for it. On either of these alternatives being complied with, the Court are then, in the third place, to dispense with consent. These three things require to be done, and then the Court may proceed as if the consents had been obtained. Before any of them were done in this case the daughter was born whose birth gives rise to the present question.

I am very clearly of opinion, with the Lord Ordinary, that the equivalents to consent which the statute requires are not present here. The case does not, therefore, come under the provisions of the 19th section of the Act of 1853.

Lord Ardmillan—Where consent is necessary no consent can avail unless it has been granted, or unless a substitute for consent has been obtained through the medium of a statutory proceeding of the nature of *compulsitor* on valuation. The requirements of the statute for valuation of interest and dispensing with consent had not been complied with, and no sufficient consent had been obtained. At this point of time, and under these circumstances, the infant here was born. I concur in your Lordship's opinion that we cannot grant this petition. I have some doubt whether, if the procedure under the statute for valuing and discharging had been completed before the child was born, we could have granted this petition, seeing that the child was *in utero*, and its birth expected immediately. But on this point I merely reserve my opinion.

Lord Mure concurred.

The Court adhered.

Counsel for Petitioner—M'Laren. Agents—Hagart & Burn Murdoch, W.S.

Counsel for Curator *ad litem*—Kinnear. Agent—John Home, W.S.

Tuesday, March 7.

SECOND DIVISION.

[Lord Craighill.

GILLESPIE *v.* MERCER & OTHERS.

Succession—Settlement—Conditio si sine liberis.

A truster directed her trustees, in the event of the death of her grandson without leaving issue, to pay over her estate to her nephew, and failing him to his children W. and H., "equally betwixt them, and to the survivor of them, and failing both to the truster's own nearest heirs and assignees whomsoever." The truster's nephew and his two children W. and H. all predeceased her grandson, who died without leaving issue.—*Held*, in a competition between the children of W. and H. and one of the next-of-kin, that this bequest was not qualified by the *conditio si sine liberis*, but that the estate fell to be divided amongst the truster's heirs and assignees.

This was an action of multiplepoinding brought by John Gillespie, Writer to the Signet, judicial factor on the trust-estate of the deceased Mrs Jean Hepburn or Weir, and the question raised in it related to the construction of a residuary bequest in her settlement. By this settlement, which was executed in 1811, Mrs Weir nominated trustees, and gave the liferent of her estate to her two sisters.

She then went on to provide that upon the death of the survivor of her two sisters, her trustees "shall pay the yearly produce and interest of my said property, sums of money, and effects, to Alexander Mercer, only surviving child procreate of the marriage betwixt the deceased Captain John Mercer and Elizabeth Weir, my daughter, as an alimentary provision to him, but which shall neither be assignable by him nor be attachable by diligence for any debts contracted or to be contracted by him, with power, however, to the said trustees, if they shall think advisable, to assign and pay over to the said Alexander Mercer the whole or any part of my said property, sums, and effects. In the *fifth* place, that the said trustees, on the death of the said Alexander Mercer, shall pay over and convey my said property, sums, and effects (unless they shall have assigned and paid the same to himself in his own lifetime), or what part thereof which shall remain after any partial payment thereof to him, and that to the child or children lawfully to be procreated of his body, equally amongst them, if more than one, share and share alike, whom failing to William Hepburn of St Vincents, my nephew, and failing him to William and Harriet Hepburn, his children, equally betwixt them, and to the survivor of them, and failing both to my own nearest heirs and assignees whomsoever."

The truster died in 1813, and the income of the estate was paid by the trustees to her sisters until the death of the survivor of them in 1825, when the liferent provision in favour of Alexander Mercer, the truster's grandson, opened to him. At that time he was insane, and continued so down to the date of his death in 1869. He was married and had issue, but it would appear that his children predeceased him without issue. Upon his death the money in the hands of the judicial factor upon Mrs Weir's estate was claimed by William Hepburn and Mrs Mary Hepburn or Cook, son and daughter of William Hepburn, the truster's grandnephew, and also by Mrs Hill or Reily, daughter of the truster's grandniece Harriet Hepburn. The truster's nephew and his two children, William and Harriet, had all predeceased her grandson Alexander Mercer. These claimants sought to have the whole estate divided amongst them, as representing William and Harriet Hepburn, and in virtue of the *conditio si sine liberis decesserit*, or otherwise to share amongst the next-of-kin of the truster. The only other claimants were Lieutenant-General Hutchinson and the other marriage-contract trustees of Mrs Amelia Jane Gordon or Hutchinson, who, for herself, and as representing a deceased brother, Sir John William Gordon, was entitled to claim as one of the next-of-kin of the truster.

