his widow all he could; but is there enough evidence to surmount that presumption which the law raises against donation? The moment you accept the evidence of the donee as sufficient, you put an end to that presumption. But suppose the words were used, Are they words of gift? They seem to me rather the utterances of a man who believes that the money belongs to his wife. Now it is said that he was quite aware—was in fact made aware, and expressed his knowledge—that he had the power to dispose of this money, though it was lodged in his wife's name. This is true at a certain date, and down to a certain date, when in consultation with Mr Hunter he received that advice from him, and expressed his knowledge on more than one occasion. But was there not some change in his mind induced by his communication with Mr Laurie? Laurie's evidence is: — "He mentioned about that time that his wife had some money, but he did not state what the amount was. He was peculiarly reticent upon that point. When he instructed me to prepare that deed I asked him whether the proceeds of the shop were in his own name, and he said they were. I then asked him if his wife had got any money, and he said she had a little. I did not ask him the amount, as I thought that would be impertinent; but I said, how does it stand? and he said it was in her own name. I told him that the deed would, therefore, require to be a mutual deed between him and his wife, and I framed the draft on that footing, and sent it to him in November 1868. Hutchison said to me that he had never interfered with his wife's money from the time they were married. He also said she was the party who always went to the bank and dealt with it, getting it taken out herself, and putting it in. He said he did not wish to interfere with it, that she had worked hard for it, and had been a long time in business both before and after they were married." The draft was prepared and given to Hutchison. In the beginning of March 1870 Hutchison brought back the settlement to Laurie, and in the course of the conversation which they had, Laurie says that Hutchison "spoke about the money that was in bank in his wife's name, and said it was all safe because it was in her maiden name. By that I understood him to mean that nobody could touch it except herself." And that seems to have been Laurie's impression—that the money belonged to the wife and not to the husband. The words which Mr Hutchison used the day before his death look very like an expression of the views which he had got from Mr Laurie. If so, how is it possible to impute to the deceased an intention to transfer the property of the money from himself to his wife by way of donation *mortis causa?* Unless there was a transference on that occasion, she has no title to that money. By law it was her husband's, and now belongs to his executor. In short, I think that donation of this sum is not proved—first, because the evidence of donation is to be found entirely in the testimony of the donee; secondly, the words which she says were used are not words of gift, not words expressive of a present intention to make a donation *mortis causa*. I am sorry to differ from your Lordships on this part of the case, for one cannot help having an impression that in a general way there was an intention on the part of the husband that this money should be the wife's.

The Court adhered, and assoilzied the defender from the remaining conclusions of the summons.

Agent for Pursuer—David Hunter, S.S.C.
Agent for Defender—George Begg, S.S.C.

Friday, July 5.

SECOND DIVISION.

SPECIAL CASE—MACKINTOSH AND OTHERS.

Parent and Child.

Trustees, who were directed to invest a fund for a mother in liferent and children in fee, to be paid to the children on their majority, are bound, after the mother's death, to pay out of the fund to the father, while the children are in minority, a reasonable sum for their maintenance and education.

Legacy—Vesting.

A legacy, which was directed to be paid on the marriage or death of a certain person, vests at the death of the testator, the term of payment being postponed till one or other event should happen.

A legacy directed to be paid on the marriage of a certain person does not vest till the marriage take place, as that event may never happen.

This Special Case was submitted by Æneas William Mackintosh, Esq. of Raigmore, and Charles Stewart, Esq. of Dalcrombie, executors of the late Mrs May Clark or Boileau, of the first *part*; Madeleine Wood, and others, children of the late Mrs Isabella Anne or Annie Boileau or Wood, daughter of Mrs May Clark or Boileau, and the said Edward Wood, as administrator-in-law for his said children, of the second part; and Stewart Clark, executor-nominate of the late Charles Elliot Boileau, son of the said Mrs May Clark or Boileau, of the third part.

