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.

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*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.

*Tuesday, March 7.*

## SECOND DIVISION.

[Sheriff of Perthshire.

### BUCHANAN *v.* BUCHANAN'S TRUSTEES.

*Succession*—Legitim—*Fund for Division*—*Donation* inter vivos—*Intention.*

A father went through the form of handing over his whole moveable property during his lifetime to a son, by discharging a debt of £700 due by the son to him, and paying over in addition the sum of £300, and taking three I O U's, one for £400 and two for £300 each, from the son in favour of three other children. These three documents of debt were all on one sheet of paper, and were handed to the father, who retained them in his custody. *Held* that there had not been a real intention to divest himself absolutely on the father's part, and that the fund had not passed out of his control, and was therefore subject to claims of *legitim.*

This was an appeal in an action in the Sheriff Court of Perthshire, at the instance of James Buchanan against his brothers Thomas Buchanan and Walter Buchanan junior, trustees and executors-nominate of their father, the deceased Walter Buchanan. The summons concluded that the defenders were bound to count and reckon to the pursuer for the amount of the personal estate which belonged to the deceased Walter Buchanan at his death, and to make payment to the pursuer of the share thereof due to him as *legitim.*

The defence was, that Walter Buchanan senior had during his life paid to the pursuer advances equal to the share to which he would otherwise have been entitled at his (Walter Buchanan's) death, and that he had divided the whole of the remainder of his estate among his children Walter Buchanan junior, and Elizabeth and Isabella Buchanan.

The defenders pleaded—"(1) The said Walter Buchanan having absolutely denuded himself of and paid away his whole personal estate during his life, his trustees and executors are not liable to account therefor; and *separatim*, not having intromitted therewith, no liability attaches to them *qua* trustees or otherwise. (2) The said Walter Buchanan having divided said personal estate among his said children, the said Walter Buchanan junior, Elizabeth, and Isabella Buchanan, before his decease, no claim thereon can in the circumstances be set up by the pursuer. (3) The pursuer having received from the said Walter Buchanan during his lifetime several sums on account of his patrimony, equal to, if not exceeding, his legal share of his father's estate, he is barred from claiming *legitim* or any other right which might have been competent to him. (4) The defender, the said Walter Buchanan junior, is bound only to pay to the pursuer the proportion of the share of said personal estate received by him required to give the pursuer an equal share with the other children in the event of his being found entitled thereto, and that only on his producing confirmation."

On a proof it appeared that the pursuer's father had for a number of years carried on business as a merchant in Callander, and that in the year 1861 he retired from business, having realised a considerable sum of money—the division and ultimate possession of which became the cause of much ill-feeling among the different members of the family, and especially between the pursuer on the one hand, and the defenders and their sister Isabella on the other. Both parties attempted to obtain influence over their father with reference to the possession of his money, and in 1867 Thomas and Isabella obtained the regulation of their father's affairs. The father had in 1859 executed a trust-disposition and settlement, and in 1869 Thomas and Isabella seemed to have resolved that their father should at once divest himself and dispose of his property so as to leave only a small amount which would fall to be distributed in terms of the settlement. In the month of August 1869, accordingly, the father paid over £1000 to the defender Thomas Buchanan, who at the same time granted three I O U's in favour of Elizabeth Buchanan for £400, and in favour of Isabella and Walter junior for £300 each. The £1000 was composed of a debt of £700 due by Thomas to his father, and £300 lying in bank in the father's name. Isabella gave the following account of the transaction:—"In the spring of 1869 my brother Andrew died. Previous to his death my father had (I knew) made a settlement. In consequence of his death, and in anticipation of some disturbance with my brother James, my father resolved either to make a codicil or divide his estate. He spoke to me about it. He resolved not to make a codicil, but to divide his personal estate among his children who had not already got their shares. He—said, 'I was at a loss how to deal with Thomas. He has paid back all he ever got from me, and he has now more than me, and I have no right to deprive him for his well doing.' My father added that Thomas had 'relieved him, for he would not seek anything.' He said at that time that James had already got his full share. This conversation took place in Thomas' shop. Thomas, Walter, and I were present. At this meeting the first thing done was to settle with Thomas, who paid up the £700—my father writing the receipt No. 16. There was nothing more done that day, but a day or two after that my father came again to the shop with £1000, which he said was all he had, and that he thought it would be better to give the £1000 to Thomas to keep and put out to interest on behalf of the rest of us. At the same time Thomas, at my father's request, granted an I O U in favour of Elizabeth Buchanan for £400, and an I O U in favour of Isabella Buchanan for £300, and also an I O U in favour of my brother Walter for £300. . . . I did not see any money paid. My father spoke about it not being necessary to pay legacy-duty in consequence of the division he was making. I saw my father give £300 to Thomas on the day that the I O U's were written out. I cannot say that I then saw the notes of the £700 that my brother Thomas had got from my father. I knew when the I O U's were written out that I was to get a share under my father's settlement of the rents of his heritable property. I did not keep my I O U, but at once gave it back to my father to keep, as he wished."

The defender Thomas Buchanan deponed as follows:—"My father at the time of division asked me to write out the I O U's, and he told me what names and sums to put in them. I