buildings. I do not know on what footing either schoolmaster's house or school stood. If the heritors did not provide a house for the schoolmaster, they might be compelled to do so. If they did do so, they might at any time take it away and provide another. Here there seems to have been, so far as I can find, no schoolmaster's house, designed under the Act of 1803 or otherwise. The contrary is to be inferred from the fact that the School Board did not take over the house in which the schoolmaster lived. We have no information as to the footing on which the schoolmaster lived in it. The heritors were only bound to provide a residence, and they seem to have so far satisfied the obligation. So in some Highland parishes there are no manses, though the heritors might be compelled by the minister and presbytery having charge of the interests of the benefice to provide one if they were not satisfied. Thus the minister in such parishes lives in a farmhouse, and no manse and glebe are designed for him. In many parishes the schoolmaster is in just the same position; he is provided with a residence, as apparently here, though none has been designed to him by law. Hence there is this additional difficulty in the way of our affirming in the present appeal that a right of servitude exists.

While, therefore, I entirely agree with your Lordships in refusing interdict, I have thought it right to explain my views on the more important matter, which I understand your Lordships are prepared to decide.

The Lord Justice-Clerk was absent, but Lord Rutherfurd Clark intimated that his Lordship had perused and concurred in the opinion delivered by him.

The Court affirmed the judgment of the Sheriff and refused the prayer of the petition.

Counsel for Pursuer (Appellant) — Solicitor-General (Asher, Q.C.)—A. J. Young. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defender (Respondent)—Mackintosh—Low. Agent—C. S. Taylor, S.S.C.

Thursday, January 26.

FIRST DIVISION.

SPECIAL CASE—DUNCAN AND ANOTHER (BOGIE'S TRUSTEES) AND OTHERS.

Succession—Division per capita *or* per stirpes—"*Between*" *or Among*—Conditio si sine liberis—*Presumption.*

A testatrix left her whole estate, heritable and moveable, to trustees, with directions "to divide the whole equally between the children of my late brother W. and the children of my late sister M." To the children of another brother D., also deceased, she left nothing. *Held* (1) that the division fell to be made *per capita* and not *per stirpes*; and (2) that although D.'s children had been omitted, that did not prevent the truster from placing herself by the terms of her deed *in loco parentis* to the children of her other brother and sister, and that since she had done so, the children of a deceased daughter of the testatrix's sister M. were entitled to succeed to the share which would have fallen to their mother had she survived the testatrix.

Mrs Janet Carstairs or Bogie died on 9th February 1881, aged eighty-three, leaving a holograph disposition and settlement, dated 15th January 1875, in these terms—"I, Mrs Janet Carstairs or Bogie, in order to regulate the management and distribution of my means and estate after my decease, do hereby give, grant, and dispone, assigne and convey, to and in favour of William Duncan, Esqr., town-clerk of Cupar, and James Mitchell, Esqr., my nephew, as trustees for the uses and purposes after mentioned, all my heritable and moveable estate of whatever kind or denomination, and to divide the whole equally between the three children of my late brother William Carstairs and the children of my late sister Margaret, otherwise Mrs Capt. Mitchell; and I appoint my trustees executors; my trustees shall, from the produce of my means or estate, pay all my just and lawful debts, death-bed and funeral expenses, together with such legacies as I may leave or bequeath by any writing under my hand. Janet Carstairs or Bogie. Cupar, West-Port House, January 15th 1875."

Mrs Bogie left no heritable estate. The total amount of her personal estate was over £7389. At the time of her death she was a widow, having been three times married, but having had no family by any of her marriages. Her next-of-kin were—(1) the children of her deceased brother David Carstairs, who took no interest under the above settlement, (2) the children of her deceased brother William Carstairs, (3) the children of her deceased sister Margaret Carstairs or Mitchell, and (4) the issue of a deceased daughter of Margaret Carstairs or Mitchell, named Mrs Duncan, who died on 14th January 1878.

The parties to this Special Case were—(1) Mrs Bogie's trustees and executors under her said will, (2) the children of William Carstairs, (3) the children of Margaret Carstairs or Mitchell, and (4) the children of the deceased Mrs Duncan.

