If there be *prima facie* evidence of funds, the arrestment is sufficient to make him liable to our jurisdiction." The conclusive distinction between that case and this is, that we have not here to consider the question on a *prima facie* case that a debt exists, but on a concluded proof that there is no such debt. I think it perfectly clear from the proof that there is no such debt. We are in the same position as if the pursuer had admitted on record the facts which are established against him by the proof.

The Court adhered.

Counsel for the Pursuer — Dickson — Napier. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defender—Ure—Campbell. Agents—Tods, Murray, & Jamieson, W.S.

Friday, January 29.

FIRST DIVISION.

M'EWAN AND ANOTHER (CARTER'S TRUSTEES) *v.* CARTER AND OTHERS.

Succession — Settlement — Conditio si sine liberis.

In his trust-settlement a testator left a legacy of £500 to his son John if he returned to this country within ten years after the death of the survivor of the testator and his wife, "declaring that at the end of the said ten years the said sum of £500 shall be divided equally among my surviving children." Elsewhere in the deed the testator made various provisions in favour of his other children and their issue. John did not return to this country within the ten years prescribed, and before the expiry of that period James, another son of the testator, died leaving issue.

Held that the legacy was divisible among the children of the testator who had survived the period prescribed, and that the issue of James had no right to any share of it under the *conditio si sine liberis.*

By trust-disposition and settlement dated 7th May 1862 John Carter of Castlehill conveyed to trustees for the purposes therein mentioned his whole heritable and moveable estate.

The deed was granted for, *inter alia*, the following purposes—(1) to pay the testator's debts and funeral expenses, and the expenses of the trust; (2) to give his widow the use of his household furniture during her life, and to pay her the sums of £50 for mourning and £50 for aliment; (3) to hold his whole property (except money in bank and cash in hand) for behoof of his widow in liferent; (4) to sell his property in England; (5) "that my trustees shall at the first term of Whitsunday or Martinmas, six months after the death of my said wife in the event of her surviving me, and in the event of her predeceasing me, then at the first term of Whitsunday or Martinmas six months after my death, make payment of or provide for the following legacies to the persons after named, viz., to my son John Carter personally the sum of Five hundred pounds sterling, but declaring that this legacy shall not be payable to him unless upon his return to this country within ten years after the death of the survivor of me and my said wife; and also declaring that at the end of the said ten years the said sum of five hundred pounds shall be divided equally among my surviving children; to my daughter Margaret Carter and her heirs the sum of Five hundred pounds sterling; to my daughter Catherine M'Ewen Carter and her heirs the sum of Five hundred pounds sterling; to my son Thomas Carter and his heirs the sum of Five hundred pounds sterling; and to my daughter Agnes Barbara Carter and her heirs the sum of Five hundred pounds sterling" . . . (7) at the said term of Whitsunday or Martinmas to dispone, convey, and make over to his son James Carter, "and his heirs and assignees whomsoever," heritably and irredeemably, the lands of Castlehill and Greenlane; and lastly, at the said term of Whitsunday or Martinmas to pay the residue of his means and estate to his son James, and his daughters Margaret, Catherine M'Ewen, and Agnes Barbara, equally among them, "declaring that the shares of such of my said residuary legatees as shall die without leaving lawful issue shall belong to the survivors of my said residuary legatees equally."

John Carter, the testator, died on 19th January 1864, survived by his widow and by his sons James and Thomas, and by his three daughters. John Carter, the testator's son, went to America in June 1856. At the time of his father's death it was not known whether he was living or not, and since then no tidings had been heard of him. Agnes Barbara Carter one of the testator's daughters died in 1868 without issue, and James Carter, the testator's son, died on 4th January 1877 survived by five children. The testator's widow died on the 26th September 1881. By disposition, dated 3rd May 1882, and recorded in the Division of the General Register of Sasines applicable to the county of the stewartry of Kirkcudbright, the trustees under the trust-disposition and settlement conveyed to the five daughters of James Carter, as heirs-portioners of their father, the lands of Castlehill and Greenlane.

In these circumstances a question arose as to the persons entitled to receive payment on 26th September 1891, *i.e.*, ten years after the death of the testator's widow, of the legacy of £500 bequeathed to the testator's son John Carter in the fifth purpose of the trust-deed. The children of the testator surviving at that date maintained that they were entitled to receive payment of it equally among them. On the other hand, the children of James Carter maintained that they were entitled

to the share of the said £500 which would have fallen to their father if he had been alive at that date.

