonald, *real raisers*, claimed the whole fund *in medio*, or alternatively so much thereof as would amount to one-fourth of the residue of the trust estate. Duncan Macdonald, *defender*, claimed one-half of the fund *in medio*, the other half going to his sister, Mrs Jane Macdonald or Matheson or M'Intyre in liferent, and her children in fee.

Alexander M'Dougal, the truster, died on 28th April 1880, leaving a trust-disposition and settlement dated 14th December 1870, and five codicils. He was predeceased by his wife, and had no issue. He had a married sister, Mrs Margaret M'Dougal or Macdonald, wife of James Macdonald, farmer, Comrie Farm, Aberfeldy, and she had four children, Robert Burdon Macdonald, who died on 13th March 1910, leaving issue, the real raisers, Duncan Macdonald the defender, Alexander Macdonald, who died on 22nd January 1886 without issue, and Mrs Jane Macdonald or Matheson or M'Intyre. James Macdonald died on 11th February 1890, and his wife Mrs Margaret M'Dougal or Macdonald on 11th February 1914.

The *trust-disposition* provided—"(*Sixth*) And I direct my trustees to hold the residue and remainder of my estate in trust for my sister, the said Margaret M'Dougal or Macdonald, in liferent, and failing her for the said James Macdonald in liferent, and failing him for the use of their children [read '*their* children'] in fee, it being my wish that my sister shall have for her life the interest and annual income of the residue of my means and estate for her alimentary use only, exclusive of the *jus mariti* and right of administration of her present or any future husband, and that such liferent shall not be assignable or subject to the diligence of her or his creditors, and that at her death the said James Macdonald shall have the liferent of the residue of my said means and estate, and at the death of the longest liver I direct that the residue of my means and estate, except the leases of my farm and stock and crop which are afterwards provided for shall be divided equally, share and share alike, among their children who shall then be alive, the shares of the sons being payable on their respectively attaining twenty-one, and the shares of the daughters being payable on their respectively attaining that age or marrying, whichever shall first happen, . . . and I direct that the leases of Granton Mains and Muirhouse, with the whole stock, crop, and utensils in and about the farm, shall be made over to the said Margaret M'Dougal or Macdonald in liferent, and at her death to the said James Macdonald also in liferent, and at the death of the longest liver of them to such of her sons as she may appoint by any writing under her hand in fee, and failing such appointment then to her eldest son in fee, and if he will not accept of the same then to the next eldest son who shall be alive at the death of the said Margaret M'Dougal or Macdonald and her husband, and so on to her sons in succession in fee, and if all the sons shall refuse or die then to the daughters in succession in fee, and such son or daughter so succeeding to the said leases with the stock, crop, and utensils shall be debarred from participating in any other share or portion of my means and estate, and the said son or daughter so succeeding to the said leases shall be bound to pay all the rents then due and payable and those to become due, and also to fulfil all

the conditions and obligations of the leases, and to free and relieve my estate of and from the payment of the said rents, and the fulfilment of all obligations incumbent on the tenant." Mr and Mrs Macdonald did not take the leases, &c., but by agreement between themselves, their four children, and the trustees, their son Robert Burdon Macdonald took them.

On February 24, 1916, the Lord Ordinary (ORMIDALE) pronounced this interlocutor—"Finds (1) that the claimants Mrs Ida Margaret Macdonald or Heinemann, James Alexander Macdonald, and Annie Macdonald are entitled under the *conditio si sine liberis* to an equal one-fourth share of the residue of the testator's estate; (2) that the agreement of 16th, 21st, and 23rd August 1880, and relative assignation of 16th, 23rd, and 26th August 1880, do not bar the said claimants from insisting in their claim to said share of residue; (3) that the said deeds, or either of them, were not an appointment to the claimants' father Robert Burdon Macdonald in terms of the testator's testamentary deeds; and (4) that the transference of the leases and stock to him under the said agreement and assignation was not of the nature of an advance to him in terms of the said testamentary deeds, and the value thereof does not fall to be imputed against the share of residue falling to the said claimants: Reserves all questions of expenses, and grants leave to reclaim."

Opinion.—"The first question to answer is whether the *conditio si institutus sine liberis decesserit* applies to the bequest of residue in Mr M'Dougal's settlement.

"The provision made by him is in the following terms:—'At the death of the longest liver' (of Mr and Mrs Macdonald) 'I direct that the residue of my means and estate, except the leases of my farms and stock and crop, which are afterwards provided for, shall be divided equally, share and share alike, among their children who shall then be alive, the shares of the sons being payable on their respectively attaining twenty-one, and the shares of the daughters being payable on their respectively attaining that age or marrying, whichever shall first happen, with power nevertheless to my trustees, if they shall think proper and at their discretion, to withhold the share or shares of any one or more of the children who shall act in a manner contrary to the wishes and against the advice of my trustees, and to divide such share or shares amongst the others in the same manner as if the children defaulting had been dead.'

