be followed—*M'Nish*, 7 R. 96; *Henderson*, 17 R. 293. It was because such an indication of intention was held to be clear that the Court gave the children of a predeceaser a share of a lapsed share in the case of *M'Culloch*, 19 R. 777. It was contended for the children of James and Robert that an indication of such an intention was given here, because the trust settlement provided that the children were to "be entitled to succeed to their parent's share . . . in the same manner and as fully as if such parent had survived." I do not think, however, that these words express or indicate any intention to give the children more than the parent's share, that is, the share originally destined to the parent. In *M'Nish's* case the words were just as favourable to children as they are here, for they directed that the children should be "entitled to the share of their mother as if she had been in life." This did not, however, it was decided, entitle them to share in a lapsed share. But assuming even that this matter were doubtful, I think it quite settled by the case of *Robertson* v. *Young* that the clause of survivorship excludes the children of James and Robert from any participation in the lapsed share of John.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent at the hearing.

The Court pronounced this interlocutor:—

"Answer the third alternative of the first question in the affirmative, the the third question in the affirmative, and the first alternative of the fourth question in the affirmative: Find and declare accordingly."

Counsel for the First and Second Parties—Lees—Sym. Counsel for the Third Parties—C. N. Johnston—Younger. Counsel for the Fourth Parties—Jameson—Aitken. Agent—F. J. Martin, W.S.

Thursday, March 2.

SECOND DIVISION.

CAMPBELL WHITE AND ANOTHER (WHITE'S TRUSTEES).

Succession—Vesting—Liferent.

A testator who died in 1860 directed his trustees to set aside £7000 to be invested and held by them for behoof of his daughter Janet for her liferent use allenarly, and for the issue of her body in fee, whom failing he directed that "the said sum or property in which the same may be invested shall fall and accrue to and be divided among the brothers and sister of the said Janet equally and share and share alike, the issue of any brother or sister deceasing always succeeding to the same share as would have fallen to their parent had he or she been in life."

The testator's daughter Janet died in 1892 unmarried. She was survived by one brother and one sister, and predeceased by three brothers, two of whom left issue.

Held that no share of the £7000 vested in the brothers and sister of Janet until her death; that her surviving brother and sister took the whole provision except the portion of it which passed under the terms of the destination to the issue of the two predeceasing brothers as conditional institutes of their parents, and accordingly that the surviving brother and sister took three-fifths of the sum, and the issue of each of the predeceasing brothers each took one-fifth.

John White, residing at Shawfield near Glasgow, died in 1860 leaving a trust-disposition and settlement dated 23rd May 1859, whereby he disponed and conveyed his whole estate for various purposes, and *inter alia*—"In the second place, I direct my said trustees to set aside and invest the sum of £7000 sterling in name of themselves, or of such other trustees as may be named under any contract of marriage or other deed to be executed by my eldest daughter Janet White, with their consent for the purpose, and to hold the said sum, or the property or securities in which the same may from time to time be invested, for behoof of my said eldest daughter Janet White in liferent for her liferent use allenarly of the free annual proceeds thereof, and for behoof of the issue of her body in fee: . . . And failing issue of the body of the said Janet White, or in case of such issue predeceasing before becoming entitled to or receiving payment of said provision, then the said sum of £7000 sterling, or property in which the same may be invested, shall fall and accrue to and be divided among the brothers and sister of the said Janet White equally and share and share alike, the issue of any brother or sister deceasing always succeeding to the same share as would have fallen to their parent had he or she been in life."

John White was survived by the following children, viz.—(1) the said Miss Janet White (the liferentrix of the said provision of £7000) who died unmarried on 22nd March 1892, being then in her eighty-fourth year; (2) Jane Cumming White or Chrystal, who still survived; (3) John White, who died testate on the 27th June 1881, without leaving issue; (4) James White, who died testate on 8th March 1884, leaving issue, who still survived; (5) Robert White, who died testate on 7th September 1875, leaving issue, who still survived; (6) Alexander Campbell White, who still survived.

Questions having arisen as to the distribution of the sum of £7000, a special case was presented to the Court by (1) John White's trustees, (2) Mrs Chrystal's marriage-contract trustees, (3) John White junior's trustees, (4) James White's trustees, (5) Robert White's trustees, (6) Alexander Campbell White, (7) James White's children, (8) Robert White's children.