For the settlement of the point the present special case was presented for the opinion of the Court. The first parties to the case were the trustees under the trust-disposition and settlement of John Carter, the testator. The second parties were the testator's surviving children. The third parties were the children of James Carter.

The questions of law submitted were—"(1) Are the second parties entitled to receive payment equally among them of the said sum of £500? or (2) Are the third parties entitled to receive the share thereof which would have fallen to the testator's son James if now alive?"

Argued for the third parties—This was a plain case for the application of the *conditio si sine liberis*. Whenever a bequest was made to children as a class, as to "surviving children," the *conditio* applied, and the issue of a parent predeceasing were included. Here the bequest was directly left to such a class conditionally on John, the testator's son, not returning within the specified time. The chance of John's returning was just a burden on the bequest. *M'Call* v. *Dennistoun*, December 22, 1871, 10 Macph. 281, did not apply, as there a special legacy was left to each individual child in the event of his surviving a particular event—*Gould's Trustees* v. *Duncan*, March 20, 1877, 4 R. 691, Lord Ormidale's opinion, 694; *Grant* v. *Brooke*, November 3, 1882, 10 R. 92.

Argued for second parties—The *conditio si sine liberis* was only applied in order to give effect to the intention of the testator gathered from the terms of the deed. Opinion of Lord Gifford in *Gillespie* v. *Mercer*, March 8, 1876, 3 R. 565; *Berwick's Executor*, January 23, 1885, 12 R. 565. The terms of this deed plainly shewed that the testator had in his mind the possibility of his children dying and leaving issue, for mention was made of "heirs" in the other legacies to children in the same clause, and in the clause leaving the residue to four of his children the testator declared that the survivors were to take the shares of such as shall die "without leaving lawful issue." A suitable provision was made in the deed for the children of James; they were to get the heritable estate of the testator. The *conditio si sine liberis* did not apply where other provision had been made for the issue of a predeceasing child—*Greig* v. *Malcolm*, March 5, 1891, 13 S. 607; or in a case of simple legacies—*Douglas's Executors*, February 5, 1869, 7 Macph. 504. *M'Call* v. *Dennistoun*, ruled the present case, as in it there was a similar settlement giving special bequests. *Gould's Trustees* v. *Duncan* was different from the present case, as it dealt with a general provision of residue. Where "surviving children" were conditionally instituted, the issue of a predeceasing child were excluded from participating in the share which the parent would have taken if he had survived—*Thornhill* v. *Macpherson*, January 20, 1841, 3 D. 394; *Walker* v. *Park*, January 20, 1859, 21 D. 286; *Young* v. *Robertson*, February 1862, 4 Macq. 314; *Graham's Trustees* v. *Grahams*, May 26, 1868, 6 Macph. 820.

At advising—

LORD PRESIDENT—It appears to me that the case of *Greig* v. *Malcolm*, to which the attention of parties was called by Lord Kinnear, affords a sound rule of judgment here. The *conditio si sine liberis* is applicable where the terms of the settlement are such as to conduce to the conclusion, that the testator has not taken into account that one of his children may die survived by issue. But if it should turn out upon an examination of the whole deed that the testator has had that contingency in view, and has provided for it, then the room for the application of the condition disappears.

The doctrine as put by Lord Corehouse in the case of *Greig* v. *Malcolm*, 13 S. 611, is this—"This doctrine which we have borrowed from the Roman law proceeds entirely on the presumption that the testator, having overlooked or forgotten the contingency of the institute having children, has left children unprovided if they come into existence. But this presumption 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." Now, applying that principle to the settlement before us, it is important to observe that in the clause of the deed dealing with residue there are these words—"declaring that the shares of such of my said residuary legatees as shall die without leaving lawful issue, shall belong to the survivors of my said residuary legatees equally." That shows that the contingency of his children dying leaving lawful issue was fully in the mind of the testator when he made the deed.

I think, therefore, the result is that Mr Johnston's argument must prevail, and he has fortified it by pointing out that the testator has very carefully discriminated between the various provisions in this very matter. The legacy with which we have to do is one of a series of legacies in the proper sense. In it there is no mention of issue or heirs, but in the other legacies we find that they are granted "to my daughter Margaret Carter and her heirs," "to my daughter Catherine M'Ewen Carter and her heirs," and so on.

It therefore appears to me that this deed is one giving ample scope for the application of the doctrine laid down by Lord Corehouse, and that it is impossible to hold that this clause can be read as containing an implied provision in favour of the children of the predeceasing son.

Many cases have been cited which go to show that the current of decision has run strongly in favour of the application of the *conditio*. None of the cases, however, gainsay the justice and efficacy of the rule laid down by Lord Corehouse.