Mrs May Clark or Boileau died on 8th October 1856, leaving a last will and testament and two relative codicils. The will contained the following clause:—"I ordain and appoint my said executors to invest the free residue of my said personal estate and executry either in the best heritable or personal security, and pay over the annual interests, dividends, or proceeds thereof to my daughter, Isabella Ann or Annie Boileau, in liferent during all the days of her lifetime, or until the period of her marriage, whichever of these events shall first happen; and in the event of the marriage of the said Isabella Ann or Annie Boileau, I ordain and appoint my said executors, immediately thereafter, to make payment to Thomas Theophilus and Charles Elliot Boileau, my sons, the sums of £600 sterling each; and the residue and remainder of my said personal estate and executry I ordain them to settle, by such deeds and documents as they may think necessary and requisite at the time, on the said Isabella Ann or Annie Boileau, in liferent during all the days of her lifetime, but for her liferent use only, exclusive of the *jus mariti* of any husband whom she may marry, and not affectable by his debts or deeds, or by the diligence of his creditors, in any way or manner, and to the child or children of the said Isabella Ann or Annie Boileau, in fee, equally and share alike, on their respectively reaching the years of majority or being married,

and the respective heirs of their bodies *per stirpes et non per capita*, in the event of any of said children predeceasing their mother and leaving lawful issue, that is to say, the children of the deceased parent taking equally among them the succession that would have opened to said parent had he or she lived to the period of division of the sums hereby bequeathed to them in fee." The first codicil contained the following clause:—"Having come into the possession of more money than I calculated upon by the will of Miss Maddie Macpherson, I now bequeath the additional sum of £400 to each of my two sons, Thos. Theos. Boileau, and Charles Elliot Boileau. This additional sum not to be paid to them but in the event of the marriage of my daughter, Isa. Ann or Annie Boileau, or her death." The second codicil contains this clause:—"It is my intention that the provisions contained in the foregoing codicil, as to take effect in favour of my sons in the event of the death of my daughter, refer only to her death without leaving issue." She was survived by her three children, Thomas Theophilus Boileau, Charles Elliot Boileau, and Isabella Anne or Annie Boileau. The said Thomas Theophilus Boileau is still alive. Charles Boileau died, leaving a last will and testament under which the party of the third part was named his executor. Isabella Anne or Annie Boileau was married on or about 17th August 1858 to Edward Wood. She died on 22d April 1871, leaving children, the parties hereto of the second part. The said children are all in pupillarity. They all live in family with their father, who is their legal guardian, and whose domicile is in England.

The legacies of £600 and £400 bequeathed under the said last will and testament and codicils to the said Thomas Theophilus Boileau were paid to him on the marriage of his sister; but the legacies of similar amount left to Charles Boileau have not been paid. No deed of settlement or other deed was or has yet been executed by the parties of the first part for the purpose of settling the residue of the estate upon the said Mrs Wood and her said children.

The following were the questions for the opinion and judgment of the Court:—

"1. Whether the shares of residue falling to the children of the said Mrs Isabella Anne or Annie Boileau or Wood under the said last will and testament and codicils of the said Mrs May Clark or Boileau have now vested in the said children, parties hereto of the second part?

"2. Whether the parties of the first part are bound or entitled to apply the annual income arising from the said residue, or such part of said income as may be necessary, towards the maintenance and education of the said children, (parties hereto of the second part), during their respective pupillarities and minorities?

"3. In the event of the preceding question being answered in the affirmative, whether the said first parties are entitled or bound to pay over the said income, or such part thereof as may be applicable to said purpose, to the said Edward Wood, as the legal guardian of his said children?

"4. Whether the said legacies of £600 and £400, bequeathed as aforesaid to the said Charles Elliot Boileau, vested in him prior to his death, and now belong to the third party as his executor; or whether the said legacies, or either of them, lapsed, and now form part of the residue of the estate of the said Mrs May Clark or Boileau?"

Solicitor-General (CLARK) and MACKINTOSH for the first and third parties.

MARSHALL and RUTHERFURD for the second parties.

At advising—

LORD BENHOLME—The question in this case arises out of the settlement of Mrs Boileau. She was survived by three children, viz., Theophilus, Charles, and Isabella Ann. Isabella married and left children.

Now, there are two sets of questions presented in this case—first, regarding the special legacies; and, secondly, regarding the residue. As regards the special legacies of £600 each to the two sons, the bequest is contained in the testament, and is in these terms—(*reads ut supra*). Here there is a distinct leaving of a bequest of £600 each to the two sons. Then there is a second legacy by a codicil in the following terms:—"Having come into the possession of more money than I calculated upon by the will of Miss Maddie Macpherson, I now bequeath the additional sum of four hundred pounds (£400) to each of my two sons, Thos. Theos. Boileau, and Charles Elliot Boileau. This additional sum not to be paid to them but in the event of the marriage of my daughter, Isa. Ann or Annie Boileau, or her death."