"The testator died predeceased by his wife, and he had no issue. The settlement was conceived in favour of his sister Mrs Macdonald and her family, and there is nothing in it to indicate that the testator in making the provisions he did was actuated by any motive other than that of relationship. There is no suggestion of what has been termed 'individual predilection.' *Farquharson* v. *Kelly*, 2 F. 863, at 865, 37 S.L.R. 574. There is no doubt, therefore, that the testator had placed himself *in loco parentis* to his nephews and niece. *Bogie's Trustees* v. *Christie*, 9 R. 453, 19 S.L.R. 363; *Waddell's Trustees* v. *Waddell*, 24 R. 189, 34 S.L.R. 142. It is admitted that the words 'who shall then be alive' are not of themselves sufficient to exclude the application of the *conditio*. *Gauld's Trustees* v. *Duncan*, 4 R. 691, 14 S.L.R. 446. Keeping in view that the implied *conditio* is founded on the presumption that the failure to mention the issue of the legatees instituted by a testator is due to his not having contemplated the event of the legatees leaving issue (*Greig* v. *Malcolm*, 13 S. 607), is there anything in the other provisions of the settlement to rebut the presumption in the present case?

"The claimants, other than Robert's children, point to the clause giving the trustees a discretionary power to withhold the share of any one or more of the children who shall act contrary to their wishes, and to divide 'such share amongst the others in the same manner as if the children defaulting had been dead.' 'Amongst the others' is a definite and precise term, and *ex figura verborum* limits the right to take in the event contemplated to other children only, thus excluding the issue of any predeceasing child, and, as the clause goes on, 'in the same manner as if the children defaulting had been dead,' there is force in the contention that this shows that the testator did deliberately and of purpose intend to limit the bequest of residue to such children only as were alive at the termination of the liferent.

"These claimants further found on the codicil of 27th November 1875, by which the truster, under reference to the clause in his will directing the residue of his estate to be divided share and share alike between the children of Mr and Mrs Macdonald, directs that the share falling to Mrs Matheson (afterwards M'Intyre) shall not be paid to her, but that she shall have only an alimentary liferent of it, and at her death her share of the residue shall be divided among her children equally. In the event of her dying without children, then the residue shall be at her disposal after her death, and if she shall leave no will, then such residue shall be divided among her brothers or their heirs. Now here the issue of a child are expressly provided for in a certain event, and it is argued that the provision shows indubitably that the testator had in fact contemplated the possibility of Mrs Macdonald's children having issue.

"Do the clause relating to defaulting children and the codicil afford sufficient grounds for excluding the *conditio*? In my opinion they do not. The clause is certainly not intended to modify or vary in any way the effect of the earlier clause. But after all it is concerned with a particular event and a particular share, and there is nothing in it to suggest that the testator had in framing it, any more than in framing the earlier clause, contemplated the possibility of any children who might predecease leaving issue. It seems to me that the later clause is dependent for its construction as much on the meaning to be given to the earlier clause as *vice versa*. At anyrate if

the earlier clause taken by itself is sufficient to let in the implied *conditio* there is nothing in the later clause which can be read back so as to modify its construction.

"The codicil is in a different position. Lord Corehouse in *Malcolm* v. *Greig*, 13 S. 607 (*cit. sup.*), says that the presumption that the testator has forgotten the contingency of the institute leaving children may be defeated by opposite presumptions or evidence, 'and there can be no stronger evidence to that effect than a clause in the settlement by which the testator does make a provision for the issue of predeceasing legatees, because it incontestably shows that he had them in view when he made the substitution.'

"It is said that the codicil raises just such a counter presumption. But this is not really so. The provision is inserted to meet a special contingency, and contemplates that Mrs M'Intyre has survived, not predeceased, the appointed date of distribution, and so would herself have taken a share of the residue if the will had not been altered by the codicil. The assumption of the provision is that the fee of the share is altogether undisposed of, and in no way, as I read it, negatives the idea that the testator had overlooked the contingency of the children instituted to the residue predeceasing the date of distribution and leaving issue. So far as it goes it tends rather to confirm the view that if he had not done so he would have directed the share which the predeceasing child would have taken to be divided equally among any children he might leave —in other words, would have expressed the *conditio* instead of leaving it to be implied. No reason suggests itself why the children of the niece should be favoured and the children of the nephews not.

"I cannot hold therefore that by the codicil the presumption that the *conditio* applies has been defeated.

