as under the old statute was intended to be reserved, and that the standing committee's decision was to come in place of the former right of appeal.

The Court reduced the proceedings complained of.

Counsel for the Pursuer — Jameson — Guy. Agents—Nisbet & Mathison, S.S.C.

Counsel for the Defenders—Graham Murray—Napier. Agents—Fodd, Simpson, & Marwick, W.S.

Friday, May 24.

FIRST DIVISION.

YOUNG AND OTHERS (EARL OF DALHOUSIE'S TRUSTEES) *v.* MACDONALD AND OTHERS.

Succession — Vesting — Destination-Over — Vesting Subject to Defeasance.

A testator directed his trustees to realise the residue of his estate and to pay the free annual proceeds thereof to his sister during her life, and at her death to divide the residue among his nephews and nieces *nominatim* in certain proportions. The deed further provided that "if any of my said nephews or nieces die before my sister, leaving a child or children, such child or children shall be entitled to their parent's share, and if any of my said nephews or nieces, other than my said nephew Edward Bannerman Ramsay or my said niece Patricia Ramsay, die without issue, the share of such deceaser or deceasers shall fall to their surviving brothers and sisters equally among them if more than one, the issue of any deceased brother or sister taking the share which would have fallen to their parent if in life, or if there be no surviving brother or sister, and no issue of a deceased brother or sister of such deceasing nephew or niece, then the share of such deceasing and childless nephew or niece shall on such decease go to such of my said nephews and nieces above named as may be then living, equally among them if more than one."

Held that the surviving brothers and sisters of one of the nephews who had predeceased both the testator and the liferentrix were entitled to take his share of residue as conditional institutes, and that the share of Edward Bannerman Ramsay, who had predeceased the liferentrix, had vested *a morte testatoris* subject to defeasance in the event of the beneficiary leaving children, but as he had died without issue, it fell to the executor under his settlement.

The Right Honourable Fox, Earl of Dalhousie, died on 6th July 1874. He left a trust-disposition and settlement by which he conveyed to trustees his whole estates heritable and moveable. By the last purpose of the deed the trustees were directed to realise the residue of his estate, and pay the free annual interest thereof to his sister, Lady Christian Maule, during her life, and at her decease to divide the residue among his nine nephews and seven nieces specified in the deed, to the effect of giving each nephew £6000, and each niece £4000. The purpose contained, *inter alia*, the following provisions:—"Provided always and declaring that if any of my said nephews or nieces die before my sister, the said Lady Christian, leaving a child or children, such child or children shall be entitled to their parent's share, and if any of my said nephews or nieces, other than my said nephew Edward Bannerman Ramsay or my said niece Patricia Ramsay, die without issue, the share of such deceaser or deceasers shall fall to their surviving brothers and sisters equally among them if more than one, the issue of any deceased brother or sister taking the share which would have fallen to their parent if in life, or if there be no surviving brother or sister and no issue of a deceased brother or sister of such deceasing nephew or niece, then the share of such deceasing and childless nephew or niece shall on such decease go to such of my said nephews and nieces above named as may be then living, equally among them if more than one. And with regard to the £6000 herein before directed to be apportioned to my said nephew Edward Bannerman Ramsay, I desire that in the event of his predeceasing me without issue the same shall go, one-half to the said Christina Ramsay or Elliot, whom failing to her issue, equally among them, and the other half to the said Georgina Harvey Ramsay or Hay, whom failing her issue, equally among them." The truster left means and estate sufficient to pay all the bequests above mentioned. He was predeceased by one of the nine nephews, Captain Henry Macdonald, who died in March 1873 without issue.

In December 1883 another nephew, Major-General Edward Bannerman Ramsay died, testate, but without issue.

Lady Christian Maule died on 21st March 1888. In her settlement, dated August 1887, she directed her trustees how they were to deal with the legacy of £6000 bequeathed by the Earl of Dalhousie to the said Edward Bannerman Ramsay in the event of its being found to have lapsed by his predecease of her, the liferentrix.