The questions of law for the opinion of the Court were as follows:—"(1) Upon a sound construction of the settlement of the said Mrs Janet Carstairs or Bogie, do the shares of residue provided to the children of William Carstairs and the children of Margaret Carstairs or Mitchell fall to be reckoned *per capita* or *per stirpes?* (2) Are the parties of the fourth part entitled to the share which would have fallen to their mother Mrs Duncan if she had survived the testatrix?"

It was argued for the second parties, William Carstairs' children—(1) The division of the residue here should be *per capita*. The word "between" was often used in ordinary language as equivalent to "among," and the two words had been considered as interchangeable terms in repeated decisions, both Scotch and English—*M'Kenzie* v. *Holt*, 1781, M. 6602; *Grant* v. *Fyffe*, May 22, 1810, F.C.; *M'Courtie* v. *Blackie*, January 15, 1812, Hume 270; *Pitcairn* v. *Thomson*, June 8, 1853, 15 D. 741; *Laing's Trustees* v. *Sanson*, November 18, 1879, 7 R. 244; *Abrey* v. *Newman*, 1853, 16 Beavan 432; and *Barnes* v. *Patch*, 8 Vesey 604, there cited; 2 Jarman on Wills, 196; 2 Williams on Executors, 1519. (2) Mrs Duncan's children were entitled to no share of this residue.

The *conditio si sine liberis* was not applicable to this case, because Mrs Bogie had not placed herself by this settlement *in loco parentis* to her whole nephews and nieces as a class. The omission of her brother David's children from her will created a *delectus personarum*, which rebutted the presumption which might otherwise have arisen of her having placed herself *in loco parentis* to her nephews and nieces as a class. Favour to a particular sub-class, as here, was not sufficient to raise the presumption—*Dixon* v. *Dixon*, June 10, 1836, 14 S. 938, *aff.* 2 Rob. App. 1; *Fleming* v. *Martin*, 1798, M. 8111 (contrast *Thomson's Trustees* v. *Robb*, July 10, 1851, 13 D. 1326); *Thomson* v. *Cumberland*, November 16, 1814, F.C.; *Sturrock* v. *Binning & Company*, November 29, 1843, 6 D. 117; *Bryce's Trustee*, March 2, 1878, 5 R. 722; *Gauld's Trustees* v. *Duncan*, March 20, 1877, 4 R. 691; *Wallace* v. *Wallace's Trustees*, M. *voce* "Clause," App. No. 6. In the case of *MacGown's Trustees* v. *Robertson*, December 17, 1869, 8 Macph. 356, the excepted daughter was well provided for on her own account, which gave a reason for her omission from the will. The Court would be slow to extend the application of the *conditio*, as they would be obliged here to do, in order to include Mrs Duncan's children—*M'Call* v. *Dennistoun*, December 22, 1871, 10 Macph. 281; *Blair's Executors* v. *Taylor*, January 18, 1876, 3 R. 362.

The first, third, and fourth parties argued—(1) The division of the residue should be *per stirpes*. This view was supported by the word "between," which both by etymology and in all correct usage necessarily inferred a bipartite division; and also by the repetition of the words "the children of" by the testatrix, which indicated two distinct classes to be favoured (contrast *Abrey's* case). (2) The *conditio* ought here to be applied. The omission of David Carstairs' children did not alter the presumption of the testatrix having placed herself *in loco parentis* towards the favoured nephews and nieces. That presumption must always be settled by looking at the intention expressed in the terms of the will. The case of *MacGown's Trustees* was a direct authority in favour of their contention.

At advising—

Lord President—The will of the late Mrs Bogie, whatever else may be said of it, has certainly the merit of great brevity. Yet brief as it is, she has contrived to raise two questions of law which have now to be settled. She leaves all her estate, heritable and moveable, to trustees with directions to them to "divide the whole equally between the children of my late brother William Carstairs and the children of my late sister Margaret, otherwise Mrs Captain Mitchell." It appears that Mrs Bogie had another brother named David Carstairs, to whom and to whose children nothing is left in the will.