"The next point for consideration is the effect of the agreement and relative assignation. Did Robert under them 'succeed' to the leases in terms of the settlement? The desire and intention of the testator is very clearly evinced in the clause dealing with the leases, viz., that the leases should not be given up or allowed to lapse so long as any member of the Macdonald family was willing to take them up. The clause, however, proceeds on the assumption that Mrs and Mr Macdonald would in the first place take up the leases and keep the farms going during their lives, and the event which happened, viz , their declinature to do so, is not in terms provided for. It is a *casus improvisus*, and the question seems to me to be whether the language, obviously framed and fitted to meet an anticipated set of circumstances, can without violation of its terms be read so as to be applicable to an entirely different and wholly unexpected set of circumstances. The leases are treated by the testator as a separable part of his estate—a part that was not residue, although in certain events it might come to be residue. The direction given in regard to them is not that the trustee should continue to hold them as part of the trust estate, but that they should make them over to Mrs Macdonald in liferent and at her death to Mr Macdonald in liferent, and on the death of the longest liver of them to a member of their family in fee, the member to be either a son appointed by Mrs Macdonald, or failing such appointment that one of the sons, and failing sons that one of the daughters, all in succession according to their seniority, who should be willing to accept them. Now, as I have said, the testator did not himself contemplate a declinature on the part of Mrs and Mr Macdonald to take up the leases, and accordingly the death of the longest liver of these two is the date at which he anticipated and provided for the opening of the succession to the children. Are the expressions 'at the death of the longest liver of them,' and 'who shall be alive at the death of Mrs Macdonald and her husband,' and 'if all the sons refuse or die,' to be read literally as conditioning the right of Mrs Macdonald to make an appointment and the right of the children to take? I was invited to read them out altogether. I cannot subject the settlement to such drastic treatment as that, but leaving them in, and keeping in view what I have already said is the clearly evinced intention of the testator, I was at first inclined to construe them in the light of the context as referring to and as meaning no more than the termination of the liferent which the testator assumed Mrs and Mr Macdonald would enjoy. The language of the clause, however, is so precise and definite that I feel that so to construe it would be to give it a meaning and effect that it cannot reasonably bear, and I come reluctantly to the conclusion that while the testator has expressed his intention quite clearly, he has not used terms habile to carry it into effect. If so, then it follows that, however reasonable and natural, the agreement and the assignation not being in terms of the settlement, they cannot be allowed to bar Robert's children from claiming the share of residue to which they were conditionally instituted. The agreement, however binding it would have been on their father had he survived, was not binding on them because they were not parties to it, and for the same reason the date of the provision as to the leases becoming operative in favour of children could not be accelerated to their disadvantage, whether the liferent right to the leases conferred on Mrs Macdonald was alimentary or not—*Elliot's Trustees*, 21 R. 975, 31 S.L.R. 850; *Hughes* v. *Edwards*, 19 R. (H.L.) 33, 29 S.L.R. 911; *Muirhead*, 17 R. (H.L.) 45, 27 S.L.R. 917; *Dawson* v. *Smart*, [1903] A.C. 457. It follows also that if *quoad* his children the actings of Robert were not warranted by the settlement, the decisions to the effect that where a father is himself excluded from the bequest (and I assume that Robert if he had survived would himself have been excluded from the bequest here) his children would have no right to claim under the *conditio* have no application—*Macfarlane's Trustees*, 9 R. 1138, 19 S.L.R. 850; *Jack*, 1913 S.C. 815; *Scott*, 1913 S.C. 467, 50 S.L.R. 536; *Rhind's Trustees*, 5 Macph.

104, 3 S.L.R. 91; *Chalmers' Judicial Factor*, 5 F. 1154, 40 S.L.R. 814.

"The next question is whether the value of the leases and subjects conveyed to Robert, £2251, 10s., can be treated as of the nature of an advance in terms of the settlement. However equitable such a result would be, there is, I am afraid, no warrant for it. The suggestion is obviously an afterthought. The trustees neither considered the propriety of making an advance, nor did they in fact pay over the £2251, 10s. as an advance to account of Robert's expectant share. The payment was made on condition of Robert renouncing and discharging all claims to his expectant share. The only fund available to the trustees out of which to make advances was the proper residue.

"The only remaining question is whether Robert's children are entitled to one-fourth or one-third of the residue. There were four children alive at the date of the testator's death. One of them, Alexander, died in 1886. Robert died in 1910. The expectant share of each child, and therefore of Robert, was one-fourth. Now the general rule is that children taking under the *conditio* take only their parent's original share, and not any share that would have accrued to him if he had survived—*Young* v. *Robertson*, 4 Macq. App. 337; *Bowman*, 2 F. 624, 37 S.L.R. 424; *Graham's Trustees*, 6 Macph. 820, 5 S.L.R. 402. It was maintained here that Alexander cannot be said to have had any share, there being no bequest to him *nominatim*, and further, that as there was no expressed destination-over of a predeceasing child's share to his surviving brothers and sister, the rule limiting the issue's right to their parent's original share had no application—*Henderson's Trustees*, 17 R. 293, 27 S.L.R. 247. In a sense it is true that Alexander had no share, but in the same sense the same is true of Robert. They both had what the testator himself calls expectant shares, and it is to the expectant share of Robert that his children are instituted under the implied *conditio*. The plea founded on the distinction between an expressed and an implied destination-over to survivors of a predeceasing child's share is negatived by the authorities. I need only refer to two—*Aitken's Trustees* v. *Wright*, 10 Macph. 275, 9 S.L.R. 180; and *Neville* v. *Shepherd*, 23 R. 351, 33 S.L.R. 248. In the latter of these cases the original share which issue take under the *conditio* is there defined as 'the share which the parent would take supposing everyone in the destination to survive the period of payment.'

"Robert's children therefore are entitled to only one-fourth share of the residue.