After the death of Lady Christian Maule, questions arose as to the sums of £6000 bequeathed respectively to Captain Henry Macdonald, and to Major-General Edward Bannerman Ramsay under the trust-disposition of the Earl of Dalhousie.

This special case was accordingly presented by (1) Earl of Dalhousie's trustees; (2) Lady Christian Maule's trustees; (3) George Dalhousie Ramsay and others, certain of the nephews and nieces of the Earl of Dalhousie; (4) the surviving brothers of the said Captain Henry Macdonald; (5) the executor of the deceased Major-General Edward Ramsay, and another.

It was maintained by the fourth parties that they were, as conditional institutes, entitled to the £6000 bequeathed to their brother Captain Henry Macdonald, in virtue of the survivorship clause above quoted, contained in the trust-disposition of the Earl.

The parties of the second part maintained that the bequest lapsed in consequence of his having predeceased the testator; that it fell to Lady Christian Maule as residuary legatee, and was now payable to her trustees and executors.

A further question arose with regard to the

sum of £6000 bequeathed to Major-General Edward Bannerman Ramsay under the same trust-disposition and settlement. The parties of the fifth part maintained that the bequest vested in Major-General Edward Bannerman Ramsay on the death of the testator, or at all events vested in him at said date, subject to defeasance only in the event of his predeceasing Lady Christian Maule and leaving issue, and that it thus fell to be paid to Colonel Elliot, an executor under Major-General Edward Bannerman Ramsay's will. The parties of the third part, on the other hand, maintained that in consequence of Major-General Edward Bannerman Ramsay having predeceased Lady Christian Maule he never took any vested interest in the bequest of £6000; that it accordingly lapsed and fell to Lady Christian Maule, as residuary legatee under the Earl's trust-disposition and settlement, and was now payable to her trustees and executors.

The following questions were submitted to the Court—"(1) Whether the bequest of £6000 by the Earl of Dalhousie to Captain Henry Macdonald falls to the fourth parties, equally among them, in virtue of the survivorship clause contained in the trust-disposition and settlement; or whether the said bequest lapsed in consequence of Captain Macdonald predeceasing the testator? (2) Whether the bequest of £6000 by the Earl of Dalhousie to Major-General Edward Bannerman Ramsay, vested in him *a morte testatoris;* or whether the said bequest lapsed in consequence of his predeceasing the liferentrix?"

Argued for the fourth parties—The fact that Captain Henry Macdonald predeceased the testator did not in any way prevent the fourth parties taking the benefit of this legacy as they took as conditional institutes. The testator provided that they were to take failing issue of the beneficiary, and in preference to his own residuary legatee. The circumstances contemplated and provided for had occurred—*Denholm*, January 1726, M. 6346; *Dunlop*, June 2, 1812, F.C.; *Moray*, December 15, 1782, M. 8103; *Halliburton* v. *Halliburton*, June 26, 1884, 11 R. 979; *Martin* v. *Holgate*, L.R., 1 Eng. and Ir. App. 175.

Argued for the second parties—As Captain Macdonald did not survive the testator, the bequest in his favour lapsed—little benefit could be got from authorities, as the case really depended upon facts. There was no natural obligation here which fell to be implemented, the testator was not *in loco parentis* to the beneficiary.

Argued for the fifth parties — As Edward Ramsay survived the testator, his legacy vested *a morte testatoris* subject to defeasance if he had issue; as he died childless it fell to be disposed of by his settlement—*Maxwell* v. *Wylie*, May 25, 1837, 15 S. 1005; *Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H. of L.) 217; *Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697; *Fraser* v. *Fraser's Trustees*, November 23, 1883, 11 R. 196; *Ross' Trustees* v. *Ross*, December 18, 1884, 12 R. 378; *Finlay's Trustees* v. *Finlay*, July 6, 1886, 13 R. 1052; *Byar's Trustees* v. *Hay*, July 19, 1887, 14 R. 1034.