Regarding the two legacies to Theophilus there can be no doubt, for he survived the two events specified.

It was not so with Charles. He died before the marriage, and consequently before the death of the daughter. The question then arises, Is the first legacy to be paid? The marriage of the sister not having in fact taken place during the lifetime of Charles, can we hold that that legacy ever vested? The ordinary rule (founded on the civil law) is, that it did not so vest, and I think that this rule applies to the circumstances here.

But this does not go to settle the question regarding the second legacy of £400. It was left on a different footing, namely, "on the marriage or death of Annie."—(*reads*) Here there is a contingency besides marriage. The legacy is not left dependent on that uncertain event. It was left dependent on a certain event, namely death. It is true the marriage might come before the death, but one or other of these events must happen. Therefore, I think Charles' heirs were entitled to his share. The rule derived from the civil law is this—that when a legacy is made dependent on a certain event, and the legatee does not survive that event, the legacy is merely postponed. The certainty of an event happening some time renders the vesting absolute, postponing the time of payment. This rule was well illustrated in the case of *Home* v. *Home* (Jan. 28, 1807, Hume's Rep., p. 530). The case was this—A legacy was left to a party, half on attaining majority or marriage; the other half on the death of A. B. The lady died before majority or marriage. It was held that there was a good claim by her next of kin for the half depending upon the certain event, namely A. B.'s death. As regarded the other half—depending upon majority or marriage, which never arrived—the legacy was held to have lapsed. The remarks made by Lord Braxfield appear to me sound, and to rule the present case. "One-half of it clearly lapsed, being left pendent on the condition of majority or marriage, which never arrived. . . .

As to the other half, I think it vested in the child, though suspended in point of payment till the mother's death, which is a *dies certus*, that will happen, though uncertain when." This points out the capital distinction between events which *must*, and events which *may*, happen. It is clear that if the legatee does not survive the uncertain event, he does not take. But if he does not survive a certain event that does not interfere with the vesting.

As regards the vesting of the residue of the estate:—The terms of the document are these—(*reads ut supra*). Here then is a liferent to the daughter so long as she remains unmarried. Then in the event of her marriage, there is this legacy to the sons—(*reads*). The lady died leaving children, and the questions are these—First, "Whether the shares of the residue falling to the children of the said Mrs Isabella Anne or Annie Boileau or Wood under the said last will and testament and codicils of the said Mrs May Clark or Boileau have now vested in the said children, parties hereto of the second part?" This, I think, must be answered affirmatively. The second question is as follows—"Whether the parties of the first part are bound or entitled to apply the annual income arising from the said residue, or such part of said income as may be necessary, towards the maintenance and education of the said children, parties hereto of the second part, during their respective pupillarities and minorities?" This question must also be answered in the affirmative. The question cannot be considered without reference to the fact that these children have a legal guardian. They are English children, and their father is their legal guardian. In regard to the third question, I entertain no doubt. The executors are bound to pay over such part for the maintenance of the said children.

Lord Cowan—1.—In the first point submitted for the consideration of the Court, I am of opinion that the shares of residue falling to the children of Mrs Wood have vested in them, subject, as regards the extent of their interest, to be diminished should other children be born entitled to participate in the bequest. The direction to the executors is to "invest" the free residue of the estate (in their own names), and pay over the annual proceeds for the liferent use of the daughter while unmarried, and in the event of her marriage (which happened), to "settle" the amount by such deeds as might be necessary on the daughter, in liferent, for her liferent use only, and to her "child or children in fee, equally and share alike, on their respectively reaching the years of majority, or being married," the issue of predeceasers taking "the succession that would have opened to their parent had he or she lived to the *period of division* of the sums hereby bequeathed to them in fee." This is a direct disposition of the fee to the children when born, as a class, so that, while the fee until their existence would be in the parent fiduciarily, the beneficial interest vested in them when they were born. There is no ulterior destination of the fee failing the children, assuming the daughter to be married and to have children of the marriage, so that, upon her death leaving children, which is the case that has occurred, those children are the only parties having interest in the residue of this estate under the deed. This being so, I cannot view the words "on their respectively reaching the years of majority or being married" as a condition failing which, on the predecease of all the children, there would be intestacy. I think any such result would be inconsistent with the intention of the maker of this deed, and it appears to me that the words above recited must be held to have exclusive regard to the period of payment of their respective shares. Meanwhile, as a class, the existing children, in the circumstances which have occurred, are vested with right to the residue of this estate. And there can be no difficulty in carrying into effect the intention of the testatrix, seeing that the executors, in terms of the deed, have invested in their own names the funds, and which are held by them, consequently, for behoof of and to all effects and purposes in trust for these beneficiaries.

