[11*th August* 1832.]

No. 12.

JOHN and LIVINGSTONE BOOTH, Appellants.—*Lord Advocate* (*Jeffrey*) — *Lushington.*

RACHEL BOOTH or BLACK and HUSBAND, Respondents. — *Sir Charles Wetherell* — *Wilson.*

Implied condition — *Si sine liberis, &c.* — Circumstances which were held (affirming the judgment of the Court of Session) not sufficient to exclude a grand-daughter claiming under the condition " si sine liberis," from the provision contained in her grand-father's settlement in favour of his children.

2d DIVISION.
Lord Medwyn.

BY antenuptial contract, dated the 24th of February 1770, betwixt Patrick Booth, merchant in Aberdeen, and Ann Hogg, he bound and obliged himself, " his " heirs, executors, and successors," inter alia, " to make " payment to the children, one or more, to be pro- " created of this marriage, of the sum of 400*l.* sterling " money; 200*l.* sterling whereof is declared payable at " their attaining the respective ages of twenty-one years " complete, and the remaining 200*l.* is payable at the " first term of Whitsunday or Martinmas immediately " following the said Patrick Booth his decease, with " interest and penalty thereafter during the not-pay- " ment: And also the said Patrick Booth binds and " obliges him and his foresaids to provide the just and " equal half of both heritable and movable subjects, " that shall be conquest or acquired during this mar- " riage; to the children of the marriage; and in the " meantime he binds and obliges him to educate and

No. 12.

11*th August* 1832.

BOOTHS *v.* BOOTH.

" sustain the said children, according to their quality, " in all necessaries for their maintenance and education, " till their respective ages of twenty-one years com- " plete." Of this marriage there were born three sons —John, Alexander, and Livingstone.

In 1783, during the subsistence of the marriage, Patrick Booth executed a trust-settlement, mortis causâ, of all his property, heritable and movable, in favour of his wife and two brothers, as trustees, for payment, in the first place, of all his debts and funeral expences. Then followed a declaration, that " after complete pay- " ment of all my just and lawful debts, it is my inten- " tion that the whole rest and remainder of my estate, " whether heritable or moveable, be considered as a " residue for behoof of my said spouse and children " who shall then be alive." Powers and directions are then given to the trustees, to secure a provision to Ann Booth his wife; " and the said capital sum being so " secured and set apart, it is my will and appointment " that all my children, who shall then be alive, shall be " entitled to the full free residue of my whole heritable " and movable estates, equally, share and share alike, " without any preference to the one before the other; " and in case they be all arrived at majority, or be " married, at the time of my death, then I appoint my " said trustees to pay their said shares to them how soon " my estates can be realized and converted into cash; " but in case it shall happen that some of my children " shall then be major, or married, while others of them " are still in minority, then and in that event I ordain " and appoint the shares or portions of the children so " major, and the expense of whose education I will " have paid, to suffer a defalcation in favour of the

No. 12.

11th August 1832.

BOOTHS *v.* BOOTH.

" younger children, so as to educate them in the same
" manner, of which my said trustees shall be judges,
" my intention being to do strict and impartial justice
" to all my children without distinction; and however
" soon any of my children arrive at majority, or be
" married, his or her share of the free unliferented
" residue of my said estates shall then become payable
" to him or her, subject always to the defalcation above
" mentioned, in case the cause thereof still subsist; and
" providing also, that in case any of my said children
" shall incline, even before arriving at majority, to set
" up in any lawful business or occupation, &c., then
" and in that event my said trustees are hereby autho-
" rized and empowered to advance to such child any
" part of his or her share of the free unliferented re-
" sidue they shall think proper; but such advances shall
" not interfere with or prejudice the shares of my other
" children."

Ann Booth died in 1787. In 1801 Patrick Booth on his son Alexander's marriage, made an allotment of property among his three sons as follows: — to Alexander, 1,650*l.*; to John, 1,650*l.*; to Livingstone, 1,030*l.*, but with a declaration that the difference between his and his brothers' share was afterwards to be made up to him. The particulars of these portions, to which some further additions were afterwards made, Patrick Booth entered with his own hand in a book, to which he prefixed the following note and title: — " A clatt-book of
" John, Alexander, and Livingstone Booth's portions,
" as put by to them in July 1801, on Alexander being
" married, who receives all the profits himself that arise
" from his portion from this time; but J. and L.'s
" profits that arise from their share, P. Booth keeps,

No. 12.

