as will be immediately shown. And, in my apprehension, to hold that the doubtful or equivocal words in the last deed, on which reliance is placed as amounting to a revocation of the first deed, would be to disregard the established principles to which I have adverted. For these reasons, I am of opinion that the second and third questions must be answered—the second in the negative, and the third in the affirmative.

As regards the effect of the second writing and its several provisions, its true construction, I think, must lead to these results:—

1. That the annuities provided to his two sisters and to Mrs Low supersede the bequest in the first writing to them of the interest on the residue, to be taken in three equal parts in half-yearly payments.

2. That the families of the annuitants take the interest of their mothers' until the death of the last annuitant.

3. That the two bequests to charities in Glasgow and charities in Aberdeen are void from vagueness and uncertainty.

And 4. That the residue, as appointed by the first deed, will fall on the death of the last annuitant to be divided between the parties, and for the purposes and in the manner prescribed by the testator in that deed.

The other Judges concurred.

Counsel for First Party — Solicitor-General (Clark), Q.C., and Jameson. Agent—John Auld, W.S.

Counsel for Second Parties — Cleghorn and Innes. Agents—Dalmahoy & Cowan, W.S.

Saturday, June 21.

SECOND DIVISION.

SPECIAL CASE—THE TRUSTEES OF JAMES SPEARS AND OTHERS.

Trust—Residue—Advances to Children.

Circumstances in which *held* (1) that a widow was not entitled to a liferent of a residue; and (2) that trustees (though not bound) were entitled to make advances from the income of the estate for the education and maintenance of the children.

James Spears died on 1st June 1853. He left a trust disposition and settlement, by which he conveyed his whole estate to trustees for the following purposes:—1st, Payment of debts and funeral expenses; 2nd, Liferent of residue to his widow; 3rd, On the death of his widow, payment of dividend of certain stock to a niece; and the residue of the estate to be held in trust for the use and behoof of his son George Spears in liferent. The deed then went on to narrate as follows:—"And after the death of the said George Spears, I appoint my said trustees to hold the whole of the remaining residue of the said funds and effects for behoof of any children to be procreated of the said George Spears by his present or any subsequent marriage, share and share alike, in fee, but always subject to the general provisions and powers after mentioned; and failing the whole of said children by death, then, and in that case, the said trustees shall divide the residue, and convey the same as follows:—*First*, To Isabella Burns Brown and James Spears Brown, children of Alexander Brown, residing at Trip Bridge near Stirling, the said Edinburgh Water Company's stock, with the interest and profits thereon; *Second*, The remainder of said residue equally amongst Annie Spears or Rutherford, spouse of Neil Rutherford, presently residing at the Bridge of Allan, the said James Burns, and the children of my brother George Spears, residing at Haddington, share and share alike: Declaring that the shares of the children of my brother George Spears shall be burdened with an annuity of £50 sterling, to be paid to him during all the days of his life, which I hereby appoint to be paid to him: And declaring further, that should any of the parties die, the lawful issue of such of them as shall predecease shall be entitled to the share of their deceased parent: Declaring that the said trustees are to hold the whole property, estates, funds, and effects, heritable and moveable, real and personal, before conveyed, in trust, for the liferent use and fee of the several parties before mentioned in their order, as all before mentioned, and shall pay over the free annual rents, interests, and produce of the said whole property, estates, funds, and effects, conveyed as aforesaid, to each of the parties according to their several rights, deducting all necessary charges and expenses, and that weekly, monthly, quarterly, or half-yearly, as my said trustees shall think proper; and the said free annual rents, interest, profits, and dividends are hereby declared to be strictly alimentary, and shall not be attachable by the diligence of the respective creditors of any of the foresaid several parties, nor be assignable, nor subject to the deeds or obligations of any of said parties: Declaring that the shares of any of the foresaid parties who may be under age, or of their children, in the event of their leaving sons, shall not be paid over or conveyed to them respectively till they each attain the age of twenty-one years complete; and the shares of such of them as are daughters until they each respectively attain the said age of twenty-one, or marriage, whichever event shall first happen: Declaring further, that the shares of the children or child predeceasing the said respective terms of payment without lawful issue shall accresce to the survivors equally among them, and to the lawful issue of such survivors, such issue being in all cases entitled to come in room and place of, and to claim the same rights with their respective parents: And declaring that until the respective terms of payment of said shares, the said trustees, after the death of both parents, shall have full power to pay the interest or free produce of the respective shares of the said trust estate, or such part thereof as they in their discretion shall think proper, to the children who may ultimately be respectively entitled to the said shares, and likewise to advance such sums as the said trustees shall think reasonable to any of the said children out of their share of the capital stock for the purpose of putting them to any profession or business, or furthering their prospects in life."

