capable of acting independently or is put under restrictions by the terms of the gift or conveyance.

On the whole, I think this question should be answered in the affirmative.

LORD ORMIDALE concurred.

LORD GIFFORD—The question here, I think, really turns upon whether the beneficiary's interest in the residue has vested *a morte testatoris*, for if that be so the beneficiary is entitled to avail himself of the fund at once, provided all intermediate interests have been duly provided for. I think that the residuary legatees have had a vested right conferred on them in the present instance, and accordingly I agree with your Lordships in the decision arrived at.

The Court therefore answered the question in the affirmative.

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

Counsel for Second and Third Parties—M'Laren —Macfarlane. Agents — Morton, Neilson, & Smart, W.S.

Tuesday, December 3.

SECOND DIVISION.

SPECIAL CASE—PATERSON AND ANOTHER (MACFARLANE'S TRUSTEES).

Succession — Legacy — Falsa demonstratio — *"Brother James' Son," where there was only Daughter.*

A truster bequeathed one-sixth of the residue of his estate to "my late brother James' son." His brother James left no son but he left an only daughter. Another brother, however, named David, left an only son. Little or no correspondence passed between the testator and the families of these two brothers. *Held,* in the circumstances of the case—(1) that the bequest was not void on the ground of uncertainty; (2) that as it was more probable that the testator should have mistaken the sex of his brother's child than the name of his brother, James' daughter was entitled to the bequest.

By holograph will, dated 10th June 1875, Alexander Macfarlane directed the residue of his estate to be divided into six portions, as follows:—(1) One portion to his late brother John's three daughters; (2) One portion to his late brother James' "son;" (3) One portion betwixt his brother Henry's son and daughter; (4) One portion to William S. Macfarlane, his brother; (5) One portion to Peter Macfarlane, his brother; (6) One portion to George Macfarlane, his brother, which, if not claimed within three years, was "to be divided amongst the other five portions." In the case of the second portion a difficulty arose with respect to the legatee. The deceased's brother James had only one child, a daughter, Mrs Henderson. But the truster's deceased brother David Jobson Macfarlane, left an only "son," William Henry Macfarlane.

The trustees brought this Special Case in order to have it determined, *inter alia*, to whom they were to pay the bequest, or whether it was altogether void.

The third parties to it, Mrs Elizabeth Macfarlane or Henderson, the only child of the deceased James Macfarlane, the testator's brother, and her husband, maintained that she had the best right, as her father's name was distinctly mentioned and one child clearly indicated, and that the mistake in the sex was unimportant, the legacy being meant for James' child. Moreover, the testator in the settlement named his brothers in proper rotation of their ages, and James was named second, being second oldest.

The fourth party, William Henry Macfarlane, only son of the deceased's brother David Jobson Macfarlane, maintained that he had the best right as being the only son of a deceased brother of the testator named "David Jobson," but by mistake named "James" in the bequest, the legacy being undoubtedly intended for a son of a brother and not a daughter of a brother. David Jobson Macfarlane was further the only one of the deceased's brothers who had only one son. Otherwise, he maintained that the second portion fell to be treated as intestate succession.

The other legatees under the will, the second parties, maintained that the legacy was ambiguous and ineffectual by reason of uncertainty, and that the portion fell into the general residue, and was divisible among the legatees of the various portions in the same manner as was directed to be done with the sixth portion in the event of its not being claimed by George within the prescribed time; or otherwise, that it was not tested on.

Little or no intercourse or correspondence had ever passed between the testator and his deceased brothers James and David or their families. The testator had regular correspondence with his brothers William and Peter. There was nothing, however, that could be founded on to indicate the deceased's intentions under his settlement farther than the settlement itself bore.

Authorities cited—*Ryall* v. *Hannam*, July 1847, 10 Beavan, 536; *In re Rickit*, July 1853, 11 Hare, 299; *Lord Camoys* v. *Blundell*, July 1848, 11 Clark and Finelly's H. L. Ca. 778; *Drake* v. *Drake*, February 1860, 8 Clark and Finelly's H. L. Ca. 172.

At advising—

LORD JUSTICE-CLERK—The question is to whom the legacy left by the testator in favour of the son of his brother James belongs, or whether it is void from uncertainty? He had a brother James, who had no son, but had a daughter. He had another brother, David Jobson Macfarlane, who had a son. The question is—First, Whether the bequest can be read in favour of the latter? I am very clear that it cannot. A man might easily mistake or forget the name, or even the sex, of his brother's child, when separated, as here, by time and distance; but the names of his brothers he could not fail to remember while he remembered anything. Then, secondly, is there such uncertainty here as will void the legacy? I think there is reasonable certainty that he meant the legacy for his brother's child, and that the mistake in regard to sex is immaterial.

LORD ORMIDALE and LORD GIFFORD concurred.

The Court therefore answered in favour of the third parties to the case.

