plication "heirs whatsoever" on the one occasion in which it is used in each case ought to be read as equivalent to heirs whatsoever of the body.

Lord Deas was absent.

The Court pronounced this interlocutor :—

"Having heard counsel for the petitioner and for the curator and tutor *ad litem* of the minor and pupil children, respondents, Remit to the Lord Ordinary to grant the prayer of the petition so far as not disposed of."

Counsel for Petitioner—Mackay—H. Johnston. Agents—Lindsay, Howe, & Co., W.S.

Counsel for Curator and Tutor *ad litem*—Maconochie. Agents—Dundas & Wilson, C.S.

Friday, November 3.

FIRST DIVISION.

SPECIAL CASE—GRANT AND OTHERS.

Succession — Trust — Conditio si sine liberis decesserit—*Great-Great-Grandchildren.*

A testatrix bequeathed to trustees a sum of money for behoof of her two grand-daughters A and B, and "to such of their children as may be in life at the death of the survivor." A died without issue. At the death of B her surviving children claimed the whole fund under the terms of the deed of trust, to the exclusion of the children of two daughters who had predeceased her. *Held* that the *conditio si sine liberis decesserit* applied, and that therefore these children were entitled to participate in the bequest as representing their mothers.

By deed of trust dated 23d January 1832, and having reference to a last will and testament previously executed, the late Mrs Mary Hamilton Nisbet directed her executrix under the latter deed to transfer to certain parties named, as trustees "for behoof of my grandchildren Lady Harriet Matilda Bruce and Lady Lucy Grant, or the survivor in liferent, and to such of their children as may be in life at the death of the survivor equally among them, and failing children then to my own nearest heirs in fee," the sum of £12,000, which by two subsequent codicils was increased to £20,000. The trust was created under the declaration that if one of her grand-daughters, Lady Harriet Matilda Bruce should succeed to certain entailed estates during the existence of the trust, then the trustees were to hold the fund for the sole use and behoof of her other grand-daughter, Lady Lucy Grant, and her children. Lady Harriet Matilda Bruce did not succeed to the entailed estate referred to. She died on 31st August 1857 without leaving issue. Lady Lucy Grant was married and had issue. She died on 4th September 1881, and the trust-fund aforesaid, amounting to £20,189, 8s. 11d., then fell, in terms of the deed of trust and relative codicils, to be divided amongst her children. Lady Lucy Grant was survived by five of her children, as well as by several grandchildren, the issue of two married daughters who had predeceased her. A question then arose whether under the terms of the deed of trust the children of the two daughters of Lady Lucy Grant who had predeceased her were entitled to any share of the £20,000. A Special Case was presented to the First Division, the first parties to which were the five surviving children of Lady Lucy Grant, the second parties the children of her two daughters who had predeceased her, and the third parties the trustees acting under the trust-deed.

The question submitted for the opinion and judgment of the Court was—"Whether the five parties of the first part, the children of the said Lady Lucy Grant who were alive at the date of her death, are entitled to the whole of the said trust-fund; or Whether the child of the said Mrs Anne Grant or Brooke, and the children of the said Mrs Lucy Grant or Feilding, as representing their respective mothers, are entitled to participate equally in the said fund along with the said five parties of the first part?"

Argued for the first parties—This is not a case in which the *conditio si sine liberis* could apply; if so, it would overturn the words of the deed—"Such of their children as may be in life at the death of the survivor." Children as a class were thus not called to the succession, but only those who are alive at a certain time. This excluded the claim of the second parties. The parents here are not instituted, as they have failed to comply with the condition; how then can the children take as conditional institutes? To apply the *conditio* here would be to extend it further than it had yet been extended.

Authorities—*Douglas' Exrs.*, Dec. 5, 1869, 7 Macph. 504; *Gauld's Trustees* v. *Duncan*, Mar. 20, 1877, 4 R. 691.

Argued for the second parties—The *conditio si sine liberis* applied. The parties claiming were in the direct line, and not the collateral. The testatrix stood *in loco parentis* to them, and there was no residue clause in the deed. This was in effect a family provision. The third parties' contention only carried the *conditio* one step further than it has hitherto been admitted.

Authorities—*Wallace*, 1807, M. "Clause" App. No. 6; *Thomson's Trustees* v. *Robb*, July 10, 1851, 13 D. 1326; *Christie* v. *Patersons*, July 5, 1822, 1 Sh. 543; *Rhind's Trustees*, Dec. 5, 1866, 5 Macph. 104; *Haliday* v. *M'Callum*, Nov. 9, 1869, 8 Macph. 112; *Blair's Exrs.* v. *Taylor*, Jan. 18, 1876, 3 R. 362; *Gauld's Trustees, supra; Bogie's Trustees* v. *Christie*, Jan. 26, 1882, 9 R. 453.