Argued for the third parties—The term of distribution was the death of the liferentrix, till which time no vesting could take place. Edward Ramsay predeceased the liferentrix, so his share lapsed and fell into residue to be disposed of by Lady Christian Maule's settlement—*Young* v. *Robertson*, 4 Macq. 314; *Laing* v. *Barclay*, July 20, 1865, 3 Macph. 1143; *Snell's Trustees* v. *Morrison*, March 20, 1877, 4 R. 709; *Wannop* (*Haldane's Trustee*) v. *Murphy*, December 15, 1881, 9 R. 269; *Water's Trustees* v. *Waters*, December 6, 1884, 12 R. 253.

At advising—

LORD PRESIDENT—[*After narrating the circumstances above mentioned.*]—The first question therefore which we have to determine is, whether seeing that Captain Henry Macdonald predeceased not only the lifrentrix but also the testator, his share of the residue did not lapse? or whether, on the other hand, there is anything in the destination here which will entitle the fourth parties to take under it? What the testator desired was that each of his nine nephews should receive out of the residue of his estate a sum of £6000, and each of his seven nieces a sum of £4000, and after so directing his trustees the testator inserted the following provisos:—"Provided always and declaring that if any of my said nephews or nieces die before my sister, the said Lady Christian, leaving a child or children, such child or children shall be entitled to their parent's share, and if any of my said nephews or nieces, other than my said nephew Edward Bannerman Ramsay, or my said niece Patricia Ramsay, die without issue, the share of such deceaser or deceasers shall fall to their surviving brothers and sisters equally among them if more than one, the issue of any deceased brother or sister taking the share which would have fallen to their parent if in life, or if there be no surviving brother or sister, and no issue of a deceased brother or sister of such deceasing nephew or niece, then the share of such deceasing and childless nephew or niece shall on such decease go to such of my said nephews and nieces above named as may be then living, equally among them if more than one."

It is to be observed that in these two provisos there is a variation in the expression—thus it is provided in the first, that if a nephew or niece dies before the testator's sister, leaving issue, such issue is to take the parent's share; while in the second proviso the words "before my sister" are omitted, and it is provided that if any of the said nephews or nieces die without issue, the share of the deceaser is to go to their surviving brothers and sisters equally among them if more than one.

Now, though the words "before my sister" are not expressed in this latter proviso, it appears to me that they may fairly be implied; and if that be so, then the fourth parties here are entitled to prevail in respect that they are the brothers of a nephew who died before the testator's sister and left no issue.

But it was urged on the other hand that we should read into this clause the words "die after me but before my sister" and that what the testator really meant was, that before the brothers or sisters of any nephew could take, such nephew must have survived the testator and died before the liferentrix. I cannot see any ground for reading in such words, nor do I think that they are in any way implied.

Again, it was urged that the death of the

liferentrix was the time at which the parties among whom the residue was to be divided were to be sought for; and that as Captain Henry Macdonald had predeceased the liferentrix, his share had lapsed. I am not however prepared to adopt so constrained a construction of this clause of residue. I prefer to give to the words their literal interpretation, and I think that there is here a conditional institution of the brothers and sisters of a nephew dying without issue, and that the fourth parties are accordingly entitled to take their brother's share.

The second question in this case relates to the share of another nephew Edward Bannerman Ramsay, but it stands in a different position. He left no children, so the first proviso does not apply to his case; nor does the second, because he is expressly excluded by its terms. He died without leaving issue, surviving the testator, but predeceasing the liferentrix. The question accordingly which we have to determine is, whether this bequest of £6000 vested in the beneficiary *a morte testatoris*, or whether it lapsed by his predeceaser of the liferentrix?