11th August 1832.

BOOTHS v. BOOTH.

" and must account to them for it when any settlement " takes place that they may want it up. J. and A.'s " portions, it's to be observed, is about equal to each of " them; but L.'s is far short, which must be after- " wards made up, as will appear in each of their ac- " counts as stated in this book."

Alexander Booth died in 1805, leaving a widow and three children, of whom Rachel Booth (married to the Rev. Dr. Black) was one. Old Patrick Booth took charge of Alexander's family and funds, but died in 1825, eighty-eight years of age. At his death the trust settlement was found in his repositories. By this time the trustees were all dead. John and Livingstone Booth confirmed as executors of their father, and in that character, as well as joint heirs under his settlement, they took the management of his estate. Rachel Booth survived her grandfather, and, as representing her father, Alexander, claimed an equal share of the property along with John and Livingstone, and this being resisted, she raised an action of exhibition and count and reckoning against them before the sheriff of Aberdeenshire. The proceedings, however, in the action were superseded by a summons of declarator, raised at the instance of John and Livingstone Booth, concluding to have it found that all claims competent to Alexander Booth against Patrick Booth his father, in virtue of the contract of marriage, were satisfied and discharged by the property allotted to Alexander Booth, by Patrick Booth, upon the occasion of his marriage, and afterwards, as stated in the clatt-book kept by Patrick Booth; and that the pursuers, as the only children of Patrick Booth who were alive at the time of his death, are, in virtue of his disposition and deed of settlement, entitled to the whole

free residue (if any be) of his whole heritable and moveable estates equally between them, share and share alike; and that Mrs. Rachel Booth and Dr. Alexander Black, her husband, for his interest, have no right or title, in virtue of Patrick Booth's deed of settlement, or otherwise, to any part of the residue of his heritable and moveable means and estate; and it being so found and declared, the said Mrs. Rachel Booth or Black and the said Dr. Alexander Black, her husband, for his interest, ought and should be prohibited and discharged, by decree foresaid, from further troubling or molesting the pursuers, &c.

The Lord Ordinary reported the cause on cases to the Court, and their Lordships found, "that the defender, Mrs. Booth, is entitled to that share of her "grandfather's succession that would have belonged to "her deceased father under the grandfather's deed of "settlement referred to, and to that extent sustains the "defences: Find the defender entitled to expences, "&c." *

Booths appealed.

Appellants. — (1.) All claims competent to Alexander Booth under the marriage contract of 1770 were more than satisfied by the provision allotted to him by Patrick Booth in 1801, on occasion of his marriage and foris familiation, and which must be presumed to have been paid by his father, and received by him in full satisfaction of all his claims under that contract or otherwise; and the respondent, as representing him, has no claim against the appellants in virtue of any obligation

* 9 Shaw and Dun. 406.

No 12.
11th August 1832.
BOOTHS v. BOOTH.

in that deed. The onus of showing that the provision of 1801 was not equal to the claim under the marriage contract lies on the respondent. The provision was not a free gift. The circumstances of the case do not warrant such an inference. At all events the respondent cannot both claim under the settlement and under the marriage contract.

(2.) Then comes the simple inquiry, whether, upon the construction of the settlement, taken in connection with the circumstances of the case and the situation of the parties, there is room for holding that the respondent is entitled, in virtue of the implied condition si sine liberis, to the share which would have fallen to her father Alexander had he lived. Now, the appellants maintain that the presumption si sine liberis does not apply, but is excluded by the terms of the settlement, and by the circumstances of this case; for instance, by the length of time that the granter lived after the death of his son and the birth of his grandchildren, who were living constantly under his superintendence, while he made no alteration in the terms of that deed; by the liberal provisions made by him to his deceased son during his lifetime; by the fact that the pursuers, his remaining children, continued to assist him in business, and that their portions remained in his hands, and were employed in his business down to the period of his death. Some of these circumstances singly have, in questions of this kind, been held to possess great controul; but even if not of weight separately, they must be conclusive when in unison. The rule si sine liberis is founded on the equitable presumption, that a parent prefers his own children to a mere stranger, or more distant relation, and therefore that his settlements must be so construed as to give effect to this

intention. The simplest case is, where a person, having made a settlement in favour of a stranger, came afterwards to have children of his own.' There the substitution in favour of the stranger is held to be only conditional, in the event of the granter having no children of his own, and therefore the settlement falls by the existence of issue. In like manner where, the party having left his property to two or three children existing, another child is born to him after death, it is presumed that, had he known of the existence of this child, it would have been placed on the same footing with the others. Though the presumption did not apply with the same force to the case of grandchildren, since it might happen that a father would rather wish the share of a son predeceasing to accresce to his own surviving sons than to descend to the children of the deceased, the Roman law held that it would be expedient, sometimes at least, to extend the principle to this case also; and our law has made the rule general.