The first question is, How is the property to be divided between the families of William and Margaret Carstairs—whether the division is to be bipartite between the two families—that is, *per stirpes*—or whether each child of the combined families is to take an equal share—that is, *per capita*. Two considerations adverse to a division *per capita* have been ably insisted on by the counsel who appeared for the first, third, and fourth parties. The first is, that the word "between" is appropriate to a division of the property into two parts. The second is, that the children are spoken of as two distinct classes, "the children of my late brother William Carstairs and the children of my late sister Margaret." It is said that if the words had been "the children of my brother William and my sister Margaret" that would have been putting all the children into one class, and the contention for a division *per capita* would have been easier to maintain.

Now, "between" is undoubtedly a dual preposition etymologically, and in classical English signifies a separation or division into two. But it is equally clear that there is an improper use of the word "between," which makes it equivalent to "among." Independently of what one knows of this use in conversation and writing, a good example of it in testamentary writings is furnished by the case of Dr David Laing, who was a very good scholar and a very elegant writer. Yet in his testamentary disposition he clearly uses "between" as equivalent to "among," for he uses it in directing a division among more than two legatees. The strict meaning of the word "between," then, can hardly be held as conclusive of the question, for this lady might well have committed the solecism, as we must regard it to be, of using the one word for the other. Then, if the word "between" may be held as equivalent to "among," I think the mere fact of the repetition of the words "to the children" is hardly sufficient to found any very strong argument against a division *per capita*. It appears to me, there being no predilection for one family over the other to be found in the deed, that the natural presumption is that it was intended that each of Mrs Bogie's nephews and nieces should be equally benefitted; and that being the fair presumption, I am inclined to say, in the absence of any evidence to the contrary, that the two circumstances founded on by the counsel for the first, third, and fourth parties are not sufficient to overcome it. I am therefore of opinion that the division should be *per capita*.

But there arises a second question—One of Mrs Margaret Mitchell's children, Mrs Duncan, died on the 14th January 1878—that is to say, she predeceased the testatrix but left issue. If this is a case in which the *conditio si sine liberis* is to be applied, Mrs Duncan's children will take her place, and will be entitled to her share as one of Margaret's children. If it does not apply they will take nothing. Certainly it is quite settled by a long series of decisions that the *conditio* is, as a general rule, applicable to cases of settlements made by an uncle or aunt on nephews or nieces. It is said, however, that that rule is subject to this proviso, that the uncle or aunt must have placed him or her self *in loco parentis* to the children, and I assume that that proposition to a certain extent is a true qualification of the rule. But it is necessary to consider what is meant by placing themselves *in loco parentis*. It does not mean that the uncle has during his life occupied such a position, or treated his nephews and nieces with that kindness which a parent would show to his children; what is meant is, that in his settlement he has placed himself in a position like that of a parent towards the legatees—that is to say, that he has made a settlement in their favour similar to what a parent might have been presumed to make. That is what the law means by

the phrase, and the question is, has Mrs Bogie put herself in that position? She directs an equal division of her whole estate "between the children of my late brother William Carstairs and the children of my late sister Margaret." But then counsel for the second parties says that is not placing herself *in loco parentis*, because she has excluded altogether the family of one of her brothers.

On being asked whether he had any case where that view had been held to exclude the application of the *conditio* he acknowledged that he had not, but on principle he argued that there could be nothing like an assumption of the parental character by an uncle or aunt unless his or her settlement embraced as beneficiaries the whole class of nephews or nieces he or she had. As regards principle, I do not see how that can be maintained. Surely if the testatrix puts herself *in loco parentis* towards a certain class by means of her settlement—and it is by her settlement alone that she can do so—then when the class has once been selected which is to enjoy the property after her death, that class is the class towards which the testatrix assumes the particular character of parent. A father may well exclude one of his children from his settlement, but that does not make him any the less the parent of those whom he includes. So an uncle may have good reason for excluding one part of the family for reasons known to himself but which he does not choose to express in writing. I do not see how that excludes him from standing *in loco parentis* to those whom he chooses to benefit. Therefore, while there is no authority for the contention of the counsel for the second parties. I think it is on principle untenable. Therefore I am of opinion that the *conditio si sine liberis* does apply, and that therefore Mrs Duncan's children are entitled to come into their mother's place.