At advising—

Lord President—This Special Case has arisen out of the construction of a deed of trust made by Mrs Mary Hamilton Nisbet in 1832. It appears from the narrative that Mrs Nisbet had by a will—presumably an English will from the language used—left her whole personal estate to her only daughter Mrs Ferguson, and the object of the deed of trust in question was, out of the personal estate, to take a sum of £12,000 of 3½ per cent. consols, under the powers reserved under the will, and to dispose of it for the benefit of her grand-daughters. The words of the deed are—"I hereby direct and appoint the said Mrs Mary Ferguson, or any executor or executrix I may hereafter appoint, or failing such appointment, the person legally acting in that character, to transfer to James Lord Ruthven, Robert Lord Belhaven, and James Viscount Maitland, or the survivors or survivor, in trust for behoof of Lady

Harriet Matilda Bruce and Lady Lucy Grant, my grandchildren, or the survivor in liferent, and to such of their children as may be in life at the death of the survivor, equally among them, and failing children to my own nearest heirs in fee, the sum of £12,000." By two subsequent codicils it appears that the testatrix desired to make additions to this sum, for by the first of these an additional £3000, and by the second a further sum of £5000, was transferred to the said trustees, making in all a sum of £20,000. The question is, whether the words "to such of their children as may be in life at the death of the survivor" necessarily limits the disposal of the fee to those who survived the liferentrix, or whether a portion of it is to be given to the representatives of these children who predeceased Lady Lucy Grant, the survivor. Now, it is thoroughly settled—and I do not think it necessary to go over the list of cases to which we were referred—that words such as we have here do not exclude the *conditio si sine liberis*, and I am therefore of opinion that the *conditio si sine liberis* must be applied to this deed of trust, and that the second parties are entitled to participate in the fund along with the parties of the first part.

Lord Mure concurred.

Lord Shand—I am clearly of the same opinion. It appears to me that this case is ruled by those of *Wallace*, *Thomson*, and *Gauld's Trustees*. No doubt the expressions in the present deed may be somewhat different from those used in the previous cases, but substantially the deeds are the same. It cannot be disputed that if we had had here the institution of a class with a clause of survivorship, then in these circumstances the *conditio* would have been applicable, and practically that is what is done. The only novelty in the present case is the application of the rule to great-great-grandchildren, whereas previously its benefits have not been extended further than to admit the claims of great-grandchildren. I think that the *conditio* should apply in all cases of descendants, however remote, and I agree with your Lordships that the second parties in this case are entitled to its benefits.

Lord Deas was absent.

The Court found that the second parties, as representing their respective mothers, were entitled to participate in the fund along with the parties of the first part.

Counsel for First Parties — Mackintosh — Graham Murray. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Second Parties—Mackay—Dundas.

Counsel for Third Parties — Maconochie. Agents for Second and Third Parties—Dundas & Wilson, C.S.

Saturday, November 4.

FIRST DIVISION.

THARSIS SULPHUR AND COPPER COMPANY (LIMITED), PETITIONERS.

(*Ante* February 2, 1882, vol. xix. p. 379, and 9 R. p. 507; and *Hoggan* v. *Tharsis Company*, July 20, 1882, vol. xix. p. 875.)

Public Company—Companies Act 1867 (30 *and* 31 *Vict. c.* 131), *secs.* 10, 11, 13, 14, 15—*Reduction of Capital—Confirmation Order—Consent of Creditors to Reduction of Capital—Trustee—Consent of Trustee for Himself and Co-Trustees—Consent of "Duly Authorised Agent" of Creditor.*

Section 11 of the Companies Act 1867 provides with respect to reduction of capital that "The Court, if satisfied with respect to every creditor of the company who is . . . entitled to object to the reduction . . . that his consent to the reduction has been obtained . . . may make an order confirming the reduction, on such terms and subject to such conditions as it deems fit." Section 14 provides that "Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the Court may (if it think fit) dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart or appropriating" a sufficient sum to meet such debt.

A company having presented a petition to the Court for an order confirming a resolution to reduce capital, there were produced in process, *inter alia*, (1) consents signed by one of a body of trustees who were creditors, "for himself and his co-trustees;" and (2) consents signed by persons described as duly authorised agents of creditors. These agents were the agents through whom the loans were originally transacted, and were known to be in use to act for the creditors they affected to represent, though no special evidence of their authority to give consent in this instance was produced. *Held* that in both cases there was sufficient evidence that the creditors' "consent to the reduction of capital had been obtained," and that therefore the creditors for whom these persons undertook to act must be held as creditors consenting to the reduction of capital.

Opinions that the mere silence of a creditor to whom a proposed reduction of capital of a company had been intimated would not be held as proof of his consent to the reduction.

Process—Public Company—Reduction of Capital—Period of Addition of Words "and Reduced" to Name of Company which has Reduced its Capital.

Procedure in a petition by a public company for an order confirming a proposed reduction of capital.

This petition for confirmation of a proposed reduction of capital was on 2d February 1882, as previously reported, sisted to await the determination of the action of reduction, at the instance of Hoggan and others, of the resolutions passed