"I shall accordingly make findings to the effect that the *conditio* applies to the bequest of residue, that the children of Robert are not barred in any way from insisting in their claim under the *conditio* and that they are entitled to one-fourth share of the residue."

The defender Duncan Macdonald reclaimed to the First Division.

At advising on October 25, 1916—

LORD MACKENZIE—The claim we have to consider in this case is one made by the children of a deceased nephew of the testator to a share of residue. It is said that the *conditio si sine liberis* applies, and several cases upon that branch of law were cited to us. It is unnecessary, in my opinion, to consider these. The case is entirely a special one, and raises no general question of law.

The testator conveyed to his trustees his means and estate, including the leases of the farms of Granton Mains and Muirhouse, with the whole stock, crop, and utensils thereon, and dealt with the residue of his estate in the sixth purpose of his settlement. By this purpose special provision was made for the manner in which these leases and the stock were to be dealt with. The residue, except the leases, was to be held for the testator's sister Mrs Macdonald for her alimentary liferent, and failing her for her husband in liferent, and then followed this direction as regards the fee, viz.—"And at the death of the longest liver I direct that the residue of my means and estate (except the leases of my farms and stock and crop, which are afterwards provided for) shall be divided equally, share and share alike, among their children who shall then be alive."

The testator died in 1880. Mrs Macdonald died in 1914, predeceased by her husband. Her son Robert died in 1910. It is under the bequest of residue that his children claim in virtue of the *conditio si sine liberis*.

The case depends upon the construction to be put upon the latter portion of the sixth purpose, viz.—"And I direct that the leases of Granton Mains and Muirhouse, with the whole stock, crop, and utensils in and about the farm, shall be made over to the said Margaret M'Dougal or Macdonald in liferent, and at her death to the said James Macdonald also in liferent, and at the death of the longest liver of them to such of her sons as she may appoint by any writing under her hand in fee, and failing such appointment then to her eldest son in fee, and if he will not accept of the same, then to the next eldest son who shall be alive at the death of the said Margaret M'Dougal or Macdonald and her husband, and so on to her sons in succession in fee, and if all the sons shall refuse or die, then to the daughters in succession in fee, and such son or daughter so succeeding to the said leases, with the stock, crop, and utensils, shall be debarred from participating in any other share or portion of my means and estate." Now if Robert "succeeded" in terms of the settlement to the leases and stock, then the clause debarring him from participating in the residue is expressly applicable; and if he could not have taken any share of the residue had he survived his mother, it follows that his children are also debarred from taking a share of residue. I am of opinion that Robert, in the events which happened, did succeed under the settlement to the leases and stock, and that therefore the claim put forward by the children fails. I gather from the opinion

that the inclination of the Lord Ordinary's mind was towards the same conclusion, but that in his view "while the testator has expressed his intention quite clearly, he has not used terms habile to carry it into effect."

The decision of the question raised depends upon the construction put upon the power of appointment conferred upon Mrs Macdonald by the purpose of the trust settlement above quoted. In virtue of this power, Mrs Macdonald, by an agreement to which her husband and the other parties interested who were then alive were parties, made over in 1880 the leases of the farms, with the stock and crop, to her son Robert, who then entered into possession. It is now contended on behalf of Robert's children that the appointment was *ultra vires*, and that for two reasons—(1) That the liferent given the mother by the settlement was an alimentary one, and that she could not divest herself of it; and (2) that the objects of the class to whom the appointment could be made were limited to those in life at the death of the longest liver of the spouses, and that Robert, having predeceased his mother, could not be the appointee.

I am unable to assent to either of these contentions. Upon the question whether or not the liferent given to Mrs Macdonald was alimentary, I do not think, on a construction of the sixth purpose as a whole, that the limitation of Mrs Macdonald's liferent to one for her alimentary use only can be held to apply to her liferent of the farms and stock. The directions to the trustees is to make over these leases to Mrs Macdonald in liferent. There is no power to the trustees to carry on the business of farming, and I cannot infer that from the terms of the first codicil. The liferentrix was, according to the conception of the settlement, to become a party to an onerous contract, which is foreign to the idea of an alimentary liferent.

The liferentrix and her husband resolved not to interfere with the farms. It is said that the settlement makes no provision for such an event. It is contended that Mrs Macdonald had no power by *inter vivos* deed to select one of her sons to succeed to the farms during her life, but that her power was limited to a testamentary appointment to take effect in favour of a son who might survive her and her husband. It does not seem reasonable to ascribe such an intention to the testator, nor in my opinion does the language of the settlement convey that meaning. The words "at the death of the longest liver" occur in a clause giving directions to the trustees. Liferents having been given, the trustees could not convey the fee until the expiry of the liferents, which the testator contemplated would be on the death of the longest liver. The words, however, mean no more than "on the expiry of the liferents," however that may be brought about. Nor is it legitimate to limit the scope of the power of appointment by referring to the destination which is only to take effect "failing such appointment." There is no destination-over or clause of survivorship which ought to be imported into the power of appointment. The case is not the same as one where all that is given is a power of apportionment among a class restricted by the terms of the deed. When the appointment was executed the destination stood to the mother and father in liferent and the son in fee. There was nothing in these circumstances to prevent immediate vesting, nor, if I am right in holding that the liferent was not alimentary, was there anything to prevent the mother and father from renouncing their liferents. This is what they did. The important step, however, was not the renunciation of the liferent, but the acceptance by Robert of what was conferred upon him by the appointment. He entered into and remained in possession of the farms. In that state of the facts it appears to me that Robert was the son "so succeeding" to the leases within the meaning of the next clause in the settlement, and that the right of himself and his children to a share of the residue is therefore excluded. This is sufficient for the determination of the reclaiming note. The result is that the interlocutor of the Lord Ordinary should be recalled, the claim for Mrs Heinemann and others repelled, and the first alternative of the claims for Duncan Macdonald sustained.

