their office until their successors should be elected.

This was a petition by the Provost and Bailies of the burgh of Dunfermline, in which it was stated that the third of the Council, who retired according to the provisions of the Act 3 and 4 Will. IV. c. 76, included the Provost and three of the Bailies. There were four Bailies in the burgh, but the fourth was unable from illness to leave his room, and therefore could not act as returning officer, nor preside at the first meeting of Council, as by the Act 15 and 16 Vict. c. 32, sec. 6, it is required that the Provost or senior Magistrate who may continue to be a member of Council shall do. The Court therefore was craved to authorise the Provost and Magistrates who were retiring to continue to hold their office till after the first meeting of the new Council, just as they were empowered to do by the 5th section of 15 and 16 Vict. c. 32, in the event of the Provost and all the Magistrates being among the retiring Councillors.

When the petition came before the Court on Friday, November 2—the election being on Tuesday, November 6—the Court continued it till next day, that such intimation as it was possible to give might be made to the rest of the Council.

A meeting of the Council was called on Friday afternoon, and on Saturday morning there was produced to the Court an extract-minute of the said meeting on copy of the petition, with a docquet by the Councillors present at that meeting accepting service of the petition and concurring in its prayer.

The following interlocutor was pronounced:—

"The Lords having resumed consideration of the petition, with extract minute of Special Meeting of Magistrates and Town Council of Dunfermline, 2d Nov. 1877, docqueted by thirteen Town Councillors of the burgh of Dunfermline on copy of the petition, same date, and certificate of intimation by the Town Clerk, respectively Nos. 8, 9, and 10 of process; in respect the Provost and Magistrates of the said burgh all go out of office on Tuesday 6th November current, with the exception of Bailie Thomas Morrison, and that he is incapacitated by the state of his health from acting as returning officer or otherwise under the provisions of the statute 15 and 16 Vict. c. 32, sections 5 and 6—Grant the prayer of the petition, and find the petitioners entitled to their expenses, as taxed by the Auditor of Court, out of the burgh funds: And authorise a certified copy of this interlocutor to be used in place of an extract, and the petitioners to act thereon; and decern."

Counsel for Petitioners—Johnston. Agents—Morton, Neilson, & Smart, W.S.

Saturday, November 3.

SECOND DIVISION.

SPECIAL CASE—GRAHAM & OTHERS (GILBERT'S TRUSTEES) AND OTHERS.

Succession—Vesting—Condition Personal to Legatee.

The residue of an estate was destined in equal shares to A, B, and C in liferent, and to their children in fee if they should attain majority or be married. Failing issue of A or B, the survivor was to liferent the predeceaser's share, and failing issue of both, their two-third shares were to go to C and her children in liferent and fee. C predeceased A and B, who both died without issue. *Held* (*dub.* the Lord Justice-Clerk) that no part of these shares had vested in a child of C, who had died without issue before the date of the expiry of the liferent interest, although he had attained majority and was married.

Opinion (*per* the Lord Justice-Clerk) that the condition here said to stop vesting was not a condition personal to the legatee, which alone could have the effect of suspending vesting.

Andrew Gilbert of Yorkhill died on the 4th June 1838, leaving a deed of settlement, dated 16th July 1824, and a supplementary deed of settlement, dated 18th February 1829, both recorded in the Books of Council and Session 11th August 1838, by which he conveyed his whole property, heritable and moveable (with the exception of his estate of Yorkhill, which was separately entailed), to certain trustees for the purposes therein mentioned. By the supplementary deed the trustees were directed to hold and apply the whole residue "for behoof of my several nieces after named and their children, in the following proportions, viz., one-third part or share thereof for behoof of the said Jane Gilbert" (eldest daughter of John Gilbert, the testator's brother), "in liferent, and of the lawful child or children to be procreated of her body, equally among them if more than one, in fee; one-third part or share thereof for behoof of Cecilia Buchanan Gilbert, youngest daughter of the said John Gilbert, my brother, in liferent, and of the lawful child or children to be procreated of her body, equally among them if more than one, in fee; and the remaining one-third part or share of the said residue for behoof of my nieces Christian M'Cainsh, Margaret M'Cainsh, Grace M'Cainsh, and Helen M'Cainsh, daughters of Colin M'Cainsh, residing in Kirktown of Monzie, and Catherine Gilbert, my sister, equally among them in liferent, and of the lawful child or children procreated or to be procreated of their bodies equally among them, *per stirpes*, in fee."