The questions for the consideration of

the Court were—"1. Did the capital of the said provision of £7000 vest in the respective beneficiaries—(1st) Absolutely at the date of the said John White senior's death, or at that date, subject to defeasance in the event either of Miss Janet White having or leaving issue or of any of such beneficiaries dying before receiving payment leaving lawful issue? or (2nd) At the date when the liferentrix the said Miss Janet White survived the period of child-bearing? or (3rd) At the date of the death of the said liferentrix? 2. Are the trustees of the said John White, James White, and Robert White respectively entitled to one-fifth share of capital destined to each of them respectively? or 3. Are the children of the said James White and Robert White respectively entitled to one-fifth share of capital destined to their respective fathers? 4. Assuming that the trustees of the said John White are not entitled to the one-fifth share destined to him, does said share fall to be divided—(1) Equally between the marriage-contract trustees of the said Mrs Jane Cumming White or Chrystal, and the said Alexander Campbell White? or (2) In equal shares between (1st) the said marriage-contract trustees of the said Mrs Jane Cumming White or Chrystal, (2nd) the said Alexander Campbell White, (3rd) the children of the said James White, and (4th) the children of the said Robert White?"

The parties of the second part (who represented the said Mrs Jane Cumming White or Chrystal) and the party of the sixth part maintained that they were each entitled not only to the shares of said provision originally destined to the said Mrs Jane Cumming White or Chrystal and Alexander Campbell White respectively, but also that they, as the only surviving brother and sister of the said Miss Janet White as at the date of her death, were each entitled to one half of the share originally destined to the said John White who predeceased the liferentrix without leaving issue.

The parties of the third, fourth, and fifth parts maintained that the shares of said provision destined to John White, James White, and Robert White vested in these last-named parties respectively at the date of the death of the testator, or otherwise during the lives of John White, James White, and Robert White respectively, and were accordingly carried by the general conveyance contained in the respective trust-dispositions and settlements of John White, James White, and Robert White, and that each of the said parties was entitled to one-fifth of the said provision.

The parties of the seventh and eighth parts maintained that the shares of said provision destined to the said James White and Robert White did not vest in them either at the date of the testator's death or at any other date during their respective lives; or alternatively, that if the same had so vested, such vesting had been subject to defeasance in the event (which had happened) of the said James White and Robert White dying before receiving payment leaving lawful issue. Further, the said parties of the seventh and eighth parts maintained that in addition to being each entitled to the one-fifth share originally destined to their respective fathers, they were also each entitled, along with the said marriage-contract trustees of the said Mrs Jane Cumming White or Chrystal and the said Alexander Campbell White, to one-fourth of the share originally destined to the said John White, he having predeceased the liferentrix without leaving issue.

Cases cited—*Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204; *Bell* v. *Cheape*, May 21, 1845, 7 D. 614; *Earl of Dalhousie's Trustees*, May 24, 1889, 16 R. 681; *Taylor, &c.* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H. of L.) 217; *Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H. of L.) 10.

At advising—

LORD YOUNG—In this case the testator whose will, in the shape of a trust-disposition and settlement, we have to consider, was the late Mr John White of Shawfield, and the provisions in his settlement are to a great extent similar to those we considered in the case of Miss Cumming's will, but in one respect they are dissimilar. Mr White was the father of the family of grandnieces and nephews who benefited under Miss Cumming's settlement, and by his trust-deed he directed his trustees to set aside a capital sum of £7000 for behoof of his eldest daughter Janet, and to give her the proceeds for her liferent use allenarly, and for behoof of the issue of her body in fee. She died and left no children, but I stop there to notice that so far as the issue of Janet White were concerned, her father did not intend that any portion of this sum of £7000 should vest in them during her survivance. This issue were the primary objects of his bounty, but he provides distinctly "in case of such issue predeceasing before becoming entitled to or receiving payment of said provision," there is an ulterior destination to Janet White's brothers and sisters, so that if Janet's issue were deceased before the period of distribution, namely, their mother's death, then the ulterior destination would come into operation. Thus this lady might have had issue who lived and grew to maturity—she was eighty-four when she died—and who yet predeceased her, and if she had had sons and daughters who grew up, married, had children of their own, and all died before her leaving wills, those who were the beneficiaries under the wills could have taken no share of this capital sum of £7000 because it is provided that if the issue of the daughter should die before her, then the ulterior destination was to take effect.