LORD SKERRINGTON—It is a question of construction whether in a clause creating a power of appointment the objects of the power ought to be limited to the class of persons in whose favour the subject is destined failing appointment. The negative was held in the case of *Chancellor's Trustees* v. *Sharples' Trustees*, 1896, 23 R. 435, 33 S.L.R. 313; the affirmative in *Blackburn's Trustees* v. *Blackburn*, 1896, 23 R. 698, 33 S.L.R. 505. If the dicta of Lord Trayner in the former case (p. 442), and of Lord M'Laren in the latter case (pp. 701-2) were intended to be general statements of law, and not merely comments upon the particular clauses under construction, it is difficult to reconcile them. The decision in *Cumming's Trustees* v. *Cumming*, 1896, 24 R. 153, 34 S.L.R. 77, was the same as in *Blackburn's* case. In the present case, where the testator was dealing with the leases of and moveables upon two farms which he directed to be made over to his sister and her husband in liferent successively, and after their deaths to such of her sons as she might appoint by any writing under her hand in fee, I am of opinion that the words of gift ought to bear their primary meaning, and that the gift ought not to be suspended until the death of the two liferenters, notwithstanding the fact that, failing appointment, the leases and moveables fall to be offered in a certain order to such only of the liferenters' sons and daughter as might survive both their parents. The opposite construction, which the Lord Ordinary adopted with reluctance, would seriously diminish the value of the gift to the principal liferenter by preventing her from making suitable arrangements during her lifetime for the carrying on of the farm after her death. Further, whether the testator did or did

not intend that the gift to the liferenters should be alimentary, he did not take the proper steps to effect this, and accordingly it was open to the liferenters to renounce their life interest in the farms. The appointment was in my opinion duly made in favour of the late Robert Burdon Macdonald, and it having been accepted both by him and the landlord it validly made him fiar of the leases and moveables on the farm. The whole procedure having been duly authorised by the will of the testator, I hold that Robert Burdon Macdonald "succeeded" to the leases within the meaning of the clause, which debars a child "so succeeding" from participating in any other share or portion of the testator's means and estate. Accordingly his institution to a share of the general residue became void, and it follows that his issue have no claim thereto under the implied condition *si institutus sine liberis decesserit.*

LORD PRESIDENT—I agree with your Lordships, and, differing from the Lord Ordinary, my view of the meaning of the words in the clause of the settlement on which the whole controversy turns is that which his Lordship is at first inclined to take. I regard it as meaning no more than the termination of the liferent which the testator assumed his sister would enjoy.

Giving effect to these views, we shall pronounce an interlocutor in the terms suggested by Lord Mackenzie.

Their Lordships pronounced an interlocutor recalling the interlocutor of the Lord Ordinary, repelling the claim of Mrs Ida Margaret Macdonald or Heinemann, and sustaining the first alternative of each of the claims for Mr James Macdonald or Matheson or M'Intyre and others, and for said Duncan Macdonald, and remitting the cause to the Lord Ordinary to proceed.

The real raisers Mrs Ida Margaret Macdonald or Heinemann and others appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The question in this case is whether the appellants are entitled to a share in the property left by the testator to the extent of the interest given to their deceased father by way of provision. They claim to be entitled by virtue of the implied *conditio si sine liberis decesserit.* This condition is implied by Scottish law to prevent the defeat of the presumed intention of the person making the provision where the individual for whom it was made has died before it took effect.

The testator by his will provided that his trustees should hold the residue of his estate in trust for the testator's sister Margaret Macdonald and her husband in lifetent, and on the death of the longest liver of them should divide the residue equally among their children who should be then alive. Margaret Macdonald died on the 11th February 1914, her husband having pre-deceased her. Of their four children, two (Duncan Macdonald and Mrs M'Intyre, formerly Mathieson) survived them, and these two are the respondents. Alexander Macdonald, another son, had died without children in 1886, and Robert Macdonald died on the 13th March 1910, leaving three children, who are the present appellants. The appellants claim to take the interest which their father would have taken if he had been alive at the death of his mother the testator's sister, in virtue of the *conditio si sine liberis.* Robert Macdonald had a mere *spes successionis* which would have taken effect if he had survived his mother, who was the longest liver of his parents, and it is clear that no alienation or renunciation by him of his right before it vested could effect the rights of his children under the *conditio si sine liberis* which was applicable, the disposition in favour of the children of the testator's sister being in the nature of a provision for them by the testator. The answer made by the respondents to the appellants' claim was that in consequence of certain transactions in 1880 the disposition in favour of Robert Macdonald became inoperative under the terms of the testator's will.