The supplementary deed of settlement further provided—"That in case either of my said nieces Jane and Cecilia Buchanan Gilbert shall die unmarried or without leaving lawful children, or in the event of such children existing, but afterwards deceasing before attaining the years of majority or being married, then, and in either of these events, the deceaser's share of the residue of my said estate shall fall and accrue to the survivor of them and her lawful child or children in liferent

and fee, and upon the same terms as provided to the predeceaser and her issue; and in case both of my said nieces Jane and Cecilia Buchanan Gilbert shall die unmarried or without leaving lawful children, or in the event of such children existing but afterwards deceasing before attaining the years of majority or being married, then, and in either of these events, their said shares of the residue of my estate shall fall and accrue to my other nieces, the said Christian, Margaret, Grace, and Helen M'Cainsh, and their children respectively, in liferent and fee, and equally among them, *per stirpes*, as provided with respect to their own shares of my estate; and further, I hereby provide and appoint that in case any or either of my said nieces Christian, Margaret, Grace, and Helen M'Cainsh, shall die unmarried or without leaving lawful children, or in the event of such children existing, but afterwards deceasing before attaining the years of majority or being married, then, and in either of these events, the deceaser's share of the residue of my said estate shall fall and accrue to the survivors or survivor of them and their children respectively in liferent and fee, and equally among them, *per stirpes*, as aforesaid."

Cecilia Buchanan Gilbert (who became the wife of Adam Graham, writer in Glasgow), died on 9th July 1870, leaving no children, and her share of the residue accordingly fell, in terms of the directions above narrated, to her sister Jane Gilbert (then the widow of the late John Graham Gilbert, artist, and heiress of entail in possession of the estate of Yorkhill), who thus became entitled to the liferent of two-third shares of the residue. Mrs Jane Graham Gilbert died on 22d March 1877, also without leaving issue, and the two-thirds enjoyed by her in liferent now fell to be divided among the persons entitled to the fee thereof in terms of the said directions, viz., among the representatives of the M'Cainsh family. The four daughters were now dead.

This Special Case was brought by Mr Gilbert's trustees, who were the parties of the first part, to have it decided who were the parties entitled to the fee. The parties of the second part were the children of the deceased Christian M'Cainsh or M'Culloch and Margaret M'Cainsh or M'Laren. Helen M'Cainsh had died childless, and Grace had married the deceased Benjamin Taylor, and was survived by two children, James and Colin Taylor. James Taylor died intestate on 9th June 1859, twenty-five years of age and married, but without issue. Colin Taylor had died in 1845 in pupillarity. James' widow, Mrs Jessie Watling or Taylor, who succeeded to one-half of his estate *jure relictæ*, and the testamentary trustees of his father, the said Benjamin Taylor, who succeeded to the other half of his estate as next-of-kin, were the parties of the third part.

The dispute had reference to the two-thirds of the residue originally destined to the Misses Gilbert, but which had now accrued, as above explained, to the representatives of the M'Cainsh family. The question was between the second and third parties as to the right of the latter as representing the interest of James Taylor to participate in the division of these two-thirds.

The questions presented to the Court were the following:—Did a right to share in the fee of the two-thirds of the residue liferented by Mrs Graham Gilbert, vest in the said James Taylor before his death? and are the parties hereto of the third part, as representing his interest, entitled to a share in the division of the said two-thirds along with the parties hereto of the second part? Or, are the parties hereto of the second part entitled to the whole of the said two-third shares of the residue, to the exclusion of the parties hereto of the third part?

The second parties argued—No part of the fee of the two-third shares liferented by Mrs Graham Gilbert had vested in James Taylor at the time of his death, and consequently his representatives had no claim. There could be no vesting until the condition in the testator's settlement that Mrs Graham and Mrs Graham Gilbert should both die without leaving issue, who had attained majority or was married, was purified, and at the date of James Taylor's death it was not purified, for Mrs Graham and Mrs Graham Gilbert were both alive.

Authorities—*M'Lay* v. *Borland*, July 19, 1876, 3 Rettie 1124; *Ramsay's Trustees*, December 21, 1876, 4 Rettie 243; *Boyle* v. *Earl of Glasgow's Trustees*, May 14, 1858, 20 D. 925; *Martin's Trustees* v. *Milliken*, December 24, 1864, 3 Macph. 326.

