the granter of the provision. The Court held that no right had vested in him to the provision in the marriage-contract, and repelled a plea that such right vested at his birth. The grounds of decision are not, to my mind, all entirely satisfactory. But, just as I think the case of *Beattie's Trustees* no authority against my views, so, on the other hand, I do not rest on this case of *Grant's Trustee* as any authority in their favour. I think the cases to be in their circumstances essentially different. I decide the present case on its own proper grounds.

The result of these views would be to find that the sum payable to the children under the marriage-contract was £2000, not £3000, and that this sum is due to the children of Mrs Crawford in their own right. The sum would be payable out of the proceeds of the policy, including the bonus, which are sufficient to pay it, and to leave a surplus for the widow's legal claims. I agree in thinking that the holograph writing of 31st May 1869 has the effect of an antenuptial contract in favour of the second wife.

LORD DEAS—The important question is the first. I am of opinion that a right vested in the first child at its birth, and that when the second child was born the right became absolute to a provision of £3000. I give no opinion whatever on the point whether the children's provisions were such as to enable them to compete wtth onerous creditors of the father. But even assuming, with Lord Kinloch, that they were not, I have come very clearly to the same conclusions as your Lordship in the chair. The provisions in the marriage-contract of 1831 are in favour of the "children who may be procreated of the marriage." I find nothing in the deed tending to qualify these words, except that the provisions were not payable till after the death of the father, which single element has never been held sufficient to postpone vesting. It seems to me impossible to arrive at Lord Kinloch's conclusion without going counter to the well-considered decision in the case of *Beattie*, which I regard as substantially the same as the present.

LORD ARDMILLAN concurred with the Lord President and Lord Deas.

The Court found—

In regard to *Quest.* 1, "That the full provision of £3000 vested in the two children of the marriage at their birth."

Quest. 2. Answered in the affirmative.

Quest. 3. Superseded.

Quest. 4. "That Mrs Walkinshaw, the fifth party, is not entitled to *jus relictæ* out of any part of the proceeds of the policy of assurance."

Quest. 5. "That the parties hereto of the first, second, third, and fourth parts are not entitled to payment of the unsecured balance of the provision of £3000 over and above the sum of £2480, proceeds of said policy, out of the moveable estate of the deceased James Walkinshaw, in competition with the said fifth party claiming the furniture and other moveables provided to her by the holograph writing of 31st May 1869, or the value thereof, but that she is entitled to claim the said furniture and other moveables, or value thereof, preferably to the said other parties hereto."

Agents for the Fifth Party—M'Ewen & Carment, W.S.

Agent for the other Parties—John Martin, W.S.

Friday, May 31.

STOPFORD BLAIR'S TRUSTEES AND OTHERS, PETITIONERS.

(FOR OPINION OF THE COURT.)

Succession—Legacy—Vesting.

Held that a bequest of £1000 to each of the children of the testator's daughter by her present marriage was limited to children in existence at the death of the testator, and did not include a child born after that date.

This was a case for the opinion of the Court of Session, remitted by the Court of Chancery in England, arising out of certain proceedings in that Court regarding the distribution of the estate of the late Lieutenant-Colonel W. H. Stopford Blair of Penninghame.

Colonel Stopford Blair died 20th September 1868, leaving large heritable and moveable property. He was survived by a son, Edward James Stopford Blair, now of Penninghame, and a daughter, Elizabeth Ellen, who was married in 1847 to Edward Heron-Maxwell. By ante-nuptial contract between Mr and Mrs Heron-Maxwell, to which Colonel Stopford Blair was a party, the latter bound himself to provide £10,000 for the spouses and the survivor in liferent, and for the children to be procreated of the marriage in fee.

In May 1848 Colonel Stopford Blair executed a last will and testament, by which he bequeathed two further sums of £10,000 each, after certain liferents, to be disposed of in the same manner as the sum provided in the marriage contract of his daughter.

In June 1857 the testator added a codicil to the will, containing the following bequest:—"I bequeath to each of her (Mrs Heron-Maxwell) children by this her present marriage £1000 each, free of duty, but to be placed at the discretion of the marriage trustees for their special benefit while under age." He also directed the residue of his personal property at the demise of all the annuitants to be divided between his two children.

On 10th August 1866 he executed a second codicil:—"Having intimated to my son-in-law, E. H. Haxwell, my desire to relieve him of the heavy burden of his insurance (viz. £280) on his life for £8000, to be paid over at his death for the benefit of his family, I hereby bequeath that the clear sum of £8000 be at due time paid over from the residue of my property for the purpose intended."

There were nine children of the marriage between Mr and Mrs Heron-Maxwell at the date of the testator's death. Another, Margaret Emily, was born 19th July 1870.

It was agreed that Colonel Stopford Blair should be held to be a domiciled Scotchman at the date of the will, and thenceforth down to his death.

The questions submitted to the Court were the following:—

"Whether, according to the law of Scotland, the said Margaret Emily Heron Maxwell and any other child of the marriage of the said Edward Heron-Maxwell and Elizabeth Ellen, his wife, born after the death of the testator, is entitled to a legacy of £1000 under the bequest set forth in the 3d paragraph of this case? Or

"Whether such bequest is limited to the children alive at the death of the testator?"

