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

favour as sole surviving trustee foresaid, recorded in the Register of Sasines for the burgh of Edinburgh on 17th December 1867. He also made up a title to the said subjects in South Union Place by a notarial instrument in his favour as sole surviving trustee foresaid, recorded in the New Particular Register of Sasines for the county of Edinburgh on 14th May 1859, and writ of confirmation engrossed thereon dated 1st July 1864. Mr Laurence Davidson then conveyed the said subjects in Hunter's Close and South Union Place to the trustees by two dispositions, both dated 4th January 1868.

The question for the Court was:—

"Whether the share of the testatrix's estate to which the said deceased Major John Belsches Home had right, under and by virtue of her said disposition and settlement and codicil, so far as it consists of a right to one-half *pro indiviso* of said subjects in Hunter's Close and South Union Place, Edinburgh, or either of them, now belongs to (1) the first parties hereto? Or to (2) the second party hereto? Or to (3) the third party hereto?"

CRAWFORD for first parties.

RHIND for second party.

DUNCAN for third and fourth parties.

At advising—

LORD JUSTICE-CLERK—The first question raised before us is, whether the interest which Major Belsches Home had in this estate was heritable or moveable? I am of opinion that, as regards both of the subjects in dispute, the right was heritable.

With respect to the first subject, the title was a trust-title for behoof of the testatrix in the person of Mr Davidson, and with respect to it there can be no doubt. With regard to the other subject, the title is somewhat anomalous.

A disposition of the property, at the price of £400, was taken to Mr Davidson, the trustee for the testatrix, and the subjects were feudally vested in him. By a subsequent undelivered disposition and assignation by Mr Davidson and the testatrix, describing the nature of the transaction, these subjects were disponed to Preston under "the real burden of the" sum of £400. This money was advanced by Miss Aitchison, but Preston turned out to be unable to repay her, though he granted her a bill for the amount which he never retired, and the state of the case is that the subjects have been retained since 1832 as an investment for the testatrix. In these circumstances, the interest of the testatrix in both of the subjects is heritable, and therefore they would go to the heir in heritage of Major Home.

The other question is, whether the right conferred subsequently by the codicil is a conjunct right of such a nature that the right of the predeceasing disponee accrued to the survivor, or, on the other hand, as is contended for the other parties, that it was only on the predecease of the testatrix by one or other of the disponees, that the conditional institution was to take effect. There is no proper case of accretion here. Conjunct fiars take *pro indiviso*—that is the rule of law as stated by Lord Stair. There is a distinction in that respect between the Law of England and the Scotch feudal law, which is clearly pointed out by Craig. The general rule of Scotch law, as I have said, is that conjunct fiars take *pro indiviso*—that is unquestionable. Cases in regard to accretion have only occurred in connection with moveable property.

There are two elements here which make it impossible that the doctrine of accretion can apply. *First*, this is a bequest of a *universitas*—shares of mixed succession, and at the date of the settlement it was not known whether it was heritable or moveable. It is left "equally between" these two persons. It is not a case of a special subject granted to two parties conjunctly, but of a general mixed estate granted to two disponees. The cases of *Rose* and *Torrie*, which have been quoted to us, make it clear that when the words "equally" or "proportionally" are used, that is necessarily an indication that a division was intended.

The other element is, that the heir of the body of either of the disponees is to take. Now that destroys the contention that the survivor of the two disponees was to take all. That implies that it is a several and not a joint right. I cannot doubt that the heirs of the body of either of the disponees, if in life, would have taken under this destination.

The other ground for supporting the claims of the third party to this fund was that this was a substitution; without enlarging upon that argument, I will only say the presumption of law is against substitution.

Upon the whole matter, I am of opinion that the doctrine of accretion does not apply, and that this is not a case of substitution, but of conditional institution. That a right vested in Major Home, which is carried to his representatives, I have no doubt. He survived the testatrix, and the conditional institution accordingly flew off, owing to the right vesting in his lifetime.

LORD COWAN—This is a question of considerable nicety, and has been very ably argued to us.