The third parties argued—A share in the fee of the said two-thirds vested in James Taylor on his attaining majority. What was here said to be a condition was not a proper condition. It was merely an event before the arrival of which it could not be known whether the devolving clause had or had not taken effect. A condition proper must be personal to the legatee. The words "hold and apply" in the testator's deed show that this was the testator's intention, which must always be the rule by which cases of this description were governed.

Authorities—Williams on Executors, i. 887, and cases there cited; *Pinbury* v. *Elkin*, Peere Williams' Reps., i, 563; Jarman on Wills, i. 752; *Watson, &c.*, v. *Marjoribanks*, February 17, 1837, 15 S. 586.

At advising—

Lord Ormidale—The testator in this case has left the residue of his estate in certain proportions to two nieces of the name of Gilbert and four nieces of the name of M'Cainsh—one third being destined to each of the Gilberts and her children in liferent and fee, and the remaining third to and among the M'Cainshes and their respective children in liferent and fee. So far there is no dispute.

The only disputed question which has arisen, and has now to be answered, relates to that portion of the testator's estate destined by him to the Gilberts, and to devolve to the M'Cainshes in the event, which has happened, of the Gilberts dying without leaving children. The provisions of the testator's supplementary deed of settlement in regard to this question are somewhat peculiar, but sufficiently clear and distinct, I think, to lead to the conclusion at which I have arrived, as afterwards explained.

It has been contended for the third parties to this case that although Grace M'Cainsh died long before the Gilberts, the fee of their share of the testator's estate, intended on their death without leaving children to devolve upon her, Grace

M'Cainsh and her children, now belongs to them, the third parties, as the next-of-kin or representatives of Grace M'Cainsh's son James Taylor, who was married and had attained majority before his death in 1859. But in opposition to this contention it has been submitted, on behalf of the second parties to the case, that James Taylor having died without leaving children or descendants in 1859, many years before the Gilberts, no part of their shares of the estate in question could have vested in him or can now be claimed for his representatives.

It will be observed that in the testator's supplementary deed of settlement the destination or devolution to the M'Cainshs of the fee of that portion of his estate now in dispute is not immediate and unconditional, the payment of it being merely postponed. On the contrary, it is expressly made dependent upon the twofold contingency or condition of both the Gilberts dying without leaving children, and supposing they left children that died before attaining majority or being married. Till, therefore, the death of both the Gilberts, it could not be known whether they would leave children or not, and even if they left children in minority and unmarried it could not be known, prior to the event itself, whether these children might not die before attaining majority or being married. It is thus clear that, so long as these events remained *in dubio* and in the future, the twofold contingency or condition upon which depended the devolution to Grace M'Cainsh and her children of the two shares of the residue liferented by the Gilberts could not take effect. But long before the death of the Gilberts without leaving children, Grace M'Cainsh and her son, James Taylor, had themselves died. According, then, to the general rule applicable to such circumstances as these, that portion of the testator's residue which is now in dispute could not have vested in James Taylor before his death, and if so, the claim of his representatives, the third parties to the present case, cannot be sustained. Nor can I see anything in the testator's settlement otherwise, to displace this conclusion. On the contrary, it is in my opinion in accordance with what I must hold to be the will and intention of the testator.

But it was argued that the question has been determined in analogous circumstances against this view by the case of *Pinbury* v. *Elkin* (1 Peere Williams 584), as referred to and explained in Mr Justice Williams' work on Executors, as well as by two Scotch cases, which will be afterwards noticed. On examining the case of *Pinbury* v. *Elkin*, however, I am satisfied that it cannot be held as a precedent in point or as an authority to govern the present, although it may be that in that case and in some other exceptional circumstances, contingent and executory interests have been found to be transmissible to the representatives of a party dying before the contingency on which they depended could be said to be absolutely purified. The case of *Pinbury* was one of this description, but it was in its essential circumstances very different from the present. There the testator, in case his wife should die without issue to him, and after her decease, gave £80 to his brother *nominatim*. The brother survived the testator, who had died without issue. His brother and widow afterwards died, the former first; and in this state of matters the £80 was claimed and held to belong to the brother's executors, and against that claim the only thing that could be urged was the fact that the testator's brother had died before his wife. Now, although in one sense, and in a very limited degree, the legacy was apparently made dependent upon the death of the wife, and could not be exacted till then, the real and substantial contingency or condition upon which it turned was the death of the wife without issue to the testator, and that contingency or condition was satisfied by the death of the testator without issue, his brother, the legatee, surviving him. Accordingly, after that case and some others of a kindred character are noticed in Williams on Executors, it is remarked (vol. i. p. 889) that, "these cases and others establish the principle that contingent and executory interests, though they do not vest in possession, may vest in right, so as to be transmissible to executors or administrators." In the present case, however, it cannot, I think, be held that, consistently with the will or intention of the testator as expressed by himself, there was or could have been any vesting in James Taylor before his death in 1859 (many years previous to the death of the Gilberts) either in right or possession. In the case of *Pinbury* it might very well have been held, as it was, that the right vested on the death of the testator without issue, seeing that his wife could not possibly after that have issue to him, and that payment or possession of the legacy was merely postponed till her death. But here neither right nor possession could or did vest till the death without children of the testator's two nieces Cecilia and Jane Gilbert, as till then it could not be known whether they might or might not leave issue.