I am therefore of opinion that the argu-

ment of the third parties cannot receive effect.

LORD ADAM—I agree with your Lordship. I think the case of *Greig* v. *Malcolm* rules the present case. It proceeds upon the principle that the *conditio si sine liberis* applies where there is a presumption that the testator in making his will has overlooked the children of his direct descendants.

When we look at this deed it is impossible to conclude that the testator has overlooked the children of his son James. The terms of the other clauses of the deed show this. I therefore think the principle does not apply here.

It is not necessary to say more, but I have been unable to follow the argument that the *conditio* affects this case at all. We have here a clause substituting a certain person conditionally to another who is already conditional institute, because John Carter is the institute in this clause beyond all doubt, and the surviving children of the testator only take conditionally on his non-appearance within a certain time. Therefore what is proposed is, that the *conditio* should be held to apply to the case of the issue of persons who are not conditionally instituted in the first place.

I am aware of no case which will support this and doubt the soundness of the proposal.

LORD M'LAREN—I think that in considering this class of cases it must be kept in view that our law allows perfect freedom of bequest not only in the original limitations of a will, but in conditional institutions and other rights of a subsidiary character intended to have effect in certain contingencies.

We must therefore be careful not to give this useful principle, *conditio si sine liberis decesserit*, an extension which would practically have the effect of making all conditional institutions alike, and of depriving a testator of the liberty allowed to him by the law.

I make this observation because, in the opinion which was returned by the consulted Judges in the recent case of *Harvey Hall*, we expressed the view that there had been a tendency to extend the *conditio* beyond its proper limits.

I agree with your Lordship that the principle to be kept in view in applying the *conditio* is, that it involves an equitable extension of the scope of the bequest to persons who have been altogether overlooked in the testator's scheme of settlement. Such extension is founded on the relationship of the parties, and on the presumption that the testator had not intentionally disinherited persons having a claim on his goodwill.

If that is the true principle of the *conditio*, I think all the elements of this case go to exclude its application.

First of all, what is claimed by the third parties is not a part of a general family bequest. The testator gives his heritable estate to his eldest son, and provides that the residue is to be shared by his three daughters and another son. No share of the residue is given to his son John Carter, as he had been abroad for a long time and had not been heard of by his family.

But this bequest of £500 to the absent son is one of a series of pecuniary legacies given in severalty to different members of the family, and therefore it is not a part of the family provision. But again it is not claimed by the issue of the person to whom it was originally given, but by the children of a deceased brother. The claim is therefore contrary to the direction of the testator, who contemplated the case of his son not returning to claim the legacy, and who says in the deed that it is in that event to be shared by his surviving children.

I agree with Lord Adam in his expression of a doubt as to whether the benefit of the equitable rule can ever be claimed by the issue of one who is only instituted in the second order. My doubt, however, reaches a certainty that the rule has no application in this case, because that has been expressly held in a series of decisions which have been quoted to us, including the carefully expressed judgment of Lord Westbury in the case of *Young* v. *Robertson*, who lays it down that the issue only take their parents' original share, and not what their parents would have taken under a clause of survivorship.

Further, I agree that the phraseology here used excludes the *conditio*, and that perhaps is only another way of putting what I have already observed, that the clause is inconsistent with the claim put forward by the third parties.

LORD KINNEAR—I agree with your Lordships in thinking that the third parties' claim cannot be sustained, and upon the grounds stated.

I also agree in thinking that it is at least doubtful, whether the *conditio si sine liberis decesserit* can be applied in favour of the children of legatees, who are themselves claimants only on the failure of some prior legatee whom the testator preferred to them.

In the present case the children to whom the condition according to its ordinary construction would have applied, would be the children of John Carter, because he is the institute, and the children to be benefitted by the condition are the children of the institute—*si institutus decesserit sine liberis*. But it is proposed that the children of a person conditionally instituted on the failure of John Carter should have the benefit of the presumption upon which the *conditio* is founded.

I am not satisfied that the presumption could arise in such a case, but I think with Lord Adam that it is unnecessary to discuss that point, because the grounds of judgment stated by your Lordship in the chair are perfectly clear and sufficient.

The Court found that the second parties were entitled to receive payment equally

among them of the said £500, and answered the second question in the negative.

Counsel for the First and Second Parties — Dickson — Ure. Agents — Ronald & Ritchie, S.S.C.

Counsel for the Second Parties—H. Johnston — Dewar. Agent—W. J. Johnstone, S.S.C.

Friday, January 29.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MUIR *v.* BEATTIE.