As regards the first question which arises, viz., whether these subjects are heritable or moveable? I have no doubt. The subjects were feudally vested in the agent of the testatrix, under an acknowledged trust, and therefore, when she came to deal with them in her settlement, she did so as being heritable subjects held by her trustee for her behoof. I see nothing to alter or affect this view in the specialty of the bill for £400.

The second question for our consideration is, whether there is room here for holding that the co-disponee who survived was entitled to take the other *pro indiviso* half of these heritable subjects. Two arguments were urged to us in support of the view that she was so entitled, the first resting upon the doctrine of accretion, and the second upon the statement that there was a substitution in the destination here. In my apprehension the only argument which had any force in it was that based upon the substitution. If Mrs Paul has any claim at all upon the succession of her brother Major Home, it must be under the clauses of these deeds. It is quite true a great deal of difficulty exists in regard to cases of joint rights. Erskine and Bell both treat the subject at length. Erskine has two sections referring to such cases, one being with regard to the rights of husband and wife and father and son, while the other relates to the right of strangers. In the 36th section of the 8th title of his 3d book, he says—"Where an entail is made or any right conceived in favour of two strangers in conjunct fee and liferent and their heirs, the two are equal fiars during their joint lives, as if they had contributed equally to the purchase; but after the death of the first the survivor has the liferent of the whole, and after the survivor's death the fee divides equally between the heirs of both. If the right be taken to two

jointly and their heirs, without any mention of liferent, the conjunct fiars enjoy the subject equally while both are alive, as in the former case; but on the death of the first, neither the fee nor even the liferent of his half accrues to the survivor, but descends to his own heir." And then comes the passage which is more directly applicable to the case here—"In a right taken to two jointly and the longest liver and their heirs, the words *their heirs* are understood to denote the heirs of the longest liver; and, consequently, though the several shares belonging to the conjunct fiars are affectable by their several creditors while both are alive, yet, upon the death of any one of them, the survivor has the fee of the whole, exclusive of the heirs of the predeceased—not only the fee of his own original share, but that of the share belonging to the predeceased in so far as it is not exhausted by his debts." That is not exactly the case here, because the succession is not to the two parties jointly, it is "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." Then comes the codicil in which assignees are left out—"equally between them, and in the case of the death of either without heirs of his or her body, to the survivor of them." They take equally between them *pro indiviso* the heritable subjects, and it might be argued that under these clauses there was a substitution of the disponees to each other, and that Mrs Paul, when her brother died, took the whole, as being substitute to him. If this were a conveyance of a pure heritable subject it would be more difficult to get over this argument. But then it is a mixed estate, and the question is, whether this is to be treated as conditional institution or substitution. As regards heritable subjects, the presumption of law is in favour of substitution, while, as regards moveable, conditional institution—as settled in the case of *Greig* v. *Johnston* in the House of Lords (6 W. and S. 406). The case we have before us is one of a general succession, and we have to consider the intention of the testatrix. I would have felt considerable difficulty if the conveyance had been one of heritage only, but as it is a mixed succession I think we must hold it to be a case of conditional institution.

I have said so much upon the question of substitution that I am unwilling to speak upon the other point of accretion which was argued to us, but which cannot, I think, be maintained along with the argument in support of substitution. I hold, along with your Lordship, that there is no room for the doctrine of accretion here. It may be that a deed may be so expressed as to lead to accretion, but I am acquainted with no such case. The case of *Wright's Executors* quoted to us does not assist us at all.

The only other case which I recollect of is that of *Bannerman* v. *Bannerman*, 15th December 1853 (16 Jur., 326), where the question of *jus accrescendi* arose with reference to the shares of an estate. There the testator provided by his settlement that the residue of his estate should be divided into 24 equal parts, 13 of these to be left to his wife, 4 to a niece, 1 to each of his brother's children then alive and three in number; and he reserved appropriation of the remaining two shares; making a provision, however, that these two shares, if unappropriated, should be merged in his estate, as if it were only to be divided into 22 shares. One of his brother's children predeceased the testator, but it was held that that child's share could not be viewed as intestate whole residue, but that the residue fell to be divided into 21 equal shares, and to be distributed as the settlement directed.