James Spears' widow died in 1866. After her death the trustees paid dividends of certain stock to the neice of James Spears, as directed by the trust-disposition and settlement, and the free annual proceeds of the residue of the trust-estate to George Spears, down to his death in August 1871. Prior to the death of James Spears, George Spears was married to Miss Jane Smith, who died

on or about October 28, 1864, without leaving issue. The said Jane Smith was the wife of George Spears in 1853, when James Spears executed his trust-disposition and settlement. After Jane Smith's death, George Spears was married to Mrs Eliza Isabella Baxter or Spears, the party of the second part, by whom he had two children, now living, viz., Elizabeth Thomson Spears and Isabella Burns Spears, born respectively on 6th April 1867 and 8th October 1868, whose tutors are the parties of the third part. Mr George Spears' widow is now aged 29.

In these circumstances, the testamentary trustees of James Spears, the widow of George Spears, and the tutors of the grandchildren of James Spears, submitted the following questions of law to the Court:—

I. Is Mrs Eliza Isabella Baxter or Spears entitled to the liferent of the free residue of the estate of the said deceased James Spears?

II. Are the parties of the first part bound to pay over the annual proceeds of the trust-estate of the said James Spears in their hands to the tutors of George Spears' children, for behoof of their wards, or are they bound or entitled to make an allowance therefrom for the maintenance and support of the said children while their mother, Mrs Eliza Isabella Baxter or Spears survives?

Argued for the trustees—The provisions of this settlement are quite inconsistent with the wife's interest. The settlement makes majority or marriage a term of payment. Till then neither the widow nor the children can take anything. The words "after the death of both parents" merely show that the truster knew that so long as either of the parents lived the children would be provided for. The case of *Humphreys* is quite different from this—(1) there is here a term of payment fixed; (2) in *Humphreys* a particular person was named.

Argued for the widow—Under the trust-settlement two powers are contemplated, (1) a power to pay interest, (2) a power to advance money. But by the natural reading of the words of the deed these powers are not to have effect till "after the death of both parents." In these circumstances, the widow claims either the liferent of the estate, or payment to her, until her son is of age, and her daughter is of age or marries, of the annual income of the trust estate. In the case of *Humphreys* v. *Humphreys*, 4 L. R. Eq. Ca. 475, it was held that a bequest by C to A on the death of B, implied, particularly when A is the heir-at-law of B, a life estate to B. The presumption of the law is always against accumulation, and in this case it is clear that nothing can be paid to the children till they attain majority, before the death of Mrs Spears. Mrs Spears is, therefore, on the analogy of the case of *Humphreys*, entitled to receive the annual income of the trust-estate, at least till the children are of age.

Authorities—*Humphreys* v. *Humphreys*, 4 L. R. Eq. Ca. 475: 1 Jarman on Wills, p. 397; *Cockshott* v. *Cockshott*, 2 Coll. 432.

Argued for the tutors—The claim of the widow is excluded by the fact that a specific term of payment is fixed, namely, marriage or majority. But the trustees are entitled to make payment of interest during the lifetime of the widow.

Authorities—*Macintosh*, 9 Scot. Law Rep., 519; *Ogilvy*, 14 D. 363; *Campbell*, 2 D. 1084.

At advising—

LORD BENHOLME—This question in the administration of Mr Spears' estate appears to me to be ruled by the clause in the will which I deem the most important—(*His Lordship read the clause above narrated*). I say no more than this, that it appears to be of no consequence whether the parties called are conditional disponees or substitutes to George Spears, because the trustees are expressly directed to hold the estate for the children of George Spears.

There are two questions before us for decision, and these are—Firstly, the claim set up by Mrs Spears, George Spears' widow, for a liferent; and secondly, whether under the will the trustees have the power to make advances to the children, the ultimate beneficiaries, although their mother yet survives?

The mother of these children was not the wife of George Spears at the time his father made the settlement, so I do not think that any favour could have been intended to her. The argument addressed to us, and founded upon the English case of *Humphreys*, was both ingenious and able, but I regard the resemblance between that case and this as only partial. There the residue was left to be equally divided after the death of the wife, and there was no disposal of the residue in the meantime. In the present case, on the other hand, the trustees were, on the death of George Spears, to hold with a a view to distribution. That the trust subsists as to the whole estate in the persons of these trustees from the moment of George Spears' death for the behoof of his children there can be no doubt. There is not in this deed a word said about George's widow—there is nothing as to her having a penny of residue, nothing but the clause "declaring that until the respective terms of payment of said shares the said trustees after the death of both parents," &c. Why the two parents should both be mentioned is matter of conjecture; I cannot however arrive at the view maintained for Mrs Spears, that the mother was thereby intended to enjoy a liferent.

There is not here, as in *Humphreys'* case, a residue entirely undisposed of, for, as I have observed, it is vested in the trustees for the children's behoof.

With regard to the second question, the difficulty—if difficulty there be—arises from the same clause as that already referred to. Does the survivance of the mother preclude the trustees from making advances to the children, or even paying over the interest for their maintenance and support? Are no such payments to be made until "after the death of both parents?" I am humbly of opinion that this cannot have been the testator's intention, and on this matter one consideration weighs with me very heavily, and that is, the very great discretionary powers with which the trustees under the will are entrusted—[*His Lordship read the clause.*] There is here a discretion granted as ample as I have ever seen in any deed, and the trustees are not debarred in my view from advancing during the widow's life the interest (or a part of it) of these children's provisions to enable them to live and to have due attention given to their education.