Lord Deas—The first question is, whether these children of William Carstairs and Mrs Mitchell are to take *per stirpes* or *per capita?* That depends upon what is the meaning of the testatrix as shown in her settlement. She conveys her whole heritable and moveable estate to be divided equally "between the children of my late brother William Carstairs and the children of my late sister Margaret." I cannot read these words without being satisfied that the testatrix's meaning was that the children were to take *per capita.* The words naturally convey that meaning, and I have no doubt that that meaning was in the mind of the testatrix.

As to the other question, whether the *conditio si sine liberis* applies to the case, I also concur. The parents of all the children mentioned in the will were dead at the date at which this testamentary writing was executed. That fact goes in favour of the application of the maxim, and looking to these considerations, and the decided cases, I am of opinion that the maxim does apply. Such a decision is, I think, consistent both with the testator's wish and the course of decision.

Lord Mure—I concur. The argument has been very strongly pressed that the use of the word "between" indicates an equal division of this property into two parts, and that each of these two parts should be divided equally between the children of the two classes respectively. Now, if it could be made out that this was the necessary meaning of the word "between" according to its ordinary use, I think we should be bound to give effect to the argument, but after the decision in the case of *Laing's Trustees* I think that cannot be held to be the meaning of the word in all circumstances, for there it was used with reference to a division "between" seven or eight legatees. If that construction is admissible, then I think, reading the clauses as a whole, the division must be *per capita*, and that view is borne out by the case of *Pitcairn*, 15 D. 741.

With reference to the other question, I also concur. It is quite settled that the rule of the *conditio si sine liberis* is to be applied between uncles or aunts and nephews or nieces (and there have, I think, been cases where it has been held to apply as between grandparents and grandchildren), provided there is an intention apparent in the testator's deed of placing himself *in loco parentis* to the children. I think Mrs Bogie has indicated such an intention in this will, and that therefore the *conditio* is applicable.

Lord Shand—I am of the same opinion. It may be, and is, quite true that the word "between" in its original and proper meaning refers to a division into two parts, but it is matter of ordinary knowledge that the word is not always used in that limited sense in popular language at the present day. Nothing is more common than its use when the division is to be into more than two parts, as, for instance, where a testator leaves money to be divided "between A, B, and C equally," or where money is left to be divided between two or three charitable institutions. Accordingly I think that the division in this case ought to be *per capita.*

On the second question it is conceded that if the children of all the testatrix's brothers and sisters had been included, the question as to whether the *conditio si sine liberis* applied could never have been raised, and the only point made in argument is, that the testatrix has selected the children of a brother and a sister, and omitted all mention of the children of another brother. I confess I have a difficulty in following this reasoning. It rather appears to me that this case is ruled by that of *MacGown's Trustees.* The very same fact of the exclusion of the children of a brother occurred there, but it is said that because a reason for the omission was there stated the case is of no weight in deciding the present question. I cannot follow that, and I notice that the opinions of the Judges in the case of *MacGown's Trustees* do not state as a ground of their judgment that the family of one brother was excluded.

It may appear on the face of the settlement that the parental character is assumed to one child or one nephew or to a class of legatees. The question is not dependent on the number of legatees selected. What we have always to do is, to take the settlement as a whole, and see whether it appears therein that the parental character was assumed towards the legatees therein named. Here the whole of her estate is divided by an aunt amongst members of her family, and I cannot doubt that as the *conditio* has been applied to the case of nephews and nieces it ought also to apply here.

The Lords accordingly found that the shares of residue fell to be reckoned *per capita*, and answered the second question in the affirmative.

Counsel for First, Third, and Fourth Parties—Mackintosh — Jameson. Agents — Boyd, Macdonald, & Co., S.S.C.

Counsel for Second Parties — Robertson — Guthrie. Agents—Graham, Johnston, & Fleming, W.S.

Friday, January 27.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

STEWART *v.* BURN MURDOCH.

Entail—Entail Amendment Act 1868 (31 *and* 32 *Vict. c.* 84), *sec.* 5—*Feu-Charter where Buildings Erected prior to its Date is liable to Reduction.*

Held that a feu-contract bearing to be granted under the powers conferred by the said Act upon entailed proprietors, and conveying lands upon which buildings had already been erected of an annual value of more than double the amount of the feu-duty, was reducible, in respect that the 5th section of the statute requires these buildings to be erected after the execution of such a charter; and decree of reduction *pronounced* accordingly against a singular successor of the original feuar.