As to the Scotch cases of *Martin's Trustees* v. *Milliken, &c.* and *M'Lay and Others* v. *Ralston*, also relied on by the third parties, their circumstances are so very different from those of the present case as to render them inapplicable. In particular, the destination in *Martin's* case upon which the disputed question of construction turned was very peculiar, and has no resemblance to that in the present case. There the question was whether the fee of the whole of the residue in dispute had vested in a certain individual *a morte testatoris*, there being no trustees or other party in whom it could have been held to have vested either in a fiduciary or any other sense; and the Court held that it had vested in the individual referred to on the death of the testator, subject to the condition that in the event of children by another party (the liferentrix of half of the estate) coming into existence, they should, in terms of the settlement, take that half. This conclusion was come to in respect that, according to the construction of the settlement adopted by the Court, there was a direct destination of the fee to the individual referred to *nominatim*, and to no one else. But in the present case the fee of the state in dispute is not given directly to any beneficiary *a morte testatoris*, but is conveyed to trustees, there to remain till certain contingent conditions should be purified on the occurrence of certain specified events. The other case, again, of *M'Lay* v. *Ralston*, is also so different from the present in its circumstances as to prevent the decision of it being any precedent for the present. And, at any rate, so far as it goes, in

place of being adverse to, it appears to me rather to support the result at which I have arrived in the present case, for there it was held that no fee had or could have vested till the death of the liferenters.

The result is that, in my opinion, the question submitted to the Court in this case ought to be answered in favour of the second parties.

Lord Gifford—This case in some of its aspects is not unattended with difficulty, but upon the whole, and according to what appears to me to be the sound construction of the testamentary deeds of the late Andrew Gilbert, I have come to be of opinion, that at the date of the death of James Taylor, which took place on 9th June 1859, no right had vested in him in any share of the two-thirds of the residue of the testator's estate which was then liferented by Mrs Graham Gilbert and Mrs Adam Graham, the two nieces of the testator.

The whole trust estate of the testator vested in his trustees at his death in 1838, and is still vested in his trustees so far as not paid and distributed, and that in trust for the uses and purposes mentioned in his testamentary deeds. This removes one difficulty which sometimes occurs in such cases, that a fee must vest somewhere, so as to avoid the supposed impossibility of a fee being nowhere, or *in pendente*. There is undoubtedly in the present case, and was from the very first, that is from Mr Gilbert's death, a trust or fiduciary fee vested in the trustees, the first parties to this case, for the uses and purposes of the settlements.

The only question, therefore, in the case is, where was the beneficiary fee in the residue of the estate, and when did it vest in the beneficiaries—and in particular (for the only question relates to two-thirds of the residue), did any share of these two-thirds vest in the late James Taylor previous to his death on 9th June 1859. Mr Taylor's death at that date is the material date in the question, for unless a share in the fee of the two-thirds residue vested in him before his death, he could not transmit it to his representatives, who are his widow and his father's trustees, being his executors *ab intestato*. He left no issue, so that there is no question as to his children being conditionally instituted to himself.

The whole question turns upon the terms of the late Mr Andrew Gilbert's supplementary deed of settlement, of 18th February 1829, which supersedes and revokes the provisions as to residue contained in the earlier deed, and although the question before us relates to only two-thirds of the residue, it is necessary to keep in view the whole residuary provisions.