When I look back upon the early part of this rust-deed, and see the direction there "for his children," I look upon that clause as allowing your Lordships to hold that these trustees are not debarred from making such advances. As regards the second question, involved in question 2 of the

Special Case—We cannot say that the trustees are "bound" to make an allowance, and I should be inclined, in answering that query, merely to say they are "entitled" to do so. I observe that this lady (though I do not think her entitled to the liferent of the residue) appears to have enjoyed the full confidence of her husband, and a proof of that is her being appointed a trustee and one of his executors.

On the whole, therefore, I admit that we should answer the *first* question in the negative, and the *second* question also in the negative, with the exception of holding that the trustees are "entitled" to make such advance—that they are "entitled" but not "bound."

LORD COWAN—I concur, and especially in the last observations of Lord Benholme. We are now construing a particular special deed of a remarkable character, not laying down any general principle.

LORD NEAVES—I concur *in omnibus*. The only thing I could suggest is that in finding the trustees "entitled" to make advances for the maintenance and education of the children, it must be borne in mind that this, while not consistent with the letter of the deed, is done by the authority of the Court granting the permission.

LORD JUSTICE-CLERK—I entirely concur. I may call attention to the fact that the second question does not cover the whole clause of the deed. I read the clause as indicating that the time at which the right of the trustees arose was the death of the father. At the same time, we do not decide the question of vesting—that the Court is not called upon to do.

The Court pronounced the following interlocutor:—

"Are of opinion and find, in answer to the first query, that Mrs Spears is not entitled to the liferent of the free residue of the estate of her deceased husband: And in answer to the second query, that the parties of the first part are entitled, but not bound, to make an allowance from the annual proceeds of the trust-estate for the maintenance and support of the children while their mother Mrs Spears survives, and decern: Allow the expenses in connection with the Special Case to be paid to the parties out of the trust-estate, and remit to the Auditor to tax the same and report."

Counsel for First Parties—Balfour. Agent—John Robertson, S.S.C.

Counsel for Second Party—Omond. Agents—Jardine, Stodart & Frasers, W.S.

Counsel for Third Parties—Watson and Mackintosh. Agents—Jardine, Stodart & Frasers, W.S.

S., Clerk.

Tuesday, June 24.

SECOND DIVISION.

[Lord Shand, Ordinary.

DAVIDSON *v.* REID AND OTHERS.

Marriage-Contract—Construction—Power of Father to affect the rights of the Children of the Marriage.

Terms of clause in an antenuptial contract of marriage between A and B, under which *held ultra vires* of A by gratuitous *mortis causa* deed to diminish, limit, or affect the rights of the children of the marriage to two-third parts of his estate provided to them by said contract.

In the conjoined actions of reduction, multiplepoinding, and exoneration, raised in connection with the succession of William Davidson, sometime doctor of medicine, Glasgow, the question came to be whether it was *ultra vires* of the said William Davidson, by gratuitous *mortis cuusa* deed, to affect the rights of the only child of his marriage, who survived him. to two-third parts of his estate provided by his antenuptial contract of marriage to the child or children of his marriage and their issue? This question the Lord Ordinary determined in the following interlocutor, which fully narrates the facts of the case:—

"*Edinburgh, 27th January* 1873.—The Lord Ordinary having considered the conjoined actions, Finds that the deceased William Davidson, doctor of medicine, Glasgow, by antenuptial contract of marriage entered into between him and the pursuer and claimant, Mrs Elizabeth Williamson or Davidson, dated 19th October 1835, bound and obliged himself to provide two-third parts of the whole estate, funds, and effects, heritable and moveable, which should belong to him at the time of his death, after deduction of the debts due by him, to the child or children of the marriage between him and the said Mrs Elizabeth Williamson or Davidson, and to their issue, as therein mentioned: Finds that it was *ultra vires* of the said William Davidson, by gratuitous *mortis causa* deed, to diminish, limit, or affect the rights of the children of the marriage, and, in particular, of his daughter Isabella Stevenson Davidson, who was the only child of the marriage who survived him, to the said two-third parts of his estate, and that the provisions of the trust-disposition and settlement and codicils of the late Dr Davidson, in so far as they diminish, limit, or affect said right, were *ultra vires*, and are ineffectual: Therefore finds that the said Mrs Elizabeth Williamson or Davidson, as disponee and executrix of her daughter, the said deceased Isabella Stevenson Davidson, has right, by virtue of the provisions of the said antenuptial contract of marriage, to two-third parts of the said estate which belonged to her husband at his death, after deduction of the debts due by him: And with these findings, appoints the cause to be enrolled, that they may be given effect to, and the cause finally disposed of.

"*Note.*—By antenuptial contract, dated 19th October 1835, between the deceased William Davidson and the claimant Mrs Elizabeth Williamson or Davidson, now his widow, *inter alia*, Mr Davidson undertook an obligation on the following terms:—'And further, the said William Davidson binds and obliges himself and his foresaids to provide two-third parts of the whole estate, funds, and effects, heritable and moveable, real and per-