The parties, viz.,—(1) The testamentary trustees of Col. Stopford Blair; (2) The marriage-contract trustees of Mr and Mrs Heron-Maxwell; (3) Mr Heron-Maxwell as administrator in law for Margaret Emily Heron-Maxwell, his youngest child,—presented a petition under 22 and 23 Vict. c. 63.

SOLICITOR-GENERAL and MARSHALL, for the second and third parties, argued that the word "children" in codicil of 1857 must receive the same meaning as in the will itself, where the word undoubtedly meant the whole children of the marriage, whether born before the testator's death or not. The provisions of the will in regard to annuities, and especially the bequest of £8000 by the second codicil, which was not to be paid till Mr Heron Maxwell's death, showed that the testator contemplated a long continuance of the trust created by his will, and removed any presumption in favour of limiting the bequest of £1000 each to the children in existence at his death, which might have arisen had he directed immediate distribution of his estate.

SHAND and BALFOUR, for the first parties, maintained that the bequest of £1000 each was limited to the children in existence at the death of the testator; *Davidson's Trustees*, 15th July 1871, 9 Macph. 995; *Wood*, 18th January 1861, 23 D. 338; *M'Dougall*, 6th February 1866, 4 Macph. 372.

The Court answered the first alternative in the affirmative, and the second in the negative.

Agents for First Parties—Tods, Murray, & Jamieson, W.S.

Agents for Second and Third Parties—J. C. & A. Steuart, W.S.

Friday, May 31.

SECOND DIVISION.

GRAY *v.* MALLOCH.

Servitude.

Clause in titles of urban subjects, by which servient tenement was debarred from erecting any other buildings on any other part of said tenement, *Held* to constitute a servitude of light and access, and not to prevent the construction of underground passages or alterations on the existing buildings not injurious to dominant tenement.

This was an appeal from a decree of lineing by the Guild Court of Glasgow, granted on a petition presented by Charles Malloch, glass merchant, 12 Croy Place, Glasgow, against certain parties, including Colin Campbell Gray, merchant in Glasgow, and praying the Court to line the petitioner's property, and to authorise them to erect the buildings, and execute the operations, all as shown by plans produced. The petitioner set forth that he owned certain subjects on east side of Miller Street, Glasgow, and forming Nos. 62 and 66 of that street, and that he proposed to make alterations on the back buildings of said subjects; to connect the front buildings with the said back buildings, and to connect both back and front buildings with his property to the north by means of passages underground and openings in the walls, as shown on ground and elevation plans produced. To this petition answers were lodged by Colin Campbell Gray, proprietor of the two upper storeys of Nos. 62 and 66 Miller Street, an apartment at the foot of the staircase leading up to the said two flats, a cellar, and two sunk cellars under the said two flats, the one going through the other in the back building behind the said tenement, together with a coal cellar in south-west corner of said back buildings. He pled (1) that the proposed alterations and erections, being in violation of the conditions in the joint titles to their respective subjects, and to an agreement between their predecessors, the prayer should be refused; (2) that the proposed alterations would materially interfere with and alter the respondent's rights in the subjects, and endanger the stability of his property. This plea, however, was not insisted on at the bar.

The common title was a disposition dated 20th December 1791, which declared that the front of said tenement "shall be composed of ashlar work, and shall consist of a half sunk storey and two square storeys, and garrets, and no more, but may be of a less composition or size." By disposition dated 30th July 1798, the common author conveyed to the predecessor of the respondent the two upper flats and the cellars of said tenement, with the declaration "That I, and all other persons acquiring right from me, shall have no right of opening or entry into the foresaid staircase leading up to the said two flats or storeys, or any access thereby; and further, that we shall be prohibited and debarred from erecting at any time hereafter any other building on any other part of the foresaid steading of ground, than those at present thereon, or of raising the back buildings thereon higher than they presently are, except that we shall have liberty to raise the foresaid back building three feet above its present height, which is 26 feet above the ground, and in these terms the said Robert Gray shall have a right of servitude over the remaining parts of the said steading for the preservation of the lights of the subjects before disposed, and which is now conveyed to them."

In the year 1802 the respective predecessors of the petitioner and respondent executed an agreement, which was recorded in the Burgh Register of Sasines, by which, with the view of avoiding misunderstanding relative to the execution of proposed buildings by Thomas Graham, the petitioner's predecessor, a ground plan of the proposed buildings was approved of, on the express condition of the said Thomas Graham becoming bound to observe the conditions after expressed, "which he hereby accordingly binds and obliges himself, his heirs and successors in said property, to fulfil and perform, as follows, viz., the said Thomas Graham, for himself and his foresaids, renounces and for ever gives up the right or liberty of raising the foresaid back building and cellars aforesaid higher than 26 feet, and shall and hereby does confine the said intended building and roof to the height of 26 feet above the level of the court, along the whole extent of said steading; and in like manner the said Thomas Graham renounces the liberty of laying a staircase to the foresaid back buildings; and in general the said Thomas Graham binds and obliges himself and his foresaids not to make any building or erection whatever on the foresaid close, other than those now agreed to.

On 3d January 1872, the Dean of Guild granted decree of lineing.

The respondent appealed.

WATSON and PATERSON, for him, maintained that the object of the servitude was to preserve intact the character of both dominant and servient tenements, and that the buildings proposed to be