2. and 3.—I concur in the views stated by Lord Benholme.

4.—As the testator's son Charles predeceased the event of his sister's marriage, I am of opinion that the legacy of £600 must be held to have fallen. The bequest is "in the event of the marriage" of his sister, the executors are appointed "immediately thereafter to make payment" to each of the testator's two sons Thomas and Charles of the sum of £600. I do not think it doubtful that the bequest in its terms was conditional, and that the death of Charles, one of the legatees, before the condition was purified, had the effect of preventing any right vesting in him that can now be claimed by his executors.

The other sum of £400 stands in a different position, inasmuch as by the terms of the codicil which bestows it there is, *first*, an unconditional bequest of the amount which by its terms would have vested the legacy in the legatee but for the condition which follows; and, in the *second* place, the condition attached to payment of the legacy is not merely the event of the sister's marriage, but also *of her death*. This last event having been the sole condition attached to the legacy, would not have prevented it vesting in the legatee at the testatrix's death. And I cannot think that the alternative condition should affect this result. As one of the two events could not have prevented the vesting of the legacy *a morte testatoris*, subject to the liferent of the daughter, I hold the better view to take of the intention of the testatrix in annexing the alternative condition, was to give right to the legatee to immediate payment on that condition being purified, but not to suspend the vesting.

The Lord Justice-Clerk and Lord Neaves concurred.

The Court pronounced this interlocutor:—"Finds, 1st, That the shares of the residue falling to the children of Mrs Isabella Anne or Annie Boileau or Wood, under the last will and testament and codicil of Mrs May Clark or Boileau, have now vested in the children, parties hereto of the second part. 2d and 3d, That the first parties are bound to pay over the annual income arising from the said residue to the said Edward Wood, as the legal guardian of his said children, towards the maintenance and education of the children, parties hereto of the second part, during their respective pupillarities and minorities, or such part thereof as may be necessary for such purpose. 4th, That the legacy of £600, bequeathed to Charles Elliot Boileau, did not vest in him prior to his death, but lapsed, and now forms part of the residue of the estate of the said Mrs May Clark or Boileau; and that the legacy of £400, bequeathed to Charles Elliot Boileau, did vest in him prior to his death,

and became payable on the marriage of Mrs Wood," &c.

Agents for First and Third Parties—Gibson-Craig, Dalziel & Brodies, W.S.

Agents for Second Parties—Mackenzie & Black, W.S.

Friday, July 5.

SPECIAL CASE—MRS PAUL AND OTHERS.

Testament—Conditional Institution—Substitution.

A testatrix gave the residue of her estate, which consisted of both heritage and moveables, to two persons "equally between them; and in case of the death of either without heirs of his or her body, to the survivor." *Held* that this was a conditional institution, and not a substitution; and that, both these legatees having survived the testatrix, the share of one who died without heirs of his body, went to his heir-at-law.

This Special Case was presented by (1) Mrs Mary Hepburn Home or Paul, widow of the late F. W. Paul; Mrs Catherine Home or Ralston, wife of John Campbell Ralston; Mrs Magdalene Home or Hutcheson, wife of Daniel Coleman Hutcheson; Mrs Christian Home or Fennell, wife of Arthur Magheer Fennell; the said John Campbell Ralston, Daniel Coleman Hutcheson, and Arthur Magheer Fennell, as administrators-in-law respectively, each for his said wife, and each for his respective interest in the premises; Henry Bayley, as administrator-in-law of his deceased wife Katherine Home or Bayley; Louis Olean Home and Mary Lilian Home, minors above pupillarity, children of the late J. M. Home; Mrs Mary Lightfoot or Home, now Stephenson, their mother. (2) The said Louis Olean Home. (3) The said Mrs Mary Hepburn Home or Paul. (4) John William Young, W.S., sole surviving trustee nominated by the late Mr Laurence Davidson, Writer to the Signet, by disposition dated 4th January 1868.

