The LORD JUSTICE-CLERK and LORD YOUNG were absent.

The Court adhered.

Counsel for Pursuer—J. P. B. Robertson—Graham Murray. Agents—Cowan & Dalmahoy, W.S.

Counsel for Defenders—Lord Adv. Balfour, Q.C.—Lang. Agents—Campbell & Smith, S.S.C.

Tuesday, January 22.

SECOND DIVISION.

SPECIAL CASE—TAYLOR'S TRUSTEES AND OTHERS.

Succession — Testacy — Provision to Children— Conditio si sine liberis decesserit—*Clause of Survivorship.*

A testator by the residuary clause of his settlement directed that a share of his estate should be liferented by a daughter, the fee to go to her issue equally, declaring that if she died without issue the share should belong to the surviving residuary beneficiaries equally. The residuary beneficiaries were the testator's two sons and the children of another son, H, who had predeceased the testator. The daughter died without issue, and was predeceased by one of the children of H leaving a child. *Held* that this child was a "surviving residuary beneficiary," and therefore entitled to share with the others in the share liferented by the daughter. *Rougheads* v. *Rainnee*, M. 6403, followed.

Henry Taylor died in 1873 leaving a trust-disposition and settlement whereby he conveyed his whole property to trustees for certain purposes. He was survived by five children —William, Patrick, Agnes (Mrs Miller), Joanna, and Jane (Mrs Primrose). He was predeceased by a son named Henry, who left three children, and by a daughter named Mary (Mrs Hendry), who left two children. The eighth purpose of Mr Taylor's settlement (the earlier purposes of which provided for Joanna and Jane and Mrs Hendry's children) provided—"I direct my said trustees to divide the whole residue of my estate into four equal shares, and as soon as convenient after my decease to pay one of said shares to each of William Taylor and Patrick Taylor, both grain merchants in Glasgow, my sons, and to hold, apply, and pay the remaining two shares thereof as follows, viz., to hold one share for behoof of the children of my deceased son Henry, equally among them, and to pay the same, share and share alike, when they respectively attain the age of twenty-one years or are married, whichever of these events shall first happen, the survivors succeeding and being entitled equally among them to the shares of any child or children of my said son predeceasing the foresaid terms of payment of their share, and the shares of daughters being paid to them always exclusive of the *jus mariti* and right of administration of their husbands; and the remaining share of said residue my said trustees shall hold for the liferent alimentary use of Agnes Taylor, my daughter, wife of Doctor Hugh Miller of Bombay, and for her children in fee; declaring that the interest or proceeds of said last-mentioned share shall be paid to my said daughter during all the days of her life exclusive of the *jus mariti* and right of administration of her present or any future husband, and that the principal sum thereof shall be divided at the first term of Whitsunday or Martinmas after her death, and paid to her children equally on their respectively attaining majority or being married, the lawful issue of predeceasers succeeding to their parent's share and otherwise, in the same manner as is provided with regard to the share appropriated to the children of my son Henry; declaring that on the death of either of my sons, or of the said Agnes Taylor [Mrs Miller], without issue or children thereof, or of the family of my said son Henry, before the time of payment above mentioned, the share that would have fallen to them shall be divided amongst the surviving residuary beneficiaries above named equally."

Mrs Miller died in 1882, having enjoyed the liferent of the share of residue destined to her in liferent and her children in fee. She left no children, and it was to settle the right to the fee of this share that this Case was adjusted.

The first parties were Mr Taylor's trustees. The second parties were William and Patrick Taylor, his sons. The third parties were Henry Taylor's children, who survived Mrs Miller. The fourth parties were the tutors of Jessie Amelia Thomson, a child of one of Henry's daughters who had predeceased Mrs Miller. These second, third, and fourth parties maintained that the share in dispute fell to be divided "amongst the surviving residuary beneficiaries equally," in terms of the eighth purpose of the settlement quoted above. The next-of-kin and the widow of the testator (fifth parties) maintained that the share was intestate succession. There was also a dispute between the third and fourth parties. They were agreed that one-third of the share belonged to each of the second parties William and Patrick Taylor, but the third parties maintained that the remaining third must be equally divided between them as the only children of Henry who survived Mrs Miller, while the fourth parties maintained that Jessie Amelia Thomson was entitled to one-third of this third part of the share as the only child of her mother, a child of Henry.

The questions of law were—"(1) Whether the share of the residue liferented by Mrs Miller falls to be divided into three equal parts among the said William Taylor, Patrick Thomson Taylor, and the representatives of the testator's son Henry Taylor (second), under the said eighth purpose of the said trust-disposition and settlement; or whether the said share is intestate succession of the testator? (2) In event of the first alternative of the above question being answered in the affirmative, Whether the said Miss Jessie Amelia Thomson is entitled to one-third of the portion of said share falling to the representatives of the said Henry Taylor (second), either immediately or contingently on her attaining the age of twenty-one years or being married?"

The Court having expressed the opinion that the first question must be answered in the first alternative, the discussion was confined to the second question.