By the will special provision was made with regard to two farms which the testator held. It was provided that the lease of these two farms, with the stock, crops, &c., upon them, should be made over by the trustees to Margaret Macdonald, and on her death to her husband in liferent, "and at the death of the longest liver of them to such of her sons as she may appoint by any writing under her hand in fee," with other provisions in favour of sons and daughters successively failing appointment. It was further provided that any sons or daughters so succeeding to the farms should be debarred from participating in any other portion of the testator's estate.

It seems to me to be quite clear that the life interest of Mrs Macdonald in the leases was not alimentary, and that it might be aliened by her. The stipulation as to the provision being alimentary is on the true construction of the will confined to the interest and annual income of the residuary estate other than the farms, and has no effect upon the leases, stock, crop, &c., of the two farms. She might therefore renounce or assign her life interest in them if she pleased.

Margaret Macdonald and her husband did not desire to take over the two farms of the testator. By an agreement recorded on the 25th August 1880 the trustees of the will and Margaret Macdonald agreed to assign the lease of one of the farms, Granton Mains, and any interest in the expired lease of the other farm, Muirhouse (which at the time of his death had been held by the testator on tacit relocation), with the stock, crops, &c., to Robert Macdonald, who on his part renounced all right to share in the testator's other estate. This agreement was accompanied by an assignation with consents, dated 16th, 23rd, and 25th August 1880. This instrument recited that it had been agreed that Margaret Macdonald and her husband should renounce the liferent in the leases, and that she should, in exercise of the power of appoint-

ment under the will, appoint Robert Macdonald to succeed to the leases. The instrument went on to state that Margaret Macdonald and her husband renounced and surrendered the liferent, and the trustees, with the consent of the landlord and also of Margaret and her husband, assigned to Robert Macdonald and his heirs the lease, stock, and crops of Granton Mains. This instrument operated as an exercise of the power of appointment under the will, and the provisions of the will, excluding Robert Macdonald from any other interests in the testator's property, accordingly took effect. He entered upon and occupied the farms.

The power of appointment under the will might be exercised by Margaret Macdonald at any time during her life, and its exercise, coupled with the surrender of the liferent of herself and her husband, conferred an immediate interest in possession on Robert Macdonald, and by terms of the will he lost all right to any share in the general residuary estate—in other words the will must be read as if Robert Macdonald's name did not occur in it as a sharer in the residuary estate, and there was therefore nothing on which the *conditio si sine liberis* could operate for the benefit of his children.

In my opinion this appeal fails, and should be dismissed with costs.

VISCOUNT HALDANE—I agree. I concur in the reasons which the Lord Chancellor has given for the conclusion at which he has arrived, and I have also had an opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Dunedin. It would be mere redundancy on my part to add to reasons with which I am in entire agreement.

LORD DUNEDIN — The late Alexander M'Dougall, farmer and tenant of the farms of Granton Mains and Muirhouse, left a trust-disposition and settlement by which he conveyed his whole estate to trustees. After some specific directions which are immaterial to the questions raised in the present case, the settlement proceeds as follows — ". . . *quotes* v. *sup.* . . ." The testator died on 28th April 1889, survived by his sister Mrs Macdonald and by three nephews, Alexander, Robert, and Duncan, and by one niece, Jane, then Mrs Macintyre. Mrs Macdonald died on 11th February 1914, and the present case is raised by the trustees to determine who are the participants in the fee of the property left by the testator, the liferent of which was enjoyed by Mrs Macdonald. Alexander, the eldest nephew, died on 22nd January 1886, without leaving issue, and Robert, the second nephew, died on 18th March 1910, survived by children. Duncan, the third nephew, and Jane, Mrs M'Intyre, the niece, are both still alive.

The children of Robert claim to participate in the fund as being admitted under the *conditio si sine liberis decesserit.* This claim is resisted by Duncan and Jane, who claim to be the sole participants in the fund. It is not disputed that the testator put himself as regards his sister's family *in loco parentis*, and that in such a case the *conditio* would apply. The denial of the claim of Robert's children is based on the special circumstances of the case now to be detailed.

At the death of the testator there were still three years of his lease of Granton Mains to run. Muirhouse was being possessed on tacit relocation. In terms of the will above quoted, Mrs Macdonald was entitled to have the leases and stocking of the farms made over to her. But she and her husband did not wish to take up the farms. Accordingly an agreement was entered into between the trustees, Mr and Mrs Macdonald and their four children, whereby it was agreed that Robert should take over the leases which should be assigned by the trustees with consent of Mrs Macdonald, and should receive delivery of the stock, crop, and implements on the farm, and that in respect thereof he should renounce all right to his share of the general residue. This was followed by an assignation of the lease of Granton Mains and of the interest in the lease of Muirhouse by the trustees, and a renunciation of the liferent present and prospective of the said leases and stocking by Mrs Macdonald and her husband respectively. The assignation was consented to by the Duke of Buccleuch, the proprietor of Granton Mains. Robert entered into possession of both farms, and enjoyed the stock, crop, and implements thereon.

