pany was trading upon this supposed practice in refusing payment of a debt though they had assets, and in another case where it was obvious that the company would never commence business.

But I do not think that there is any foundation for the alleged rule, if it be a rule of practice. The matter is very fully dealt with in *in re Crigglestone Coal Company, Limited* [1906], 2 Ch. 327, in terms which apply irrespective of the amount of the debt of the petitioning creditor. If any general rule can be deduced, I should say it was rather the reverse of what Melville, J., says, and that any creditor, whatever the amount of his debt, is entitled to a winding-up order unless special circumstances exist for refusing it. Here I do not find any such circumstances which it is in the mouth of the company to state. It is true that the Court is not bound to pronounce a winding-up order even when the conditions of the statute exist. Nowhere the company say that the whole of the creditors other than the petitioners are averse to liquidation. As Buckley, J., in *in re Crigglestone Coal Company*, pointed out, a petitioner in a winding-up has a representative as well as a personal character, and the Court may refuse him an order if it finds that he does not represent his class. But that is not for the company but for the creditors to maintain, and here no one but the company appears.

I think therefore that the winding-up order should be granted.

LORD MACKENZIE—I agree with your Lordships. A winding-up order is, in my opinion, a perfectly proper remedy for enforcing payment of a just debt. The point urged by the respondents is I think determined against them by the section of the Companies (Consolidation) Act 1908, to which your Lordships have already referred.

The Court pronounced this interlocutor—

"... Order that the Central Building Company Limited be wound up by the Court under the provisions of the Companies (Consolidation) Act 1908 ..."

Counsel for Petitioners—Valentine. Agents—Oliphant & Murray, W.S.

Counsel for Respondents — Wilton. Agent—Alexander Bowie, S.S.C.

Friday, December 23.

SECOND DIVISION.

POLLOK (TAYLOR'S TRUSTEE) *v.* ROBINSON AND OTHERS.

Succession—Will—Codicil—Construction—Faculties and Powers—Trust—Power of Division Given to Trustee.

By her trust-disposition and settlement a testatrix left legacies to a number of beneficiaries including A. She gave her trustees power to pay the residue of her estate over in such proportions as they themselves might decide "to the beneficiaries already named, or to and amongst any relatives who may be in necessitous circumstances." By codicil she revoked the legacy to A and left legacies to B and C, who were not mentioned in the trust-disposition. No relatives in necessitous circumstances were found.

Held (1) that the trust-disposition and codicil falling to be read together as one will, A was not entitled to share in the residue, not being a beneficiary, but that B and C were so entitled, and (2) that the trustee was not bound to hold any portion of the residue for behoof of necessitous relatives of the testatrix.

Miss Williamina Taylor, who resided at 122 North Frederick Street, Glasgow, died on 7th October 1909 leaving a trust-disposition and settlement and codicil. By the trust-disposition and settlement she conveyed her whole means and estate, heritable and moveable, to James Cullen Pollok, and to any other persons whom she might thereafter appoint, in trust for the purposes therein set forth.

The *trust-disposition* and *settlement* which was dated 30th June 1909, provided, *inter alia*—"I direct my trustees to pay the following legacies, *videlicet*, to my nephew *Charles Albert Robinson* and to my niece *Helena Robinson* ... the sum of *One* hundred pounds sterling each, to *William Mackay Sutherland* ... ten pounds, and to *Mrs Agnes Cullen or Pollok* ... for many acts of kindness done by them to me, the sum of twenty pounds, to my old friends *Miss Emilia Connor* ... and *Mrs Margaret Wright* ... the sum of five pounds each, to *Charles* and *William Dorward*, sons of my cousin, the sum of *five pounds* each, and to the *minister of the Tron United Free Church, Glasgow*, the sum of *twenty-five pounds*, to be applied by him for the benefit of said church in such way as he may consider it best; and lastly, should I leave no writing under my hand disposing of the balance of my said estate, then I give to my trustees full power to pay same over in such proportions as they themselves may decide to the beneficiaries already named or to and amongst any relatives who may be in necessitous circumstances. My said trustees shall be the sole judges of the manner in which the division of said residue and payments thereof shall be made, and no one shall have any right to quarrel or impugn their decision."

