Thursday, November 30.

SECOND DIVISION.

GRAHAM'S TRUSTEES *v.* GRAHAM.

Succession—Vesting—Direction to Trustees to Convey on Attaining Age of Thirty—Legacy—Legacy Changed in Lapsed Bequest of Heritage.

A testator directed his trustees as follows — "Upon my son William attaining the age of thirty years I direct my trustees to convey over to him my properties of A and T, but he shall be bound immediately on receiving such conveyance to pay to my second son Robert the sum of four thousand pounds sterling, or to execute a bond and disposition in security for that sum over the said properties in favour of the said Robert."

By the trust-deed legacies of about £4000 were given to each of the other children of the testator. The trustees were also given power to make advances to the children out of the provisions in their favour, and there was a clause in the trust-deed disposing of residue. William and Robert survived the testator, but William died before attaining the age of thirty. After the date at which William would have attained that age if he had survived, *held* (1) (following *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142) that the properties of A and T had never vested in William, and on his death had fallen into residue; and (2) that Robert was entitled to the legacy of £4000 charged on the lands of A and T.

Succession — Legacy — Joint Bequest — Accretion.

The leases of two farms were taken in the names of John Graham, William Graham, and Robert Graham, and the survivors and survivor of them, and the heir of the survivor. William and Robert were the sons of John Graham. The stock and cropping on the farms belonged to John Graham. John Graham died survived by his sons, and leaving a trust-disposition and settlement in which he directed his trustees upon his son William arriving at the age of thirty to deliver over "to his sons William Graham and Robert Graham" the stock and cropping on these farms. In the trust-deed there was a clause disposing of residue.

William died before attaining the age of thirty. After the date at which he would have attained that age if he had survived, *held* that the bequest of the stock and cropping was not a joint gift to William and Robert, and that Robert was entitled to a half, the remaining half falling into residue.

Succession—Legacy—"Leases of and Stock on Farms Occupied by Testator"—Construction

By the second purpose of his trust-deed a testator directed his trustees to continue in the management of the farms of K, B, and A, and "any other farms which may be in my occupation at the time of my death," until his son William arrived at the age of thirty years. By the third purpose the trustees were directed on William attaining thirty years of age to assign the leases of the farms of K and B, and "any other farms I may occupy at the time of my death," to the testator's sons William and Robert, and deliver over to them the whole stock and crop thereon. By the fourth purpose the trustees were directed on William attaining the age of thirty to convey over to him the properties of A and T.

At his death the testator was proprietor and in the occupation of the farms of A and T and in the occupation under lease of K and B.

Held that the testator in the third purpose of the trust-deed was only dealing with farms occupied under lease and the stock, &c. thereon, and not with the farms of A and T, of which he was the proprietor.

Succession—Trust—Direction to Trustees to Pay Legacy on Legatee Attaining Age of Thirty—Repugnancy.

A testator bequeathed to his son a legacy of £4500, and to two daughters legacies of £4000 each, none of which were to be payable till he or she obtained the age of thirty, but the trustees were directed to pay to each child the interest of his or her legacy at 4 per cent from the time he or she attained the age of twenty-five. It was further provided that in the event of either of the daughters dying before receiving payment of her legacy, it was to go to her children, whom failing to her brothers and sisters.

The son and daughters survived the testator. The income of the estate was insufficient to pay 4 per cent on the legacies, which would to some extent require to be met out of capital.

Held that the son was not entitled to receive payment of his legacy prior to his attaining the age of thirty—*Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, *distinguished.*

Succession — Legacy — Direction to Pay Interest at 4 per cent—Payment out of Capital.

A testator *inter alia* directed his trustees to pay to certain legatees "the interest of their legacies" (which were payable to each on attaining the age of thirty) "at the rate of 4 per cent per annum half yearly from the time each of them arrives at the age of twenty-five years."

Held that if the income of the estate did not suffice to pay the interest, the deficiency must be made up out of capital.

Succession—Vesting—Bequest of Residue—Accretion.

A testator directed his trustees to divide on a certain date the residue of his estate "equally among my sons William Graham, Robert Graham and John Graham."

All the sons survived the testator, but William died before the period of payment arrived.

Held that the residue vested in equal shares *a morte testatoris* in the three sons, and that William's third did not accresce to the share of the other two but formed part of his succession—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, *followed*.