But it is not by any extension of the ordinary meaning of the word "children" in such a settlement that grandchildren are admitted to the share of their deceased parent, or upon any theory that by the word children he meant grandchildren, but because the law presumes that, had he recollected the contingency of their existence, he would have provided for it by an additional substitution in their favour. And here the great error of the respondent's argument lies. She supposes that when a court of law, in the construction of a settlement, admits grandchildren to share with children property destined to children only, it is because the word children is, in all circumstances, held to include grandchildren, and that the conditio si sine liberis operates, not as an

No. 12.
11th August 1832.
BOOTHS *v.* BOOTH.

equitable insertion of a condition not existing in the settlement, but as an invariable rule of construction, arising out of the words of the deed themselves; a gratuitous assumption, unfounded in principle, and unsupported or rather negatived by decision. On the contrary, as a father, notwithstanding the ordinary presumptions arising from relationship and affection, may give his estate to a stranger in preference to his own children, and the law will refuse to supply the condition si sine liberis, if there is reason to believe, from circumstances, that the testator did not intend it to apply; so also will grandchildren, if his intention be manifest, be excluded. By the Roman law, if the child or grandchild in whose favour the presumption was pleaded existed at the time the settlement was made, and his existence was known to the testator, the rule could not apply to his case in the event of his being omitted. If, again, the child or grandchild were born after making the settlement, and the testator, though aware of the child's or grandchild's existence, took no steps to alter the settlement so as to include him, the law will not interfere upon a mere general presumption, opposed by the circumstances of the particular case. On the contrary, if the testator, notwithstanding the existence of the children or grandchildren for some competent time before his death, makes no alteration in the settlement in their favour, it is presumed that he neglected them from design. Such is the law of Scotland. But the presumption on which the maxim si sine liberis, &c. rests may also be destroyed by other circumstances; in short, by every thing that shows the testator did not and could not have intended that the grandchildren were to stand in their father's place; and such

circumstances are amply to be found in the present case.

The decisions referred to on the other side leave untouched the general principle for the application of which the appellants contend, namely, that every case relative to the conditio si sine liberis is one of intention, to be tried upon its own circumstances. — Mathieson, Nov. 80, 1766, (Mor. 11,453); Stenhouse, June 15, 1737, (Mor. 11,444); Belshes, Dec. 22, 1752, (Mor. 11,361); Campbell, Feb. 21, 1723, (Mor. 11,457). Conditio si sine Liberis: Papinian, l. 102, de Cond. et Demon.; Cod. l. 6, t. 42, de Fidei Com. 30; Bank. 1, 9, 6; Ersk. 3, 8, 46; Yule, Dec. 20, 1758, (F. C. Mor. 6,400); Watt, July 30, 1760, (Mor. 6,401); Jarvey, Jan. 7, 1762, (Mor. 8,170); Oliphant, June 19, 1793, (F. C.); Colquhoun, June 5, 1829, (7 S. & D. 709).

Respondents. — (1.) Whether the division or apportionment of funds recorded in the clatt-book is to be held as satisfying the respondent's claim under the marriage contract is of the less importance, as it would be superseded by the determination of the other question in favour of the respondent; for she does not in any event claim more than one third of her grandfather's succession. At any rate, it is enough to say, that there is not a vestige of ground for supposing that the division was made with reference to the obligations come under by Patrick Booth in his marriage contract. No discharge of any description was taken from the sons, nor has Patrick Booth in any way indicated an intention that the sums allocated were to be in extinction of the claims under the marriage contract. Indeed

No. 12.
11th August 1832.
BOOTHS v. BOOTH.

the whole distribution must be regarded as the effect of paternal affection, which alone appears to have regulated the amount of the donation.