The *codicil*, which was of date 4th August 1909, provided, *inter alia*—"I, Williamina Taylor, before designed, the maker of the foregoing settlement, being desirous of making certain alterations thereon and additions thereto, do hereby, in the first place, revoke the legacy of ten pounds sterling to William Mackay Sutherland; in the second place, I increase the legacy of five pounds sterling bequeathed to Miss Emilia Connor to ten pounds sterling; in the third place I leave and bequeath the following

additional legacies, *videlicet*:—To Miss Janet Grant . . . the sum of ten pounds sterling, and to Ernest Taylor, son of my cousin, the sum of five pounds sterling. . . . And I confirm the legacy of twenty pounds sterling to Mrs Agnes Cullen or Pollok, and except as altered by this codicil I confirm my said trust-disposition."

Questions having arisen as to the rights of parties under Miss Taylor's testamentary writings, a Special Case was presented to the Court. The *first* party was James Cullen Pollok, Miss Taylor's sole trustee. The *third* party was William Mackay Sutherland. The *fourth* parties were Miss Janet Grant and Ernest Taylor. The *second* parties were the other beneficiaries under the trust-disposition and settlement.

The Special Case stated, *inter alia*—"5. The said Williamina Taylor left moveable estate of the value of £837 or thereby. She left no heritable estate. . . . The said Williamina Taylor left no writings of a testamentary nature other than the said trust-disposition and settlement and codicil. 6. The first party has made inquiry by way of advertisement and otherwise for any relatives of the testatrix other than those mentioned in the trust-disposition and settlement and codicil, but he has been unable hitherto to discover any such, with the exception of a maternal cousin's daughter, who is not in his opinion in necessitous circumstances. 7. Questions have arisen between the parties as to the powers of the first party under the said trust-disposition and settlement and codicil, and as to the nature and extent of the rights of the beneficiaries named therein in the residue of the estate —(*a*) The first party does not propose to retain or set aside any portion of the residue for division among any relatives of the testatrix other than those named in the trust-disposition and settlement and codicil. He *maintains* that on a sound construction of the direction with regard to residue contained in the trust-disposition and settlement he is entitled to divide the whole residue among the beneficiaries named in the trust-disposition and settlement and codicil, including the third party, or any one or more of them, in such proportions as he thinks proper. (*b*) The second parties maintain that they are the only 'beneficiaries' named in the trust-disposition and settlement, and are accordingly the only persons entitled to participate in the residue, and that they are entitled to have the whole of the residue divided among them by the first party in such proportions as he may decide. (*c*) The third party maintains that, notwithstanding the revocation by the codicil of the legacy bequeathed to him by the trust-disposition and settlement, he is still a beneficiary named in the settlement, and is entitled to participate in the division of the residue along with the second parties just as if the codicil had not been executed, and that the fourth parties are not entitled to participate in the division. (*d*) The fourth parties maintain that they are entitled to a share of the residue along with the second parties, and that the third party is not entitled to any share therein."

The following *questions of law* were submitted:—"(1) Is the first party entitled, in exercising the power of division conferred on him by the trust-disposition and settlement, to include, in addition to the second parties, (*a*) the third party, and (*b*) the fourth parties, or either and which of them? (2) Is the first party bound to set aside any portion of the residue for division among relatives of the testatrix, other than those named in the trust-disposition and settlement and codicil, who may be found by him to be in necessitous circumstances?"

Argued for the first party—Where a discretionary power was given to trustees to select from a class, that involved absolute discretion on the part of the trustees—*M'Cormack* v. *Barber*, January 25, 1861, 23 D. 398.

Argued for the second parties—They alone were entitled to the residue. The third party had no right to share therein. His legacy was definitely revoked in the codicil. He therefore was not a beneficiary named in the trust-disposition and settlement. Neither were the fourth parties, whose names only appeared in the codicil. The trustees were not bound to hold any portion of the fund for behoof of necessitous relatives.

Argued for the third party—Though his legacy of £10 was revoked in the codicil, he was one of the beneficiaries already named in the trust-disposition and settlement. He adopted the second parties' argument as to the trustees holding any part of the fund.

Argued for the fourth parties—They were entitled to share in the residue. The will and codicil together were to be regarded as a new will—Theobald on Wills (7th ed.), 146. There was here a bequest to a class of named persons who must qualify the description of beneficiaries. They adopted the second parties' argument on the second point.