Argued for the parties of the fourth part—The

conditio si sine liberis operated here to the effect of substituting Jessie Amelia Thomson in the place of her mother as a sharer along with her uncle and aunt, the surviving children of Henry Taylor (second) in the share of the testator's succession liferented by Mrs Miller—*Rougheads* v. *Rainnee*, 1794, M. 6403.

Argued for the parties of the third part—The clause of survivorship which closed the bequest excluded the application of the *conditio si sine liberis.*

At advising—

Lord Justice-Clerk—The question here is, whether a great-grandchild of the testator is a beneficiary under his settlement, and this depends on whether that great-grandchild is a "surviving residuary beneficiary" in the express terms of the deed—whether the use of these words makes any difference on her position. My opinion is that they make no difference at all—that it leaves her in the same position as the other beneficiaries who take a share of Mrs Miller's provision under the residuary clause.

Lord Young—That is my opinion also. Mr Guthrie, who said all he could for his case, practically admitted that the case was undistinguishable from that of *Rougheads*, and I think it rules the present case. If Mrs Miller, who had her provision in liferent and the fee to her children, died without issue, the grandchild of Henry, both on the authority of the case of *Rougheads* and on the general principles on which it proceeded, was entitled to take a share in virtue of the *conditio si sine liberis decesserit.*

Lord Craighill—I am of the same opinion, and would have come to it equally if there had been no case of *Rougheads.* I think Miss Thomson was a survivor in the sense of the clause in the settlement at the time of the death of the liferentrix, and under that authority I am fully warranted in coming to that conclusion.

Lord Rutherfurd Clark—I am very glad your Lordships have already decided the case, as I am not quite clear upon it.

The Court pronounced this interlocutor:—

> The Lords . . . are of opinion, and find and declare (1), in answer to the first question therein put, that the share of the residue liferented by Mrs Miller falls to be divided in three equal parts among William Taylor, Patrick Taylor, and the representatives of the testator's son Henry Taylor (second) under the eighth purpose of the trust-disposition and settlement; and (2), in answer to the second question, that Jessie Amelia Thomson is entitled to one-third of the portion of the said share falling to the representatives of the said Henry Taylor (second), and to immediate payment of the same, and decern."

Counsel for First and Fifth Parties—Mackintosh—Low. Agents—Ronald & Ritchie, S.S.C.

Counsel for Second and Fourth Parties—Lord Adv. Balfour, Q.C.—Alison. Agent—John Gill, S.S.C.

Counsel for Third Parties—J. P. B. Robertson—Guthrie. Agents—Campbell & Smith, S.S.C.

Wednesday, January 23.

FIRST DIVISION.

[Lord Lee, Ordinary.

WATSON *v.* GIFFEN.

Succession—Husband and Wife—Destination—Conditional Institution or Substitution—Mutual Settlement—Revocation.

> Heritable property was purchased by a husband with his own funds, and the destination taken to himself and his wife "and the survivors of them, and to their or the survivor's heirs and assignees whomsoever." Subsequently the spouses executed a mutual settlement of their whole estate, heritable and moveable, in favour of each other, for their liferent use allenarly, and in fee to their son, the wife making also a special destination of her half of the heritage just mentioned in favour of her husband in liferent allenarly, and "my said son, whom failing to my own heirs and assignees and disponees whomsoever in fee." The son survived his mother, but died intestate before his father, who died leaving a will by which he revoked "all other wills and codicils heretofore made or purporting to have been made by me," and gave and bequeathed to his brother, *inter alia*, the said heritable property. *Held* (1) that this revocation did not affect the destination of half the subjects made by the wife in the mutual settlement; (2) that under that destination—the property being heritable—the son was a substitute, and not a conditional institute, and as he had died without evacuating the destination, the wife's half went to her heir whomsoever.

In November 1874 Alexander Baillie Watson, stationer, Glasgow, purchased from John Rowan, at the price of £4500, certain house property in Craignestock Place, Glasgow. The destination in the conveyance was "to Alexander Baillie Watson and Elizabeth Giffen or Watson (his wife), and the survivor of them, and to their or the survivor's heirs and assignees whomsoever." Mr Watson signed the disposition as a consenter "in token of his approval of the destination." Infeftment followed on this disposition.

On 12th November 1877 Mr and Mrs Watson executed a mutual settlement in the following terms:—"We, Alexander Baillie Watson, sometime stationer at No. 168 Great Hamilton Street, Glasgow, presently residing at No. 9 Binnie Place there, and Elizabeth Giffen or Watson, spouses, for the love, favour, and affection we bear to each other, and in consideration of the provisions herein contained, granted by each of us in favour of the other, have, with mutual advice and consent, agreed to grant these presents in manner afterwritten, That is to say, I, the said Alexander Baillie Watson, do hereby give, grant, dispone, and assign to and in favour of the said Elizabeth Giffen or Watson, for her liferent use allenarly, and to and in favour of my son Alexander Baillie Watson junior, whom failing to my own heirs, executors, and assignees and disponees whomsoever in fee, the whole means and estate, heritable and moveable, real and per-