On 29th October 1875 the Lord Ordinary pronounced the following interlocutor:—

"The Lord Ordinary having heard parties' procurators on the closed record, joint minute of admissions, No. 26 of process, and productions, and having considered the debate and whole process,—Finds that the residuary bequests in the

trust-deed left by the truster, the late Mrs Jean Hepburn or Weir—by which she appointed her trustees, in case of the failure of a child or children of the body of her grandson Alexander Mercer, to pay over and convey at his death the trust-estate, or such part as should remain after any partial payment thereof, under the provisions of the will "to William Hepburn of St Vincents," the truster's nephew, and failing him to "William and Harriet Hepburn, his children, equally betwixt them, and to the survivor of them, and failing both to the truster's own nearest heirs and assignees whomsoever,"—are not qualified by the *conditio si sine liberis decesserit:* Therefore, repels the first plea in law for the claimants William Hepburn and others, and also repels the first and second alternatives of their claim: Ranks and prefers the claimants Lieutenant-General William Nelson Hutchinson and others, in terms of their claim; and likewise the claimants first mentioned, the aforesaid William Hepburn and others, in terms of the third alternative of their claim, and decerns: Finds the claimants, the said William Hepburn and others, liable in the expenses of the competition; allows an account thereof to be given in; and remits that account to the Auditor for his taxation and report."

In his note, after narrating the facts of the case, his Lordship observed:—

"A dispute as to the import of a will, it need hardly be said, is a dispute as to the intention of the testator. This is as true in a case, such as the present, where the question turns upon the existence of an implied condition, as it would be in a case where the controversy related to the interpretation of obscure, or it may be apparently contradictory, provisions. Did the testator intend that the children of William and Harriet Hepburn should take the residue in room of their parents, if the latter died before the period of vesting? That, truly, is the issue now under trial. There are two ways, and only two ways, by which such an intention could be established. The first, and most obvious, as assuredly it is the most satisfactory, is the testator's appointment. There is nothing of that kind here. On the contrary, the tenor of the clause is such as seems naturally to lead to the opposite conclusion. The father is to take should he be alive at the death of Alexander Mercer, the truster's grandson. Should he fail, his children William and Harriet are to take. Should one of these two fail, the survivor is to take, and should both fail the residue is to go to the next-of-kin of the truster. A bequest so framed seems almost inconsistent with the idea that there was in the contemplation of the testator any contingency by which the course of her succession, so clearly marked out, might be diverted.

"The other way by which the testator's intention may be shown is the invoking of a presumption which in certain cases is afforded by the relation in which the testator stands towards the legatee. The law in these cases does not exactly make a will for the testator, but it supplements the will which has been made by recourse to a presumption as to what would have been done had her will upon the point been expressed. The doctrine referred to has long been recognised, and is firmly established, but the cases to which it applies are limited, and their number ought certainly not to be increased. The present is a bequest to collaterals. A grandnephew and a grandniece are the legatees. Had they been called to the succession as a class, the *conditio si sine liberis decesserit* might have been applied. This is proved by numerous decisions. These legatees, however, were called, not as a class, but individually by name; and for this reason the Lord Ordinary thinks that the doctrine in question has no application. The counsel for the unsuccessful claimants contended, that as William and Harriet Hepburn were at the date of the will the only surviving children of William Hepburn, they, though named, must be regarded as the whole members of a class, or, in other words, as a class. The Lord Ordinary doubts whether, in any circumstances, the suggestion here presented would be warrant for extending the operation of the condition; but, be that as it may, it cannot, as he thinks, be viewed as such upon this occasion, because William Hepburn, the father, was alive at the date of the will, and for anything that appears his family might have been increased by the birth of other children.

"The cases referred to by the counsel for the claimants who have been successful, were *Fleming*, Mor. 8111, and *Hamilton*, 16 S. 478. Those referred to on the other side were, *Wallace*, Mor. Appx. *voce* 'Clause' No. 6; *Ross and Others* (*Thomson's Trs.*) 13 D. 1327; *Scott and Others* (*M'Gowan's Trs.*) 8 Macph. 356; *M'Call and Others*, 10 Macph. 281; and *Irvine*, 892. The Lord Ordinary thinks it right also to cite the case of *Chancellor*, 10 Macph. 995, as there are *dicta* in the report which seem to recognise the views of the law by which he has been influenced in pronouncing the foregoing interlocutor."

William Hepburn and Mrs Cook reclaimed.

Argued for them—The circumstances of this case are favourable to the application of the *conditio*. This is no special bequest, but one of the whole residue of an estate. It is a bequest to a class, for although the children are named, in point of fact they were the only children of the testator's nephew William who were in existence at the time. The *pietas paterna* is sufficiently exhibited by the terms of the deed. The residuary legatees are specially selected because they are William's children, and there arises a presumption that the testator would have preferred their descendants to her heirs-at-law.

Argued for Mrs Hutchison's Trustees—The *conditio* cannot be held to apply here. The testator did not stand in *loco parentis*. She made a selection of individuals. William might have had other children, but only two are named. This is no bequest to a class. This is a direct settlement upon immediate descendants with a conditional institution of collaterals. It is not of the nature of a family settlement. You have the principle of a family settlement excluded by the selection of two of the children of the conditional institute. There is a survivorship clause which is unfavourable to the reclaimers' contention.