The late Miss Christian Aitchison executed a disposition and settlement dated 25th October 1814, and a codicil dated 27th May 1830, both recorded in the books of Council and Session 21st December 1836. By the disposition and settlement the testatrix, for the causes therein set forth, and for the affection and regard she had and bore to "Catherine Home and Mary Hepburn Home, daughters of James Home, Esquire of Linhouse, Clerk to the Signet," her "brother uterine," did "give, grant, assign, and dispone to and in their favour, equally between them, and in case of the death of either of them without heirs of her body, to the survivor, and to their respective assignees, all and sundry lands, teinds, tenements, annual-rents, and other heritage, as well as all debts and sums of money, and whole moveable goods, gear, and effects of every kind" belonging to her at the time of her death (under the exception of certain small articles therein mentioned), with all rights and securities of the same, but under burden of certain legacies to James, David, and John Belsches Home, brothers of the said Catherine and Mary Hepburn Home. By the codicil the testatrix recalled the foresaid settlement in so far as it was in favour of the said Catherine Home, and also the legacies to James, David, and John Belsches Home, and she thereby assigned and disponed "to the said John Belsches Home and the said Mary Hepburn Home, equally between them, and in case of the death of either without heirs of his or her body, to the survivor of them, my whole real and personal estate and effects whatsoever," with the exception of certain small articles therein mentioned. The testatrix died in December 1836, survived by John Belsches Home and Mary Hepburn Home, who were both then resident abroad. The said John Belsches Home died at Texas in October 1851, unmarried and intestate, survived by a brother, James Home, sometime of Linhouse, Scotland, and two sisters, the said Mary Hepburn Home or Paul, and the said Catherine Home, now Mrs Ralston. The said James Home died intestate in 1863 (his wife having predeceased him), leaving a family of five children—viz., two sons, John and William, and three daughters, Magdalene, Christian, and Katherine; John died also intestate in 1869, leaving two children, a son, Louis Olean, and a daughter, Mary Lillian; Katherine died in 1870, leaving no family, and survived by her husband Henry Bayley. Magdalene, now wife of Daniel Coleman Hutcheson, and Christian, now wife of Arthur Magheer Fennell, both before designed, are still alive. Mary Hepburn Home or Paul, Catherine Home or Ralston, and the said surviving children and grandchildren of James Home, who are the personal representatives of John Belsches Home, and their respective administrators-in-law and representatives foresaid, are the first parties to this case. The said Louis Olean Home, who is heir in heritage to John Belsches Home, is the second party to this case. The other legatee, the said Mary Hepburn Home, had, previous to the death of the testatrix, married Mr Francis Wilson Paul, and gone to Canandaigua, New York, United States. Mr Paul died about the year 1862 or 1863, and the said Mary Hepburn Home (Mrs Paul) is presently residing in Canandaigua aforesaid, and is the third party to this case. With the exception of a small sum of money which was remitted to the said legatees Major John Belsches Home and Mary Hepburn Home or Paul, the only estate left by the testatrix consisted of her right and interest in two small house properties in Edinburgh, viz., the fourth flat of a house in Hunter's Close, Grassmarket, Edinburgh, sometime occupied by the testatrix, and a shop in South Union Place, sometime occupied by Alexander Preston, tailor. The title to these properties in Hunter's Close and South Union Place was never completed in the person of the testatrix, but the said properties were, at the date of her settlement and codicil, and at the date of her death, feudally vested in Mr Harry Davidson, W.S., for her behoof. Mr Davidson had acquired right to the said subjects in Hunter's Close (for behoof of the testatrix) in virtue of a disposition in his favour, granted by Patrick Cockburn, accountant in Edinburgh, in consideration of a price paid, dated 15th May 1810. Mr Davidson had acquired right to the said subjects in South Union Place (for the security of the testatrix) in virtue of a disposition in his favour, granted by John Inglis, builder in Edinburgh, in consideration of the price of £400 (advanced by the testatrix), dated 30th November 1804. The name of the testatrix does not appear in either of the above-mentioned dispositions. On Mr Harry Davidson's death, in 1859, his son Mr Laurence Davidson made up a title as sole surviving trustee under his father's settlement to the said subjects in Hunter's Close, by notarial instrument in his