The leading provision in the supplementary deed is, that the trustees shall hold and apply one third of the residue for behoof of Jane Gilbert (Mrs Graham Gilbert) in liferent and her lawful children equally in fee; another third of the residue is to be held and applied for behoof of Cecilia Buchanan Gilbert (Mrs Adam Graham) in liferent and her lawful children equally in fee, and the remaining third is to be held and applied in exactly the same way for behoof of the testator's four nieces, the M'Cainsh's, in liferent and their lawful children equally in fee *per stirpes*. It is quite plain that although James Taylor, who was the only son of Grace M'Cainsh, undoubtedly took a vested interest in the fee of that portion of the last third which his mother liferented, he could take no vested interest in any part of the two-thirds of the residue which were to be liferented by Mrs Graham Gilbert and Mrs Adam Graham, and the fee whereof was destined to their children.

But the deed goes on to substitute conditionally the beneficiaries in the fee of each third to the other thirds in certain events, and it is really on this clause that the question turns. Now, I am of opinion upon this clause of the deed that the destination-over or substitution of the M'Cainshs to the two-thirds which were liferented by the two Gilberts is strictly conditional. It is not to take place upon the death of any liferenter; it is only to take place upon the death of the liferenter if that liferenter, or these two liferenters, die without issue, or without issue who survive the age of twenty-five or marriage. Now, I think that is a proper condition which stops the vesting. The existence of a liferent, however long it may endure, does not stop the vesting of the beneficial fee, because the liferent, although it postpones payment, is not a proper condition. The liferent must terminate—for all must die,—and therefore the only uncertainty is an uncertainty about time, and not an uncertainty of event. But with regard to the destination-over in the second part of the clause which I have just read the only condition upon which James Taylor, the only child of Grace M'Cainsh, can take, is, that both the Gilberts shall not only be dead first—they being liferenters,—but that they shall have died without issue or without surviving issue. They must have died without leaving children, or without these children attaining a certain age. Now, that is an uncertainty not merely as to time but as to event; and at the date of the will both the Misses Gilbert were unmarried and comparatively young women. And accordingly it was, at the date of the will and at the date of the testator's death, quite uncertain whether these two Misses Gilbert would ever have children or not, and whether their children would survive them. Now, suppose that the deed had borne, just as it does, two-thirds in liferent to these two Gilberts and to their children in fee equally among them, whom failing (*i.e.*, failing such children) to James Taylor. That is the strongest possible way in which James Taylor's case could be put, and I think in that case James Taylor could take no vested interest till the condition—that is, the existence of issue surviving a certain time—shall be purified. If the two Gilberts had never been married, and had attained a great age, and had lived till they were past childbearing, the question would have arisen—which has not been settled—was the condition of leaving issue purified by the passing of the possible time for having issue. That does not arise here; for I think at the date of James Taylor's death in June 1859 Mrs Adam Graham was only forty-eight years of age, and she had had a child, and might have more. At all events, that question of the impossibility of having issue does not arise in this case. Therefore there was a condition, and it could never have been held where there was a liferenter to whose children the fee was given in the first instance, that these children could not possibly exist, the mother being a married lady and only forty-eight years of age. So that that difficulty, which has been often avoided in this Court, and never truly settled, does not arise here. Therefore this is just the

case of a legacy to a person in liferent, her children in fee, and failing her children to the other parties named. Now, that is a conditional legacy, and does not vest in the person who is substituted to the children until it shall appear that children are impossible, till the death, or, if the case ever arose, till the other circumstances show that there could be no children to take the fee.

I think therefore that there could be no vesting of the beneficial fee in James Taylor till the condition was purified, and as he died in 1859, and the condition was not then purified, there was no vesting; and I come to the same conclusion as Lord Ormidale, that these two thirds—the children of both the Misses Gilbert having now failed—go to the children of the M'Cainshes, still living, and no part to James Taylor, whose representatives are the third parties to this case.

A very ingenious argument was raised by Mr Trayner on the words "hold and apply." I think there is no difference between these words; I think "hold and apply" means this—hold, so far as you mean to hold to secure the liferent; apply, that is pay, the moment the liferent expires. Therefore the word 'pay' is really embraced in the word apply.

Lord Justice-Clerk—Your Lordships have decided this case, and I am not prepared to say that I differ formally from the result at which your Lordships have arrived. But I have some doubts—and I shall give expression to them—not so much in regard to this particular case, but because I think they have some bearing upon this branch of the law, on which perhaps in future they may have some importance.

