£10,000. Then we find that the trustees are to dispose of the fee in this way, viz., certain specific legacies are to come out of this sum of £10,000, and then "the balance of the fee of the said principal sum of £10,000, being £3300," is to go to the children of Major Dennistoun Brown. The intention of the testator is to give these children the fee subject to the deduction of these legacies.

The only possible doubt is created by the words "being £3300," if it had not been for that parenthesis it would be perfectly plain that she intended the whole balance to go to these children. Now, I am disposed to think that she merely mentions an arithmetical balance—the balance that would have resulted if all these special bequests had taken effect. The question is a narrow one no doubt, but I think there is no reason to suppose that she intended the sum, for which no legatee could be found, to go to any one, but Major Brown's children. In short, the leaning of my mind is in favour of the Lord Ordinary's judgment.

Lord Mure—There are two questions here—(1) What is to become of the lapsed legacy of £1000? Does it fall to the two children mentioned in the codicil? (2) Is the sum to be dealt with as intestate succession, or dose it go to a residuary legatee named in the original settlement?

On the first question, I have come to the same conclusion as your Lordship in the chair. On the whole, although the question is a nice one, I think it ought not to be added to the amount of the balance, for where the testator has mentioned the amount of the balance I think the safe course for the Court to follow is to hold that it was not intended any more should go to that legatee.

On the second question, I am of the opinion that this comes within the scope of the destination of the residue in the original deed.

Lord Shand—All the legacies left to individuals in the original deed are left to their heirs if the original legatee should die; but there are also legacies to charitable institutions, and if any of them had lapsed the sum would have fallen into residue. This codicil accordingly is a codicil to a deed that provides for a residuary legatee. In this codicil we have provisions as to a sum of £10,000, the fruit of whic his to be enjoyed by liferenters, and the fee of which is thus dealt with—[*reads ut supra*]. These words do not constitute a gift of the residue of the sum of £10,000, but a specific gift of the balance of the £10,000 after deduction of £6700. I should have been disposed to hold that even if the words "being £3,300" had not been used, the word "balance" would mean the specific sum that remained after deduction of these legacies.

Accordingly, if there had been a deficiency, I think, with your Lordship in the chair, that Alexander and Jemima Brown would certainly not have been bound to stand aside and see this sum, destined to them, suffer deduction in order that the specific legacies destined to others might be satisfied in full. You must have very special words to create a special residue in a deed. My opinion goes this length, that, even if there had been no general residuary legatee, these words would not have been sufficient to carry a bequest of residue, and that, therefore, as regards residue there would have been intestacy.

The following interlocutor was pronounced—

"The Lords having heard counsel on the reclaiming-note for Mrs Maclae's trustees against Lord Young's interlocutor of 16th March 1877: Recall the interlocutor: Repel the claim for Alexander James Dennistoun Brown: Sustain the claim for Mrs Maclae's trustees to the whole fund *in medio*: Rank and prefer them accordingly, and decern against the real raisers, holders of the fund, for payment of same: Find the claimants Mrs Maclae's trustees entitled to expenses, and remit to the Auditor to tax the account of the said expenses and report."

Counsel for Claimants, Maclae's Trustees (Reclaimers)—Balfour. Agents—Pearson, Robertson & Finlay, W.S.

Counsel for Claimant A. J. Dennistoun Brown (Respondent) — Kinnear — Hunter. Agents—Melville & Lindesay, W.S.

Saturday, November 3.

FIRST DIVISION.

MACDONALD (THARP'S TRUSTEE)—

PETITIONER.

Public Records—Transmission of Deeds to English Courts.

Where the production of a deed recorded in the Books of Council and Session was essential, in a suit in the courts of England and the party who asked the Court to authorise the Keeper of the Register to exhibit the deed was the executor under the deed, and so represented all parties interested in it, the Court *granted* the authority asked upon caution to restore the deed in six months, and on condition that an extract be deposited meanwhile in the record.

This was an application by John Macdonald, Treasurer of the Free Church of Scotland, to the Court praying them to authorise the principal Keeper of the Register of the Books of Council and Session, or one of the assistant keepers thereof, to proceed to London with the deed of settlement and codicils of the late Lady Hannah Charlotte Tharp, and to exhibit it in the High Court of Justice in England (Probate, Divorce, and Admiralty Divisions). Lady Tharp had died on 3d May 1876, and her deed of settlement, under which the petitioner had been appointed sole trustee and executor, had been recorded by him in the Books of Council and Session on 10th May 1876. A suit had been thereafter raised in the High Court of Justice in England, at the instance of William Montagu Tharp, committee of the estate of John Tharp of Much Wadham, in the county of Herts, a lunatic, the husband of the testatrix, against the petitioner, claiming —(1) that the Court should pronounce against the validity of the said deed of settlement and codicils thereto; and (2) that the Court should

decree letters of administration of her personal estate and effects to be granted to him as the committee of the estate of the said John Tharp, a lunatic, for the use and benefit of the lunatic.