LORD JUSTICE-CLERK—I have formed a clear opinion in this case. This lady executed a will and afterwards added a codicil, the codicil having the effect of taking out the name of one legatee and of adding the names of two new legatees. These documents must be read as constituting this lady's will at the time of her death, and I take it to be the same as if she had deleted one name from the will, the deletion being properly authenticated, and had added a marginal addition containing the two new names, the marginal addition being also properly authenticated. Therefore I can have no hesitation in holding that Mr Sutherland is in the same position as if he had never been named in the will. At the time of this lady's death he was not in the position of being one of the "beneficiaries already named," and therefore I think that branch (*a*) of the first question must be answered in the negative. As to branch (*b*) of the first question the position is just the converse,

and this branch must be answered in the affirmative. The only remaining question is the second, whether the first party is bound to set aside any portion of the residue for division among relatives of the testatrix who may be found by him to be in necessitous circumstances. We are certiorated that every possible effort has been made to discover the relatives of the testatrix, that only one relative has been discovered, and that she is not in necessitous circumstances. In these circumstances I do not think that the trustees are bound to hold the fund for behoof of necessitous relatives of the testatrix, and therefore I think that the second question must be answered in the negative.

LORD ARDWALL concurred.

LORD SALVESEN—I also concur. I think that the two deeds, the will and the codicil, must be read together as if they formed one document, and on the same footing as if they had been placed before a conveyancer and he had been asked to embody their terms in one settlement. If that had been done by an expert conveyancer he would simply have left out one name and inserted other two names in the list of legatees. Otherwise the will would have remained unchanged, and would then have been very easy to construe. I have no difficulty in reaching the result at which your Lordship in the Chair has arrived, and substantially on the same grounds as you have more fully explained.

LORD DUNDAS was absent.

The Court answered head (*a*) of the first question in the negative, and head (*b*) in the affirmative, and the second question in the negative.

Counsel for the First Party—Wark. Agents—Patrick & James, S.S.C.

Counsel for the Second Parties—Chree. Agent—R. J. Calver, S.S.C.

Counsel for the Third Party—Aitchison. Agents—Whigham & MacLeod, S.S.C.

Counsel for the Fourth Parties—W. A. Fleming. Agents—Thomson, Dickson, & Shaw, W.S.

Friday, December 23.

FIRST DIVISION.

[Dean of Guild Court of Partick.

NICHOLSON *v.* GLASGOW BLIND ASYLUM.

Property — Building Restrictions — Real Burden — Real Condition — Title to Enforce—Jus quæsitum tertio.

Burgh — Dean of Guild — Jurisdiction — Declinature of Jurisdiction—Competition of Title.

A petition for a lining for certain subjects, of which the petitioner was the proprietor, was opposed by the proprietor of two tenements in the neighbourhood on the ground that the buildings for which warrant was sought would contravene, as, indeed, was admitted, restrictions in the title of the petitioner, and that the respondent was a *tertius* who had a *jus quæsitum* to enforce the restriction. The petitioner and respondent were each disponees tracing from a common author, and the dispositions by which the common author had disponed the subjects and others to the respective authors were of the same date, contained similar restrictions and a stipulation that the disponer (the common author) should impose similar restrictions upon another portion of land still remaining with him, and declared the restrictions to be real burdens and that they must be inserted in all future dispositions. The titles produced did not show what other pieces of ground were under similar restrictions to those of the petitioner and respondent, nor the sequence of transmission to petitioner or respondent, nor did the exact relative position or nearness of the ground of the petitioner and respondent appear. The magistrates, on the ground that there was a competition of title, sisted the case in order that the petitioner might raise an action of declarator in a competent court, and on the petitioner lodging a minute stating he did not propose to do so dismissed the petition.

The Court *held* (1) that no question of competition of title had arisen, and that the magistrates ought to have decided the questions raised—*Pitman* v. *Burnett's Trustees*, July 7, 1881, 8 R. 914, 18 S.L.R. 659; *Walker and Dick* v. *Park*, February 29, 1888, 15 R. 477, 25 S.L.R. 346; and *Macandrew* v. *Dods*, 1908 S.C. 51, 45 S.L.R. 49, *commented on*; and (2) that there was enough in the respondents' title to allow of the admission of evidence as to the community for whose benefit the restriction had been inserted, but that there was not sufficient before the Court to enable them to decide the matter, and remitted the cause to the magistrates to proceed as accords.

Hislop v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571, *explained* by the Lord President.

William Nicholson, proprietor of certain subjects situated at Hayburn Crescent and Minard Road, Partick, bounded on the north by Minard Road, on the east and south by a lane behind Annfield Road, and on the west by Hayburn Crescent, Partick, wishing to erect certain tenements of houses thereon, applied to the Magistrates of the Burgh of Partick for a lining.

The application was opposed by the Managers of the Glasgow Asylum for the Blind, who were proprietors of two tenements forming Nos. 5, 6, 7, and 8 Hayburn Crescent, Partick.

The following *narrative of the facts* is taken from the note of the Magistrates