Authorities cited (in addition to those quoted in the note of the Lord Ordinary)—*Blair's Exrs. and Others*, Jan. 18, 1876, 13 Scot. Law Rep. 217; *Christie* v. *Patersons*, July 5, 1822, F.C., 1 Sh. n.e. 498.

At advising—

Lord Ormidale—I do not go into the general principles of law raised by this case, as we had occasion to do so very recently in that of *Blair's Trustees*. In the present case there are some peculiarities which are quite conclusive of it. We have, in the first place, a destination to William Hepburn of St Vincents, who was to take, as conditional institute, upon the death of Alexander Mercer, the grandson of the testator, in the event of there being any residue, which there might not be, as the trustees had power to pay over to him the property during his lifetime.

It so happens that we have in this destination an undoubted case of selection. At the date when the deed was executed, William Hepburn had two brothers living; yet he is selected as the person whom the testator preferred, and it would have been remarkable if she had not carried this predilection further when she goes on to name his children. Here again we find that predilection exhibited. She calls his children *nominatim*. Now, in the case of *Blair's Trustees* I founded strongly upon that circumstance, and so I think did your Lordship in the chair. It was a distinguishing feature in that case, as also in some of the older decisions. Do we not find it here also? Two children are selected; the children are not called as a class. William Hepburn may have had more children, either by his then subsisting marriage or a subsequent one.

I go also upon what immediately follows. The destination is to these two children "equally betwixt them, and failing both to my own nearest heirs and assignees whomsoever." No doubt, in some cases in which the *conditio* was held to apply, there was a clause of survivorship; but here, I think, the way in which it arises indicates predilection—the property was to go to the survivor by accretion. I think these grounds sufficient to enable us to decide this case consistently with that of *Blair's Trustees*. I cannot read this deed without being satisfied that it was not the intention of the testator to leave her property to any one who was not named by her. And we cannot overlook this consideration that the *conditio si sine liberis* can only be applied when consistent with what is the presumed intention of the testator.

Lord Gifford—I am of the same opinion, but I have arrived at it with some hesitation. My leaning has always been towards the views formerly expressed by Lord Benholme, and towards the extension of this rule. But I was in the minority in the case of *Blair's Trustees*, which I must now look upon as a binding decision, and that decision goes in the opposite direction, and has the effect of narrowing the application of the rule.

You must look to the whole circumstances, and take them all into view before you can say that *conditio si sine liberis* was intended by a testator to apply. This case, when we look at the circumstances, goes beyond any of those to which the Court have refused to apply the condition. The testatrix selects a nephew, and provides that if he fails two of his children, called *nominatim*, are to take up the succession. No doubt they were the only children of the institute in life at the time, but there might have been more. She does not go on to add the words used by her immediately before, "to the child or children to be procreated of his body." I do not think the Court can be called upon to insert what the testator might so easily have inserted herself.

The Lord Justice-Clerk concurred.

Lord Neaves was absent.

The Court adhered.

Counsel for Reclaimers—Balfour—Jameson. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents — Dean of Faculty (Watson) — Moncrieff. Agent — A. P. Purves, W.S.

Tuesday, March 7.

SECOND DIVISION.

[Lord Rutherfurd-Clark.

SIR WILLIAM DUNBAR, PETITIONER.

Curator—Ward's Estate—Heir—Alimentary Provision.

Sir William Dunbar was *curator bonis* to Mr Hay of Leys and Randerston, who was of weak mind. The gross rental of the ward's estate was nearly £8000 a year, and the net rental, after deduction of all burdens upon the property, was £2000 a-year. Mr Hay had one brother, Mr Hay Paterson, and two sisters. Mr Hay Paterson on attaining majority received payment of £10,000, provided for him by his father's settlement, which sum was borrowed over the estates. Shortly after receiving payment of the £10,000, Mr Hay Paterson lost it all by speculation, and, in addition, contracted debts to the amount of £16,000. He was accordingly adjudged bankrupt in the London Court of Bankruptcy, and in consequence of the amount of unsecured debts due by him, no allowance could be made to him by his creditors. As Mr Hay Paterson was next heir to the ward Mr Hay, Sir William Dunbar applied to the Court for authority to make payment to Mr Hay Paterson of an alimentary allowance of £250 a-year out of the surplus rents of the ward's estates, payable so long as Mr Hay Paterson was in circumstances to require it. Besides the circumstances narrated above, the ground of the application was, that Mr Hay Paterson was of weak constitution, and was incapacitated by his previous training and education from earning any livelihood for himself. The ward himself and his sisters concurred in the proposed arrangement.

At advising—

Lord Justice-Clerk—We cannot grant the prayer of this petition. The property belongs to the ward, and the matters mentioned in the petition are for the curator's consideration, and not for ours. Therefore, with whatever regret, we have no choice but to refuse the prayer of the petition.

The other Judges concurred.

The Court refused the prayer of the petition.

Counsel for Petitioner—Lee. Agents—Wilson & Dunlop, W.S.