It was urged against the legacy vesting *a morte* that there is here a provision that if the beneficiary died leaving children they were to take their parent's share; and it was argued that such a provision suspended vesting. I cannot adopt such an argument; on the contrary, I think that this is a case of vesting subject to defeasance in the event of children coming into existence. In such a case they would take their parent's share and vesting would be defeated.

I am therefore for answering the second question by holding that this bequest vested in the beneficiary *a morte testatoris*, subject, however, to defeasance in the event of his having issue, which it appears he had not.

Lord Shand—I agree with your Lordship on both points, and cannot say that to my mind this case is attended with the slightest difficulty. With regard to the £6000 bequeathed to Captain Henry Macdonald, we must hold that the fourth parties are entitled to it as conditional institutes under the will. I think we cannot resist the view that the testator meant the fund to go to the legatee himself if he survived him, but that if he predeceased that date it should go to his issue if he had any, and that if he had none it should go to his brothers and sisters. The provision is quite distinct, and I agree with your Lordship that no reason whatever has been shewn for reading in any words which would deprive the fourth parties of the benefit which the testator clearly intended them to take, merely because the beneficiary predeceased the testator. There is here a *predilectio* in favour of the children of the beneficiary, whom failing of his brothers and sisters, in preference to the residuary legatee of the testator.

I think, therefore, that the fourth parties are entitled to take in virtue of the destination-over contained in this last purpose of the trust-deed.

As regards the bequest to Edward Bannerman Ramsay, it is in a somewhat different position. He survived the testator but predeceased the liferentrix leaving no issue. I am of opinion that his legacy of £6000 does not fall into residue and go to Lady Christian Maule or her representatives, but goes according to the directions of his will. The legacy vested in him *a morte testatoris* but subject to defeasance in the event of his leaving issue, which he did not do. The case is, I think, indistinguishable from that of *Snell's Trustees*, March 20, 1877, 4 R. 709, and from the recent and most authoritative judgment of the House of Lords in the case of *Gregory's Trustees* (*Hood* v. *Murray*, January 21, 1887, 14 R. 368) in which the decision of this Court has been reversed. In that case the House of Lords dealt with the case of *Wannop* (*Haldane's Trustees*) v. *Murphy*, December 15, 1881, 9 R. 269, and though their Lordships were not dealing with the case by way of appeal, they practically reversed the decision of this Court. The result of the reversal of the decision in *Gregory's Trustees* is that the House have upheld the doctrine of vesting subject to defeasance, so here the vesting in General Ramsay was subject to defeasance by an event which, as matter of fact, never occurred.

Lord Adam concurred.

Lord Mure was absent.

The Court answered the first alternative of both questions in the affirmative.

Counsel for the First Parties—C. K. Mackenzie.

Counsel for the Second Parties—C. J. Guthrie. Agents for First and Second Parties—John Clerk Brodie & Sons, W.S.

Counsel for the Third Parties—Gillespie. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Fourth Parties—Sir C. Pearson—Stuart. Agents—Alexander Campbell, S.S.C.

Counsel for the Fifth Parties—Begg. Agents—John Clerk Brodie & Sons, W.S.

VALUATION APPEAL COURT.

Saturday, February 2.

(Before Lord Fraser and Lord Trayner).

THE CRAIGTON CEMETERY CO. (LIMITED) *v.* ASSESSOR OF THE LOWER WARD OF THE COUNTY OF LANARK.

Valuation Roll—Lands Valuation Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 6—*Cemetery—Yearly Value.*

Land belonging to a cemetery company, laid out as a cemetery, from which the company derived an annual income by allotting the land in portions for burial purposes, was entered in the valuation roll at a yearly value based upon the rent at which in its actual state as a cemetery it might be expected to let to a tenant to be used by him in the same manner as it was used by the company. The company appealed against the valuation, and contended that the land ought to be entered upon the roll at its agricultural value. *Held* that the valuation was *right.*