Poor—Relief—Poor Law Amendment Act 1845 (8 *and* 9 *Vict. cap.* 83), *secs.* 70 *and* 72.

Held that a parish which had granted relief to two paupers and a pauper lunatic belonging to another parish, was entitled, in making its claim of relief against the parish of settlement, to charge it with a proportion (1) of the expense of the salaries and wages of the officials of the poorhouse and asylum in which the paupers had been maintained, and (2) of interest at 3 per cent. on the debt outstanding on the poorhouse and asylum buildings at the time the relief was granted.

This was an action of relief at the instance of Peter Beattie, Inspector of Poor of the Barony Parish of Glasgow, on behalf of the Parochial Board of that parish, against James Muir, Inspector of Poor of the Parish of Bothwell, for payment of £41, 7s. 4d. as the amount due to him for relief given (1) to Hugh White, a pauper lunatic, and (2) to Elizabeth Shaw, and the illegitimate child of a woman named Bridget M'Guire, paupers.

In the case of Hugh White the pursuer averred that he had made advances, after deduction of the Government grant, to the amount of £35, 12s. 9d., the principal item in the account being a charge of 13s. a week for the pauper's board in Woodilee Asylum from 17th August 1887 to 17th October 1888.

In the case of the other paupers a charge of 5s. 6d. a week was made for the board of each in the Barony Poorhouse during part of the years 1888-9.

In stating his account for relief given to Hugh White, the pauper lunatic, the pursuer included therein, *inter alia*, (1) a charge of 2s. a week for "salaries and wages less tradesmen," and (2) a charge of 4s. 2¼d. a week for "interest at 3 per cent. on total indebtedness," representing the amount charged for house accommodation. Similar charges were included in the account for relief given to each of the two other paupers, viz., (1) a charge of 1s. a-week for "salaries of officials," and (2) a charge of 6d. a-week for "property account" or house accommodation.

It was admitted in a joint-minute lodged by the parties that in the case of Hugh White the charge for "salaries and wages less tradesmen" included the salaries and wages of the official staff of the asylum and, *inter alios*, of the medical officers, and that a proportion of the medical grant was applicable to the salaries of the latter, leading to a deduction of 2½d. a week from this charge. The charge for house accommodation was calculated in this way:—Prior to May 1888 sums amounting to £210,477, 15s. 6d. had been borrowed, and expended by the pursuer's board in acquiring and building the asylum. By May 1889 the total amount borrowed had been increased to £212,642, 13s. 6d.. The charge of 4s. 2¼d. per week was the cost per head of the average number of inmates of the asylum of interest at 3 per cent. on these sums. It was admitted that the actual indebtedness outstanding on the loans had been reduced by May 1888 to £145,916, 13s. 6d. and by May 1889 to £144,081, 13s. 6d. In the case of the ordinary paupers the item "salaries of officials" consisted of the salaries of the official staff of the poorhouse, excluding (1) the medical officers, and (2) tradesmen, gardeners, and sewing mistress; and the rate charged for house accommodation was the cost per head of interest at 3 per cent. on the sum of £62,107, 12s. 8d., being the total capital sum expended on the poorhouse buildings up to May 1889. It was admitted that at the same date the outstanding debt amounted only to £17,910.

The defender admitted that Bothwell was the parish of the paupers' settlement, and that he was liable to reimburse the pursuer for the "monies expended on their behalf," but he objected *in toto* to the charges for salaries and wages in the case of all the paupers, and to the charge for "property account" or house accommodation in the case of the ordinary paupers. In the case of Hugh White, the pauper lunatic, he objected to the charge for interest at 3 per cent. on total indebtedness to the extent that that charge exceeded the rate of rental shown in the valuation roll, or at all events so far as it exceeded 3 per cent. on the actual amount of indebtedness outstanding at 14th May 1888 and 14th May 1889.

Besides the charges mentioned, certain other charges made by the pursuer were objected to by the defender, but as no question of importance was raised as to these charges they need not be further referred to.

The pursuer pleaded—"(2) On a just construction of the 71st section of the Poor Law Act 1845, and the 76th section of the Lunacy Act 1857, the pursuer is entitled to recover from the defender, as part of 'the monies expended in behalf of' the said paupers, a proportion of the charges set forth in articles 3 and 5 of the condescendence."

On 19th December 1891 the Lord Ordinary (STORMONTH DARLING) decerned against the defender for payment to the pursuer of the sum of £33, 3s. 4d. in full of the sum sued for and interest.

"*Opinion.*—Counsel on both sides explained that what they desired in this case