The claimants Duncan and Mrs M'Intyre argue that Robert having in terms of the will "succeeded" to the farms and stock was by the clause of the will debarred from sharing in the general residue, and that being so his children cannot be admitted under the *conditio* to a share to which their father could not have succeeded if he had survived the liferentrix. The children of Robert answer that the agreement was an agreement outside the will and not sanctioned by it, and that consequently the clause of forfeiture has no application, and further, that although Robert by private arrangement renounced for himself he could not renounce for his children a right which had not yet vested, and to which they are entitled to succeed independently of him.

The first question therefore that arises is, was the arrangement provided for by the agreement an arrangement in terms of the will? It is said for the children that Mrs Macdonald's liferent was alimentary and could not be renounced. I do not think that this view is well founded. It is true that in the conveyance of the general residue the liferent is declared alimentary. But the testator at once goes on to indicate that the leases, crop, and stocking are to be the subjects of special treatment, and when we come to the clause dealing with them the liferent which Mrs Macdonald and possibly her husband are directed to be given is not declared alimentary. Besides this, it is impossible to read the following provision without seeing that the duty of the trustees is not to keep but to hand over. Now it is well settled that a mere declaration that a fund is to be alimentary has no effect if the

donee or legatee is put in possession of it. To make an effective alimentary bequest there must be in the case of moveables the interposition of a trust. There was therefore in my opinion no obstacle to the renunciation of their liferents by Mr and Mrs Macdonald.

The children next say that the power to nominate was limited in favour of the class of those alive at the death of the liferentrix. This also is in my view a wrong contention. The words "at the death of the longest liver" are applicable to the action of making over, and such making over is to be to any son whom she may appoint. There is no reason why she should not appoint at any time, and though, if she had kept the liferent, the appointee could not have taken if not alive at her death, yet if she renounces and her husband does the same he may take at once. The succeeding words "to the eldest son in fee, and if he will not accept to the next eldest son who shall be alive at her death," create no difficulty. It could not be known till her death whether she had made no appointment. If it then became known that no appointment had been made it was clearly necessary to deal with living persons to see whether they would take up the farms or not.

Accordingly on the first point I hold that Mrs Macdonald and her husband were justified in giving up their liferent, that an appointment was made in favour of Robert in terms of the will, and that Robert, taking the benefit of such appointment, "succeeded" in terms of the will to the leases, crop, and stock, and thereby in terms of the will became debarred from participating in the general residue.

The second point is whether, Robert being so debarred, his children, he having predeceased the liferenter, are entitled to claim a share of the residue under the *conditio*, it being admitted that the two circumstances which are always necessary for the admission of the *conditio*, viz., that the testator is *in loco parentis*, and that the gift is a family provision, are both present in this case.

The learned counsel for the parties said that they had not been able to find authority on the point. Direct authority there may not be, but there are cases which so explain the *conditio* and its operation as to leave no doubt in my mind as to how the point should be decided.

The *conditio* itself, borrowed from the Roman law, was applied in the law of Scotland at least as early as 1738 in the case of the *Magistrates of Montrose*, M. 6398. It is based on the view that the testator, if he had thought of it, would have preferred the children of the institute to the substitutes to whom the share of the institute was to go if he failed to survive the period of vesting. There is a long series of cases since 1738 in which the doctrine has been applied which it would be useless to cite. But the class of cases which seem to me to show exactly what are the limits of the *conditio* are those which deal with the question of whether the child or children who are *ex concessis* admitted under the *conditio* are entitled to get not only the parent's share but also that part of a devolved or lapsed share set free by the predecease of another of the institutes to which the parent would have had a right if he had survived. It has been held that they are not; and the reasons given seem to me clearly to apply to the present question. The leading and authoritative decision (though it only affirmed previous decisions of the Court of Session) is the well-known case in your Lordships' House of *Young* v. *Robertson*, and the decision on this point will be found in 4 Macq. 337. In that case James Donaldson left the residue of his estate to be divided after the death of his wife, the liferentrix, between six grandnieces and grandnephews, declaring that if any of them died before the vesting of their shares without leaving lawful issue, such share should be divided equally among the survivors. Two of the grandnephews predeceased the liferentrix — William M'Dougall, who died without issue, and Thomas Young, who left a son, John Lawford Young. John Lawford Young claimed in virtue of the *conditio*. It was held that he was entitled to have his father's own share, but not a share of William M'Dougall's share. The Lord Chancellor, after pointing out that Thomas Young could only have got a share of William M'Dougall's share in the character of "survivor"—which he was not in fact—continues thus—"I think it impossible to hold that any principle of surrogation or substitution would give to the child that which the father by no possibility could have taken. The very principle of surrogation is merely to place the child in the room of the father; but it would be contrary to all principle to make the surrogation extend to give to the child a right which the father by no possibility could have."