On the whole matter I concur with your Lordship, and think that this *pro indiviso* half goes to the heir-at-law of Major Home.

Lord Benholme concurred.

Lord Neaves—I concur with your Lordship. Two general views have been stated to us as the grounds upon which this point should be decided; the one involves the application of the doctrine of accretion, and the other that of substitution. These are two perfectly different grounds, because where accretion applies substitution does not. The *jus accrescendi* is of great importance, and occurs in cases of conjunct rights in the proper sense of the words. Where subjects are given to two persons, upon the disappearance of one of them it is more easy to hold that the other is substituted in the case of a liferent than in the case of a fee.

The readiest illustration of this is in the case of a liferent—say held by two sisters conjointly. While they enjoy the liferent they live together and contribute to each other's maintenance; but if one of them dies, as it is necessary to keep up the establishment, the income must not be diminished by one-half, and the whole accordingly accrues to the survivor.

The most ordinary occasion where the doctrine of accretion applies is where the testator would otherwise die *pro parte* intestate. In the case of *Bannerman*, to prevent intestacy the shares which were unappropriated were divided among the others, and that decision was pronounced as following upon the case where the terms "equally and proportionally" were used. This does not, however, arise in the present case; it is not necessary here to endeavour to prevent the testatrix from dying intate. She did not do so. Neither is this a case of conjunct right; and as it is not conjunct, it can be explained why there is a conditional institution of each of the disponees to the other, in order to prevent lapse.

In a mixed succession, if possession be once got, and the right obtained by the disponee, there is no presumption of substitution. In this case it would be contrary to all probability to hold that this succession, after having been fully taken possession of, was to be left under an entail, because substitution is just an entail.

On the whole matter, I am satisfied that the full right of a *pro indiviso* half of these subjects vested in Major Home, to which his heir-at-law succeeded upon his death. Upon the other point, as to whether these subjects are heritable or moveable, I concur with the rest of your Lordships.

The Court pronounced the following interlocutor:—"Find that the share of the testatrix's estate to which the deceased Major John Belsches Home had right, under and by virtue of her disposition and settlement and codicil, so far as it consists of a right to one-half of the subjects in Hunter's Close and South Union Place, Edinburgh, now belongs to the second party to the Special Case; and decern."

Agent for First Parties—John M. Bell, W.S.

Agents for Second Party—Ferguson & Junner, W.S.

Agents for Third and Fourth Parties—Jardine, Stodart, & Frasers, W.S.

Saturday, July 6.

FIRST DIVISION.

COCHRAN *v.* DUNLOP.

Process—Reduction—Satisfying Production.

Circumstances in which, in an action of reduction, where the defenders pleaded *inter alia* that the action was incompetent and irrelevant, and that they were not bound to satisfy the production of any of the writs called for, the Court appointed the defenders to satisfy the production, and reserved consideration of the relevancy and competency, to be discussed along with the merits.

This was an action at the instance of James Cochran, Barcosh, Beith, against Gabriel Dunlop, cattle-dealer, Stewarton, and Patrick Dunlop, auctioneer, Altonhill, near Kilmaurs, for reduction of an award and relative account, and also of certain interlocutors in the Sheriff-court. The action was brought under the following circumstances. In December 1869 the pursuer raised an action in the Sheriff-court at Kilmarnock against the defender Gabriel Dunlop, for the sum of £100, 10s. 5d., in terms of account appended to the summons.