Entail Amendment Act 1868, *sec.* 3—*Valuable Consideration.*

Held (*per* Lord Rutherfurd Clark, Ordinary) that a back-letter granted by the feuar to his superior, stipulating as a condition of granting the charter that he (the superior) should be free to cut the oak trees which grew upon the subjects feued, was a valuable consideration in the sense of the 3d section of the Act, and that the transaction was therefore in contravention of the Act.

By building lease dated in March 1862 Sir William Drummond Stewart, then heir of entail in possession of the entailed estates of Murthly, Grandtully, and others, leased to Alexander Robertson, under the powers conferred on heirs of entail by the Act 10 Geo. IV. c. 51, a piece of ground forming part of said estates, extending to between one and two acres, for 99 years from Whitsunday 1859, for an annual rent, payable to the heir of entail in possession for the time, of £6, 12s. 5d. By the said lease the lessee was bound to erect, within two years from its date, on the said piece of ground, a dwelling-house of at least three storeys, in the form of a tower, and certain other buildings, to keep the same in thorough repair during the lease, and to leave them in like state on its expiry, the said buildings to become at the expiry of the lease the property of the heir of entail in possession at the time without any payment or consideration. Robertson accordingly erected the buildings in terms of the lease. By a second building lease of the same date, and between the same parties, another piece of ground, also part of the entailed estates, extending to between one and two acres, was let to Robertson for 98 years from Whitsunday 1860 for a rent of £9, 15s. 7d. By this lease the lessee was bound to execute at his own expense such repairs and additions to a dwelling-house then erected on the first piece of ground as would make it when completed worth £200 at least, and to maintain the first house during the lease, and leave it at the expiry thereof in good repair. No melioration was to be claimed by the lessee for these expenses, and the house was to become at the expiry of the lease the property of the heir of entail in possession for the time, without any payment or consideration therefor. Robertson accordingly executed the repairs and additions stipulated for. The total extent of the two pieces of ground thus leased was 2 acres 3 roods and 35¼ poles, and the total rent payable was £16, 8s.

In 1869 Robertson entered into an arrangement with Sir W. D. Stewart, by which he was to renounce these two leases, and instead obtain a feu-charter of the two pieces of ground and buildings thereon, and of certain additional ground adjoining thereto, extending in all to 13 acres and 726 decimal parts of an acre. The proposed arrangement was to be carried out under the "Entail Amendment (Scotland) Act 1868" (31 and 32 Vict. cap. 84), which provides, section 3—"It shall be lawful for any heir in possession of an entailed estate, notwithstanding any prohibitions or limitations in the deed of entail or in any Act of Parliament, in the manner and subject to the conditions hereinafter mentioned, to grant leases for the purpose of building for any number of years not exceeding 99 years, or feus of any part of such estate," reserving and excepting as therein mentioned—"Provided always that the feu-duty, rent, or ground-annual to be stipulated for shall not be less than the amount ascertained as hereinafter provided: Provided also that it shall not be lawful for such heir to take any grassum or fine or valuable consideration other than the feu-duty, rent, or ground-annual for granting any such charter, lease, or disposition; and in case any such grassum, fine, or consideration shall be taken, such charter, lease, or disposition shall be made void." . . . Section 5 is in these terms—"Provided always that every such feu-charter, lease, or disposition shall contain a condition that the same shall be void, and the same is hereby declared void, if buildings of the annual value of at the least double the feu-duty, rent, or ground-annual therein stipulated shall not be built within the space of five years from the date of such grant upon the ground comprehended therein; and that the said buildings shall be kept in good tenantable and sufficient repair; and that such grant shall be void whenever there shall not be buildings of the value foresaid standing upon the ground so feued, leased, or disponed."

In pursuance of this arrangement Sir W. D. Stewart presented a petition to the Sheriff of Perthshire, in terms of the statute, and after a remit to and report by a man of skill the Sheriff-Substitute on 20th September 1869 interponed the authority of the Court as craved. Sir W. D. Stewart then executed a feu-charter, dated 23d September 1869, disponing the said 13·726 acres to Robertson for a feu-duty of £27. By a duly