To the same effect is the dictum of Lord Cowan in *Rhind's Trustees* v. *Leith*, (1866) 5 Macph. 104, at p. 109—"There must be a legatee instituted in the first instance, otherwise there can be no conditional institute either under the express terms of the deed or under the implied condition." Another illustration of the same doctrine is to be found in the case of *Morrison* v. *Macdonald*, (1890) 18 R. 181, 28 S.L.R. 137, where the persons called were "the children of my deceased sister Mary." One of these children had died previous to the date of the will, and it was held that the children of that child could not come in under the *conditio*.

The application of these cases to the present question seems to me not doubtful. Robert having elected to take the farms was written out from the class of institutes of the general residue. That provision was gone, he having taken another provision which was alternative to it. There was therefore no longer any institute in lieu of whom the children could take their place under the *conditio*.

The appellants, in my opinion, fail on both points, and the appeal falls to be dismissed, with costs.

LORD ATKINSON—I have had the advantage and pleasure of reading both the judgments which have been delivered, and I concur with the result.

LORD PARMOOR—I concur, and for the same reasons.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—Roberton Christie, K.C.—Ingram—Archer. Agents—P. Adair & Co., S.S.C., Edinburgh—D. Graham Pole, S.S.C., London.

Counsel for the Respondents—The Lord Advocate (Clyde, K.C.)—R. C. Henderson—Bateman. Agents — J. H. Campbell & Lamond, C.S., Edinburgh—Wm. Robertson & Co., Westminster.

COURT OF SESSION.

Friday, February 16.

OUTER HOUSE.

ROBERTSON DURHAM (LIQUIDATOR OF ROBERTSON, SANDERSON & COMPANY, LIMITED) *v.* INCHES.

Company—Winding-up—Preference Shares—Arrears of Dividend—Profits Earned but not Declared at Date of Liquidation—"Assets."

The articles of association of a company provided—"Upon the dissolution of the company the assets remaining after payment of the debts and obligations of the company shall be applied, first, in repaying to the holders of the preference shares respectively the whole amount paid up on such shares; and the balance remaining thereafter shall be distributed among the holders of the ordinary shares in proportion to the amount paid up on such shares."

Held (*per* Lord Cullen, Ordinary) that "assets" meant "all the things of one kind or another belonging to the company which passed under the administration of the liquidator," and that in the liquidation of the company the preference shareholders were not entitled to payment in priority of any repayment of capital to the ordinary shareholders, of the arrears of the cumulative preferential dividend on their shares out of an alleged profit, arising out of an appreciation of stock-in-trade earned but not declared prior to the liquidation.

In July 1916 A. W. Robertson Durham, C.A., as liquidator of Robertson, Sanderson, & Company, Limited, the voluntary winding-up of which company was being continued under the supervision of the Court, presented a note for the determination of this *question*—"Whether the preference shareholders are entitled to payment of the arrears of the cumulative preferential dividend in priority to any repayment of capital to the ordinary shareholders?"

Answers were lodged on behalf J. H. Inches and others, in which it was stated—"In point of fact a profit and loss account as at the date of the liquidation on a true valuation of the stock-in-trade would show that trading profits available for dividend were earned by the company prior to liquidation to an amount at least sufficient to pay said arrears of dividend on the preference shares, and such profits fall to be applied primarily in payment of said arrears of dividend."

The *facts* are given in the opinion of the Lord Ordinary (CULLEN), which was as follows:—

Opinion.—"The holders of preference shares in this company, which is in liquidation, in common with the other preference shareholders, received payment of a 5 per cent. preferential dividend on their shares declared by the directors out of profits down to 31st March 1914, but for the period after that date they received no further payments of dividend.

"The winding-up is a voluntary one placed under the supervision of the Court. The statutory date for the commencement of the winding-up is 6th January 1916.

"It is alleged by the preference shareholders that between 31st March 1914 and the date of the winding-up there was a great appreciation in the value of the stock of whisky held by the company, with the result that if a profit and loss account were made up as at the date of the winding-up there would be disclosed a large profit earned during said period. The last profit and loss account made up while the company was a going concern was made up as at 30th September 1915, and showed no divisible profit. The preference shareholders, as I understand, do not criticise this account. It was between the date of it and the date of the winding-up that the great appreciation in the value of the whisky stock on which they found took place. Since the date of the winding-up the liquidator has made realisations of said stock at prices which, the preference shareholders say, corroborate their allegation of the fact of appreciation in value prior to the winding-up.

"If the averments made by the preference shareholders are true, the profits which might have been, but were not, while the company was a going concern, ascertained to have been made between 30th September 1914 and 6th January 1916, were on the latter date represented by an aliquot part of the value of the assets of the company which passed into the hands of the liquidator. And their contention is that there should now be made up as at 6th January 1916 an account bringing out the amount of these alleged undrawn and undeclared profits, so that the corresponding aliquot part of the value of the assets which passed into the hands of the liquidator may be separated and set aside for treatment in the character of profits earned before the winding-up liable to their recourse for payment of a 5 per cent. preferential dividend