Then, again, the principle of the case of *Young* v. *Robertson* comes in. The period on the authority of that case which, in judicially construing his will, we must hold to be period at which the testator intended this sum to vest, must be the period of distribution, that is Janet's death. That provision is inconsistent with vesting in Janet's issue before she died. There was no issue, but I think it material in endeavouring to ascertain the meaning of this

clause, to consider the case as if there had been issue of Janet.

Then I make the same observation upon the provision here, as I did in the case of *Miss Cumming's Trustees*, upon the authority of *Taylor* v. *Gilbert's Trustees*, that the mere contingency of Janet's death without leaving issue would have no bearing upon the question of vesting, but then we have also in this deed a direction not only to pay the capital sum to her brothers and sisters upon her death without surviving issue, but we have an ulterior destination, because it is plain that the predecease of all or any of her brothers and sisters is contemplated, and that some part of the capital sum should be paid to the issue of those predeceasers.

The deed goes on to say "the issue of any brother or sister deceasing, always succeeding to the same share as would have fallen to their parent had he or she been in life." Here is an event contemplated and provided for, the death of a brother or sister predeceasing Janet, with an ulterior destination. Now what is the period within which if any one of her brothers or sisters died, he or she could be said to have predeceased in the meaning of this deed. In my opinion that period covers the whole time between the death of the testator and the death of the liferentrix.

The other view which was presented was that the period during which only the brothers and sisters of Janet could have been said to predecease the period of vesting, was the time between the testator's death and the making of his will. That was the view taken by the Court in the case of *Gilbert's Trustees* v. *Crerar and Others*, 8th November 1877, 5 R. 49, but that view was corrected by the House of Lords upon appeal. The provision in this case is that if Janet White should have no issue, or if her issue should predecease the term of payment, then this capital sum of £7000 is to be divided among her brothers and sister "the issue of any brother or sister deceasing always succeeding to the same share as would have fallen to their parent had he or she been in life." That provision must take effect and cannot be affected by the debts of the predeceasing parent or by any will he may leave. Three of the brothers did predecease the liferentrix, two of them leaving issue; therefore with respect to them I am of opinion that they must take their father's share in this capital sum of £7000. They take it as coming in place of their fathers, for there was no vesting in the case of their fathers—indeed, the ulterior destination is inconsistent with the idea of vesting in the father if he did not survive the period of distribution. I think, upon the authority of *Young* v. *Robertson*, that that direction must be carried out, and I do not think it the less clear in this case than in that of *Cumming's Trustees*. The only difference is that in the case of Miss Cumming's settlement there was a double destination, when it was provided that if a brother or sister predeceased leaving issue, then the issue was to take the father's share, but if he or she died without leaving issue, then his or her share was to be divided among the survivors, and in Miss White's will there is no provision as to what is to become of the share of one dying without issue. Well, that is a difficulty, but the only parties who are claiming in respect of the brother who died without issue, are those who already take a share of the capital sum under the will, but if we are to hold the will ineffectual on that ground, then there is no need for a clause such as this which prevents vesting *a morte testatoris*, and postpones vesting until the death of the liferentrix. My opinion is that there was no vesting in the brother who died before the liferentrix without issue. The difficulty is whether this brother's share must not fall into intestacy, but I think we may avoid that result, which is to be avoided if possible, and hold that the share which he would have taken if he had survived the liferentrix, must be divided equally between the surviving brother and sister. I think there is both principle and authority for holding that that is the proper course to follow. These survivors are of the family whom the testator preferred, whom he meant to have the whole residue if all the predeceasing brothers had died without issue, therefore I think the result is the same under both Miss Cumming's and Mr White's will, although the provisions appear to be slightly different, *i.e.*, that the survivors take their share of the residue, and the issue of the predeceasing sons take the shares which their fathers would have done at the death of the liferentrix if all the family had been alive at that time.

LORD TRAYNER—The questions presented to us in this case concern the respective rights of the parties in a sum of £7000, part of the estate of the late John White senior of Shawfield. By his trust-disposition Mr White directed his trustees to set aside a sum of £7000, to be invested and held by them for behoof of his daughter Janet, for her liferent use allenarly, and for the issue of her body in fee, whom failing, he directed that the said sum, or property in which it might be invested, should "fall and accrue to and be divided among the brothers and sister of the said Janet White equally share and share alike, the issue of any brother or sister deceasing always succeeding to the same share as would have fallen to their parent had he or she been in life." The truster died in the year 1860; Janet, the liferentrix, died in March 1892, never having been married. She was survived by her brother and sister, Alexander and Jane; she was predeceased by her brothers John, who died testate but without issue, and James and Robert, who died testate and leaving issue. The four brothers and one sister of Janet above named were all alive at the date of the settlement, and all survived the truster.