These questions of vesting have to a considerable extent run into arbitrary definitions, which are perhaps not very well founded on any legal principle. The main principle of construction in all such cases is the intention of the testator, and indeed there is and can be no other canon of construction; and I rather take it that in regard to questions of this kind, where payment or the enjoyment of an interest left in a settlement is postponed on account of an existing burden in favour of another, the general rule is, that the fee which is the subject of enjoyment by the other vests *a morte testatoris*, unless there be something in the settlement which leads to the conclusion that the testator intended otherwise.

The law on this matter is, I think, correctly laid down by Lord Colonsay in the case of *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H. of L.) 151—and I think this is the latest expression of it—where his Lordship says—"The general rule of law as to bequests is, that the right of fee given vests *a morte testatoris*. That rule holds although a right of liferent is at the same time given to another, and although that is done through the instrumentality of a trust, and whether the fee be given to an individual *nominatim* or to a class. The postponement of the period of payment till the death of a liferentrix does not suspend the vesting, nor does the interposition of the machinery of a trust for carrying into effect the intentions of the testator. Indeed the creation of a trust is a very usual mode of securing the interest of a liferenter where the right to the fee is nevertheless intended to vest in the person or class of persons for whom it is destined. Although the *jus dominii* may be in trustees, the *jus crediti* is in the beneficiaries as a vested right. At one time doubts were intertained as to the case where the settlement was by a trust-deed to hold for a liferenter and successive persons as fiars, but the tendency of recent decisions in that class of cases, and indeed in almost all cases, has been in favour of the vesting of the fee *a morte testatoris*, unless the terms of the deed are such as to exclude that construction." Then his Lordship adds—"There may, however, be cases in which vesting is suspended. Thus, where the right is made conditional on a contingency personal to the legatee, such as marriage or arrival at majority, events or dates uncertain, which may never have taken place, there is a presumption, though not insuperable, that vesting or right to take was intended to be suspended until the occurrence of the continency should be ascertained."

Such, I take it, is the law. The presumption is, where a fee is left burdened by a liferent, that the fee vests *a morte testatoris*, and that presumption may be, but is not necessarily, elided by the fact of an uncertain contingency being attached personal to the legatee. The main thing, however, to look at is the intention of the testator. Now, I do not agree with Lord Gifford that a bequest to trustees to hold for behoof of a fiar, whether described or named, is the same thing as a direction to pay at a future date. They are two different things. The direction to pay at a future date may infer the same thing as a direction to hold the fee in the meantime, but a direction to hold the fee *a morte testatoris* for behoof of a certain party not named or designed or indicated, is different from a direction to pay at a future date, in this, that the one takes effect *a morte testatoris*, and the other only takes effect at an uncertain period. Here the direction to trustees is to hold for behoof of those nieces in liferent and their children in certain proportions. Now, what was the intention? The intention was this, that the children of Mrs Graham Gilbert and Mrs Andrew Graham should takes the shares in liferent, and their children, if they had any, in fee; but their children were not to take unless they attained majority and had been married. Then it was provided that if these failed, that is to say, if the fee never went to the children of these two nieces, their share in the fee was to devolve, that is to say to belong, to the children of the other nieces; and the question is whether the intention is not perfectly plain that the families of the neices were the persons pointed out in the trust deed. It never was intended that if all the nieces had children and all the children predeceased the liferentrix, although they all left families, this settlement was to fail altogether and the funds were to go to the next-of-kin, or whoever might turn out to be his heir-at-law. The intention was that each family should take if there were children who arrived at majority or were married, and if they did so arrive, and the devolution clause took effect, they clearly were the persons intended by the testator.

But then it is said there is a contingency or condition here on which the right of the party on whom the share devolves depends. I think that is a mistake, and I think Lord Colonsay points out that quite clearly in the case of *Carleton*. The reaching majority or being married is a proper condition, and if James Taylor here had not reached majority or had not been

married before his death, then unquestionably the condition must needs have applied, and he would never have taken anything. But survivance of the liferentrix is not a condition at all. The payment is postponed in her case for the purpose of securing her. It is not a matter personal to the legatee at all. And so, if the children of Mrs Gilbert or Mrs Graham had attained majority during their mother's lifetime, and then died, predeceasing their mother, the share would have vested beyond all doubt, simply because it was no part of the condition that these legatees should survive the liferentrix. The condition was that they should attain majority or marriage.