In this action the defender stated the following defence, namely,—£42, the last item in the account, was denied. The rest of the account, amounting to £58, 10s., was admitted, but it was pleaded that there fell to be deducted from that sum the price of four cows sold by the defender to the pursuer in June 1866, at £28; and that he had further paid £20 to account, thus leaving due a balance of £10, 10s., which the defender averred he had all along been willing to pay, and then consigned. Having closed the record, the Sheriff-Substitute allowed a proof, but before the commencement of the proof the parties entered into a joint minute, which is dated the 9th March 1870, and was signed by pursuer and defender. By said minute the parties agreed that the first items of the account sued for, and the defences thereagainst, should be referred to Mr Patrick Dunlop, auctioneer, Altonhill, Kilmaurs, with power to examine the defender; call both parties and witnesses before him and dispose of the question of expenses. As to the remaining item of the account, for £42, evidence was led before the said Sheriff-Substitute. The said Patrick Dunlop accepted the reference, and had various meetings with the parties, at which the questions submitted to his determination were duly explained. On the 22d July 1870, he pronounced the following award:—"Having heard both parties on this case, and examined the papers and accounts relative thereto, I find that the four first items in the account sued for are admitted by the defender, amounting to £58 10 0

I am also satisfied that the defender, in payment of that sum, paid in cash, 6th January 1865, . £20 0 0

Sold to the pursuer four cows, valued, at June 1866, . . . 28 0 0

And one cow, June 1866, bought on commission for and delivered to pursuer, 9 10 0

57 10 0

Balance due by defender, £1 0 0

I am further of opinion that the expenses connected with the above items should be paid by the pursuer and defender in equal portions."

Then, on the 5th October 1870, the Sheriff-Substitute pronounced an interlocutor, in which, on a review of the record, proof, productions, and whole process, he found, in terms of the foregoing award, that there was a sum of £1 sterling due to the pursuer by the defender under the first four items of the account appended to the summons, and that the costs of the reference were to be paid by the pursuer and defender in equal portions; found, as regarded the remaining item of £42, under date the 6th of December 1866, in the account sued for, the pursuer had failed to prove that the four fat cows in question were sold by the defender, or by any person employed by him, or for whom he was responsible; therefore assoilzied the defender from the conclusion of the action; found the pursuer liable in expenses; allowed the defender to give in an account, and remitted the same, when lodged, to the auditor to tax and report, and decerned.

The Sheriff-Substitute thereafter pronounced the following interlocutor:—

"*Kilmarnock, 5th January* 1871.—The Sheriff-Substitute having resumed consideration of the process, with the Auditor's report on the amount of taxed expenses, and having heard parties' procurators thereon, sustains the defenders' objections to said report. Finds the conclusions of the action being upwards of £100, the taxation must proceed upon the highest scale allowed by the table of fees. Therefore decerns against the pursuer for £14, 16s. 9d. sterling of taxed expenses."

The pursuer then raised this action of reduction of the award and interlocutors above mentioned, and which also called for production of the award, with relative account and interlocutor of the Sheriff. The pursuer pleaded, *inter alia*, that "the said award and relative statement of account were null and reducible in respect they are *ultra vires compromissi*," that they were "altogether false and erroneous, pronounced under essential error as to the true state of the accounts between the parties and the meaning of the reference, and without due inquiry, and therefore ought to be reduced and set aside." In support of these pleas the pursuer averred that the defender, having admitted the items in the account sued for, amounting to £58, 10s., the only question submitted to the referree related to the two sums of £28 and £20, for which the defender claimed credit. That the statement of the defender that the £28 was the price of four cows, sold in June 1866, and unpaid, was untrue. That as to the other £20, no particulars were given, no receipt was produced, and no reason assigned for the defender being entitled to credit therefor; and further, that the said arbiter was not entitled to allow any deduction to the defender for the sum of £9, 10s. which was disputed by the pursuer, was not claimed in the defences, and was not embraced in the said reference. In respect to the interlocutors of the Sheriff-Substitute, the pursuer pleaded that they were "null and reducible in respect they were founded upon and gave effect to an award which was itself null, and were pronounced in absence of the pursuer."

The defender pleaded, *inter alia*, that "the pursuer had stated no relevant or tenable grounds of reduction; that as the interlocutors sought to be reduced were pronounced *in foro*, and in an existing process, they were final, and not subject to