Counsel for First and Second Parties—Mitchell. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Third Parties—Graham Murray. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Fourth Party—Guthrie. Agent—Alexander Fleming, S.S.C.

Saturday, December 7.

SECOND DIVISION.

[Lord Adam, Ordinary.

PAXTON'S EXECUTORS *v.* PAXTON.

Trust—Legacy made Burden on Heritage with Power to Legatee to Sell, but no Direct Conveyance—Right to sue Heir-at-law for Payment where Legatee Dead without Payment.

A husband left his whole means and estate to his wife in liferent, and to his heirs and executors and assignees whomsoever in fee. Subsequently by codicil he bequeathed a specific legacy to his wife, declaring the same until paid a real burden on the heritable estate, and conferring on her power to sell the heritable property if necessary to meet this. There was no direct disposition of the heritage to the wife. The wife did not receive payment of the legacy during her lifetime, and never exercised the power of sale, but died leaving a general disposition of all her estate in favour of executors. *Held*, in a question between them and her husband's heir-at-law, whose title had been made up independently of the deed of settlement, that the former were entitled to obtain payment from the latter of the amount of the specific legacy, less any sums received by the widow from the moveable estate of her husband.

Prescription — Holograph Writings and Mems. in Note-books—Proof of Resting-owing.

Seventeen years after a party's death a claim was made against his representative, founded on a prescribed promissory-note, endorsed by the debtor, and having markings of payments of interest appended holograph of him, and also on certain memoranda relating to the interest which had been entered by the deceased in pass-books. No interest had been paid for seventeen years. *Held* (*revg.* the Lord Ordinary (Adam), *dub.* Lord Gifford) that in the circumstances there was not sufficient evidence of resting-owing.

Observed (*per* Lord Gifford) that the promissory-note was an adminicle of proof, not of the debt, but of its having at one time existed.

Andrew Paxton died on 4th August 1861 leaving a disposition and settlement conveying his whole estate, heritable and moveable, to his widow Mrs Margaret Storey or Paxton in liferent, and his own heirs, executors, and assignees whomsoever in fee. By codicil, dated 23d June 1857, appended thereto, he also bequeathed to his widow a legacy of £600, and declared the same to be payable to her twelve months after his death, and that it should form a real burden on his heritable estate until paid. He also gave his widow power to sell such portion of the heritable estate as should be sufficient to discharge the legacy and pay expenses. The widow was confirmed executrix, and after payment of debts the estate amounted to no more than £90, 14s. 4d. She died on 24th February 1877 leaving a disposition and settlement nominating her brothers, the pursuers in this action—Ralph, Richard, and John Storey,—her executors, and conveying to them her whole means and estate, heritable and moveable. Mrs Paxton never exercised her power to realise the heritable estate in payment of the £600 legacy, and the pursuers asserted it was still a burden on the estate, and claimed it from Adam Paxton, the defender, who had made up his title to the heritage as heir-at-law independently of the disposition and settlement. The defender answered that Mrs Paxton had obtained payment otherwise. This question formed the first point of the case.

The pursuers further averred, *inter alia*—"By promissory-note, dated 4th June 1845, the deceased Andrew Paxton bound himself to pay to Ralph Storey six months after date the sum of £223 sterling for value received, and by holograph acknowledgment, of date 1859, Paxton acknowledged to be owing Storey £223 sterling. The interest was duly paid by Paxton up to the term preceding his death, and thereafter by his widow. By another holograph writing, dated 22d July 1846, Paxton acknowledged to have received from Storey £10. The holograph acknowledgment contained in the pass-book embraces this sum. The pursuers as executors of the deceased Ralph Storey senior are now in right of these two sums, amounting together to £233, and interest is due thereon from 1861." There was also a claim for £30 founded on similar entries.

The defenders objected to these claims, impugning the genuineness of the holograph writings, and further objecting to them as prescribed.

The pursuers further stated that they were ready to give the defender credit for £90 14s. 4d. (the balance Mrs Paxton had in her hands as executrix), and for one-fifth of Ralph Storey senior's moveable estate, which had vested in Andrew Paxton in right of his wife.

The pursuers pleaded, *inter alia*,—"1. The foresaid legacy having vested in the said Mrs Margaret Storey or Paxton, and the same having been carried by the disposition and settlement executed by her in favour of the pursuers, they, as executors foresaid, are entitled to decree therefor, with interest from the date of her death as concluded for. 2. In any view, the said legacy having been declared a real burden on the heritable estate of the said deceased Andrew Paxton, the defender is not entitled to take up the succession without discharging it by making payment of the sum so constituted. 3. The foresaid sums of £223 and £10 and £30 being due and resting-owing, the pursuers as executors of the said Ralph Storey senior are entitled to decree therefor with interest."

The defender pleaded, *inter alia*,—"1. The claim for the alleged legacy is unfounded, in respect (1) that the writings libelled are insufficient to constitute a real burden upon the property, or any obligation enforceable against an heir-at-law