Well, in the case of James Taylor was it a condition that the liferentrix should die without leaving issue? I think that is not a condition. It is a contingency which must be ascertained before it can be discovered whether the devolution has taken place or not. That is a totally different matter from a condition. The real meaning of the clause of devolution is this, that if there are no children, or if they do not attain majority, that which they would have taken, had they attained majority, shall devolve upon James Taylor. That is the meaning of it. That is not a condition at all. That is a condition which, when purified, denotes who the fiar was for whom the trustees held from the date of the majority or marriage. That is my view. It was no doubt a clause under which, when James Taylor attained majority he was presumptive fiar, and if he was never displaced he remained absolute fiar; but he might be displaced by the appearance of a nearer heir. But that is a thing which stands entirely distinguished from the conditions. It is in no respect a condition of the legacy. It is only an event before the arrival of which it cannot be known whether the devolving clause has or has not taken effect in favour of the conditional institute. But when that is once ascertained, James Taylor simply takes from the date of his majority or marriage; that is to say, it vests, and whether he predeceases or survives the liferentrix is a matter of no moment. These are the views which have occurred to me about this matter. There is some complication in the way in which they would be worked out in this particular case, but I have thought it right to give expression to them, because the general view which I take is, that it is only conditions personal to the legatee that can have the effect of suspending the vesting.

The Court therefore held that the parties of the second part were entitled to the whole of the two-third shares of the residue.

Counsel for M'Cullochs (Second Parties)—Balfour—H. E. Gordon; for M'Larens (Second Parties) — M'Laren — G. Watson. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Taylor's Representatives (Third Parties)—Trayner—Omond. Agents—Frasers, Stodart, & Mackenzie, W.S.

Saturday, November 3.

SECOND DIVISION.

[Lord Adam, Ordinary.

UNION BANK OF SCOTLAND *v.* BUTTERY & COMPANY AND OTHERS.

Obligation—Contract, Construction of—Proof of Intention.

A signed written contract with shipbuilders to make certain alterations on a ship for a certain sum, contained, *inter alia*, this clause—"The plating of the hull to be carefully overhauled and repaired, but if any new plating is required, the same to be paid for extra." The last fourteen words were deleted from the contract before signature, but remained legible, and the deletion was initialed by both parties. In a claim by the shipbuilders for payment on account of a considerable amount of new plating which they said was outwith the contract, *held* (in the result *revg.* the Lord Ordinary, Adam—*diss.* Lord Gifford), that in order to ascertain the understanding of parties the Court were entitled to be placed in the position in which the parties were before they signed the contract; and that upon the evidence and correspondence, and looking to the "surrounding circumstances" of the case, the work, payment of which was claimed, must be held to have been within the contract.

Opinion per Lord Justice-Clerk that the Court were entitled to get assistance in interpreting the contract from the letters of the parties before the contract was signed, and from the initialed deletion of the disputed clause in the contract.

Opinion contra per Lord Gifford, and *observations* by his Lordship on the law regarding the admissibility of evidence as affecting the interpretation of formal written contracts.

Observations per Lord Ormidale on the meaning of the expression "repair" as used above.

This was a multiplepoinding raised in name of the Union Bank of Scotland. The fund *in medio* consisted of a sum of £1260, 0s. 10d. (which was consigned in the Union Bank), the price of a quantity of new iron plating which formed part of the repairs executed by Messrs Inglis, shipbuilders, Glasgow, one of the claimants, upon the ship "United Service," to the order of Messrs Buttery, the other claimants of the fund.

In March 1875 Messrs Buttery & Company, as agents for the owners of the steamship "United Service," entered into a contract with Messrs Inglis to execute certain alterations and repairs on that vessel for the sum of £17,250. After the ship was placed on Messrs Inglis' slip it was found that the shell-plating of the hull required renewal to a considerable extent. Messrs Inglis intimated this to Messrs Buttery & Company, and informed them at the same time that they did not consider that the renewal of this plating was covered by the contract price. Messrs Buttery did not admit this reading of the contract, but it was agreed that Messrs Inglis should proceed with the work, under reservation of the pleas of both parties, conform to minute dated 30th July 1875, endorsed on the original memorandum of agreement. The only question between the parties was whether or