In these circumstances the question arises, when did the fee of the £7000 vest in the brothers and sister of Janet. It is main-

tained on the one hand that vesting did not take place until the death of the liferentrix, because it could not be sooner ascertained whether she would die without issue, in which event only could her brothers and sister succeed to the fee. On the other hand, it is maintained that according to authority vesting took place in the brothers and sister *a morte testatoris*, subject to defeasance in the event of Janet leaving issue.

If the destination in favour of the liferentrix's brothers and sisters had been to them "or the survivor of them," no difficulty would have arisen. Then (as we have just decided in the case of *Cumming's Trustees*) the date of vesting would have been the same as the period of distribution, that is, at the death of the liferentrix. The want of these words, however, has given rise to the contention that vesting took place *a morte*, and certain authorities were quoted in support of that view, particularly the opinion of the Lord President in *Steel's* case, and the opinion of Lord Watson in the case of *Gregory*. I understand the rule which these learned Judges have laid down to be this, that if a testator leaves a legacy in liferent to A, and to his issue in fee, whom failing to B, or to a class of persons the members of which are known and ascertained at the date of the testator's death, "in absolute property" (that is, as I understand, without any ulterior destination) then the legacy vests in B or the members of the class *a morte*, subject to defeasance in the event of A leaving issue. Assuming that to be the rule of our law, I think it is not (or may not) be applicable here, because the destination in favour of the brothers and sister of Janet White gave nothing to them "in absolute property" in the sense in which I understand that phrase, there being an ulterior destination in favour of their children if they predeceased. Apart from that, however, I think it may be distinctly gathered from the terms of this settlement, that, according to the will and purpose of the testator, no vesting of the fee of the estate liferented was to take place until the death of the liferentrix. The right of succession devolved upon the brothers and sister of Janet White only (1) in the event of her having no issue, or (2) "in case of such issue predeceasing before becoming entitled to or receiving payment of said provision." Accordingly, if Janet had had a son, the right to the provision did not vest in him either at his birth or majority. The right to the provision was conditional on his surviving his mother, as it was only on that event happening that he became entitled to receive or could receive payment of the £7000. If he did not survive that period, the provision passed to the next in order under the destination, viz., the brothers and sister of Janet. If, therefore, the issue of Janet, who were first called as fiars, had no vested right until the death of the liferentrix, the fiars next called could not have a vested right at an earlier date.

I come to the conclusion, therefore, that there was no vesting in the brothers and sister of Janet until her death. The result of that view is that Jane and Alexander, as the only brother and sister of Janet surviving at the date of Janet's death—the period of distribution—take the whole provision, except the portion of it which passes, under the terms of the destination, to the children of such of the brothers of Janet who died leaving issue. These children take as conditional institutes of their respective parents. Accordingly, while Jane and Alexander take three-fifths of the provision, the children of James and Robert each take a fifth. These children, for the reasons I have stated in the case of *Cumming's Trustees*, take their parents' original share, and no part of the share which would have fallen to John had he survived the liferentrix.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent at the hearing.

The Court pronounced this judgment:—

"The Lords having considered the special case and heard counsel for the parties thereon, Answer the third alternative of the first question in the affirmative, the third question in the affirmative, and the first alternative of the fourth question in the affirmative."

Counsel for First and Second Parties—Sym. Counsel for Third Parties—Younger. Counsel for Fourth Parties—Aitken. Agent—F. J. Martin, W.S.

Tuesday, February 28.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MACLAREN & SONS *v.* M'CAW, STEVENSON, & ORR, LIMITED.

Sale—Damages for Breach of Contract—Coloured Plate—Latent Defect—Timeous Rejection.

M. & Sons ordered 100,000 copies of a coloured plate from a printing company for the Christmas number of their weekly magazine *Scottish Nights*. The plates were examined on delivery, and appeared to be in good order. Some weeks later, after 32,000 copies of the plate had been sold, the unsold copies were found to be sticking together, so that it was difficult or impossible to separate them. M. & Sons thereupon intimated to the printing company that they rejected the goods so far as unsold.

In an action of damages by M. & Sons, *held* that the plates were disconform to contract and unfit for sale; that from the nature of the defect it was natural that it should not be at once discovered; and that M. & Sons