Under the marriage contract, grandchildren, issue of the marriage, would unquestionably have succeeded to the share of their predeceasing parent, in that part of Patrick Booth's property which fell under the deed. Now, the trust deed of 1783 is a universal disposition, and the fair presumption in dubio certainly is, that Patrick Booth did not mean to disappoint rights which were already legally constituted over part of his property; but that, in the equal division prescribed by the trust deed, grandchildren should be admitted on the same principle as in the marriage contract. The subsequent division by the Clatt-book was not a measure to extinguish the marriage contract, but merely an anticipation of that equal succession which would accrue to the family under the joint and harmonious operation of both deeds.

The appellants say, that if the respondent claims under the trust settlement of 1783, she must abandon her claim under the marriage contract. This is true so far, that if her claim under the settlement be sustained that will include what she could have demanded under the marriage contract, her plea being for entire equality under both of these deeds. But there can obviously be nothing inconsistent in the respondent taking, under the contract, either in corroboration of the settlement, or in the event of her plea under the settlement being repelled.

(2.) The real question in this case is, Was it the testator's intention to exclude from all participation under the deed the children of such of his sons as might

No. 12.

11*th August* 1832.

BOOTHS *v.* BOOTH.

predecease himself? Now, to the respondent it appears plain, that the exclusion of the families of the predeceasing children is contrary to the intention of the testator, as gathered from a fair construction of the deed. Under the general term "children," Patrick Booth meant to include grandchildren. This intention is apparent, from the circumstance that, under the appellants' construction, the deed of settlement would be inconsistent with the prior onerous contract of marriage, by virtue of which the respondent would without doubt have been entitled to her predeceasing parent's provision; while, by the respondent's construction, it is consistent with and supplemental to the marriage contract, and it was the testator's obvious intention to enlarge and not to restrict the provisions of his children. This is farther evidenced by the allocation which he made during his life by the "clatt-book." Besides, the conditio si sine liberis is implied in family settlements, unless excluded per expressum. This condition is to be found in the Roman law, but has been greatly extended and enlarged in our practice. It is much too late to attempt to shake the doctrine on the fancied exception created by circumstances. Indeed, there are express decisions on the point, which put the question beyond doubt. The cases in the books are almost parallel with the present. The appellants no doubt also rely on cases; but when these are examined they will be found to belong to the class when presumed revocation is the plea, and not to touch the present question; and in particular it deserves notice, that the survivance of the testator, a point so much made by the appellants, occurred in those very cases to which the respondent [illegible]rs, and was accounted of

No. 12.
11th August 1832.
BOOTHS v. BOOTH.

no value. Besides, the rule "Inest conditio si sine liberis, &c." has always been the successful answer to these very specialties. The appellants seem to consider that elements of proof, which when scattered are worthless, when combined are resistless; but the respondent knows of no measure by which to ascertain how many bad objections are required, when united, to make a good one. In short, the claim of the respondent may be safely based on the settlement itself. But it is also supported by the circumstances of the case, and is untouched by the facts on which the appellants rely, and on which years ago litigants have relied, but to no purpose. — Conditio si sine: D. l. 35, t. 102; Cod. l. 6, t. 42, 130; Magistrates of Montrose, Nov. 21, 1738, (6398); M'Kenzie, Feb. 2, 1781, (6,602); Cuthbertson, March 1, 1781, (4,279); Wallace, Jan. 28, 1807; Neilson, June 4, 1822, and authorities there referred to, (1 S. & D. 458); Christie, July 5, 1822, (1 S. & D. 543); Colquhoun, ut supra.

LORD CHANCELLOR: — My Lords, in this case a very important question has been raised, and it called for great attention on the part of your Lordships, not only on account of the parties concerned, but of the principles which it involved. Various decisions were adverted to as ruling the case; and I felt it my duty, after hearing the observations of the learned counsel at your Lordships' bar, minutely to investigate the authorities cited, particularly Wallace v. Wallace, and Christie and others v. Paterson. I have taken an opportunity of doing so, and the result of that investigation is, that I think the interlocutor of the Court below

right. I therefore move your Lordships that that interlocutor be affirmed, and I think it should be affirmed with costs.

The House of Lords ordered and adjudged, "That the "said petition and appeal be, and the same are hereby dis-"missed this House, and that the said interlocutor therein "complained of, be, and the same is hereby affirmed: And "it is further ordered, That the appellants do pay or cause "to be paid to the said respondents the sum of 230*l.* for "their costs in respect of the said appeal."

MONCRIEFF and WEBSTER—CRAWFURD and MEGGET, —Solicitors.