In the statement of defence for the petitioner lodged in that action, it was, *inter alia*, stated for him that "(2) the said will was signed by the deceased then and there in the kingdom of Scotland, in presence of two witnesses, and the said will was duly executed according to the laws of the said kingdom of Scotland; and (3) that the said codicils were duly signed by the said deceased then and there in the kingdom of Scotland, according to the laws of the said kingdom;" and the petitioner claimed that the Court should decree probate of the said will and codicils in solemn form of law, and that the Court should reject the claim of the plaintiff in the said action. In the reply for the plaintiff to the statement of defence, the plaintiff took and joined issue on the second and third paragraphs of the statement of defence above narrated.

The petitioner produced an affidavit by his solicitor that counsel considered it absolutely necessary that the deed referred to should be produced.

Argued for the petitioner—It was laid down in the case of *Dunlop*, November 30, 1861, 24 D. 107, that the Court would require in granting an application like the present to be satisfied—(1) that the production of the deed was necessary to protect the interest of the petitioner; (2) that its production would not be prejudicial to any of the parties interested in it. Here its production was essential; for the committee of the lunatic husband pleaded intestacy, and so all the parties interested in the deed would be benefited by the success of the petitioner, who was executor. Cf, also *Duncan*, July 14, 1842, 4 D. 1517, where the petitioner was the executor; *Bayley*, May 31, 1862, 24 D. 1024. In the case of *Jolly*, June 25, 1864, 2 Macph. 1288, the applicant had not the sole interest in the deed, yet the application was granted. In *Young*, February 2, 1866, 4 Macph. 344, the application was refused, but the applicant there was a stranger to the deeds, and the purpose for which he desired to use them was not the purpose for which they were recorded. Such an application was refused in the case of the *Western Bank and Liquidators*, March 20, 1868, 6 Macph. 656, the Court not being satisfied that the production of an extract would not be sufficient. Here, as the existence of the deed was disputed, it must be produced.

At advising—

Lord President—Cases of this kind always require to be thoroughly investigated and seriously considered, for this Court stands in the position of guardian and custodier of all deeds recorded in the Books of Council and Session, for the benefit of all concerned. We must therefore consider carefully whether any prejudice is likely to result to any of these parties by allowing the deed to be taken out of the kingdom. All the cases on this point, that have been decided since the case of *Dunlop* in 1861, are capable of being reconciled, though the previous practice was somewhat doubtful, and is not perhaps very easy to justify. Since that time we have always acted consistently.

The case of *Dunlop* is a precedent directly in point here; that was a case where a party applied for a warrant on the Deputy-Clerk-Register to deliver up a deed to him that he might produce it in an English Court. The applicant was the only party interested in that deed. But although there are no doubt various parties interested in this deed, the executor may fairly be taken as representing them all, and may be trusted to have the interest of them all in view. The object for which it is desired to produce the deed is imperative, for the committee of the lunatic husband of the testatrix is claiming letters of adminstration in the Court of Probate, and the executor opposes this and founds his opposition upon this very deed. The committee does not admit its existence, and also denies that it was validly executed according to Scotch law. That question cannot be tried without the production of the deed itself, for an extract would not be sufficient to prove the executor's case in the English Court. That there is a case of necessity is sufficient to justify us in granting warrant as craved. That warrant must of course be granted, as it always has been, on these two conditions—(1) that the petitioner shall find caution to return the deed in six months; (2) that he shall deposit an extract of the deed in the record until he returns the principal.

Lords Deas, Mure, and Shand concurred.

The Court pronounced the following interlocutor:—

"The Lords having considered this petition and heard counsel, grant warrant to and authorise the Principal Keeper of the Register of the Books of Council and Session and other officers of the records to deliver to the petitioner or his agents the deed of settlement and codicils mentioned in the petition on his granting bond of caution, with sufficient security to return the same to the said Principal Keeper of the Books of Council and Session within six months, and an extract of the said deed and codicils duly authenticated being previously lodged in their stead, and decern."

Counsel for Petitioner — Stuart. Agents—Cowan & Dalmahoy, W.S.

Counsel for Mr Tharp—Pearson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Saturday, November 3.

FIRST DIVISION.

MATHIESON AND OTHERS (MAGISTRATES OF DUNFERMLINE), PETITIONERS.

Burgh—Election where no Magistrate able to act.

Where all the magistrates of a burgh fell to retire except one, who was unable through illness to attend and act as returning officer at the succeeding election, or to preside at the first meeting of council, the Court authorised the existing provost and magistrates to retain