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

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