John Graham, farmer at Kirkconnel, in the stewartry of Kirkcudbright, died on 4th December 1891, leaving a trust-disposition and settlement dated 18th November 1891, by which he conveyed his whole property, heritable and moveable, to trustees for the following purposes:—"*First*, For payment of all my just and lawful debts and the expenses of executing this trust. *Second*, I direct my trustees to continue on the management of the farms of Kirkconnel, Bargatton, and Auchengashel, and any other farms which may be in my occupation at the time of my death, until my son William Graham arrives at the age of thirty years, and during that time my trustees shall maintain and uphold the farmhouse of Kirkconnel as a residence for all the members of my family. *Third*, Upon my said son William arriving at the age of thirty years, I direct my trustees to assign the leases of the farms of Kirkconnel and Bargatton, and any other farms I may occupy at the time of my death, to my sons, the said William Graham and Robert Graham, and deliver over to them the whole stock, crop, implements, and all other effects thereon. *Fourth*, Upon my said son William attaining the age of thirty years, I direct my trustees to convey over to him my properties of Auchengashel and Tannymaws, in the parishes of Twynholm and Borgue, but he shall be bound immediately on receiving such conveyance to pay to my second son, the said Robert Graham, the sum of four thousand pounds sterling, or to execute a bond and disposition in security for that sum over the said properties in favour of the said Robert Graham. *Fifth*, I hereby leave and bequeath to my youngest son John Graham a legacy of four thousand five hundred pounds sterling, but the same shall not be paid to him until he arrives at the age of thirty years, but my trustees shall pay over to him the interest of the said legacy at the rate of four pounds per centum per annum half-yearly from the time he reaches the age of twenty-five years. *Sixth*, Upon my said youngest son reaching the age of thirty years, I direct my trustees to assign, dispone, and make over to him the lands of Bankend and Hardmanor belonging to me, situated in the parish of Newcastle in the county of Cumberland. *Seventh*, To each of my daughters Mary Graham and Jane Graham I bequeath a legacy of four thousand pounds sterling, but the same shall not be paid to them until they respectively attain the age of thirty years, but my trustees shall pay over to each of them the interest of their legacies at the rate of four pounds per centum per annum half-yearly from the time each of them arrives at the age of twenty-five years. *Eighth*, To my daughter Isabella Kyle Graham I bequeath a legacy of four thousand pounds sterling, but the same shall not be paid to her until she reaches the age of twenty-five years. In the event of any of my daughters dying before receiving payment of their legacies without leaving issue, the legacy of my daughter so predeceasing shall be divided equally among her brothers and sisters; but in the event of any of my daughters predeceasing the time of payment of their legacies and leaving lawful issue, such issue shall succeed to their deceased parent's share: Declaring that the legacies to my sons and daughters shall not bear interest until the dates when the same are made payable except as above provided for. *Ninth*, Upon my said son William Graham attaining twenty-five years of age, I direct my trustees to deliver over to my said daughters my whole household furniture, bed and table linen, and other effects in the farmhouse of Kirkconnel. *Tenth*, Upon my said daughter Isabella Kyle Graham attaining twenty-five years of age, or at the date when she would have arrived at that age, I direct my trustees to realise my whole estates and to divide the same equally among my sons William Graham, Robert Graham, and John Graham. In the event of my trustees considering it for the interest of my children at any time during this trust, they shall have power to make such advances to them from the provisions in their favour under the settlement as they may consider beneficial for their interest and advancement in life."

The truster was survived by the following children:—(1) William, born on 4th September 1869, died unmarried and intestate on 16th November 1894—had he survived he would have arrived at the age of thirty upon 4th September 1899; (2) Robert Kyle, born 13th June 1871; (3) Mary, born 16th July 1874; (4) Jane, born 26th July 1876; (5) John, born 22nd July 1879; (6) Isabella, born 8th November 1885.

At the date of his death the testator was proprietor and in occupation of the farms of Auchengashel and Tannymaws, in the stewartry of Kirkcudbright. He was also proprietor of the lands of Bankend and Hardmanor, in the county of Cumberland. He was also in occupation as tenant at the date of his death of the farms of Kirkconnel and Bargatton in the stewartry of Kirkcudbright. The leases of these two farms were taken in name of John Graham (the testator), William Graham and Robert Graham (his sons), and the survivors and survivor of them, and the heirs of the survivor, excludiug assignees. The stock, crop, and implements on the farms were the property of the testator.

In terms of the trust-deed the trustees

continued in possession of the farms, and maintained the house at Kirkconnel as a residence for the family, and handed over the household furniture in the house at Kirkconnel to the truster's daughters.

At 4th December 1898 the trust-estate, exclusive of heritage and of farm stock, crop, and implements, and of the household furniture foresaid, amounted to £11,750, 13s. 6d.

Various questions arose with reference to the interpretation of the trust-deed. These questions had reference to (1) the bequest of the estates of Auchengashel and Tannymaws to the late William Graham on condition of payment of £4000 to his brother Robert; (2) the directions in regard to the leases and farm stocking; (3) the time of payment of the provisions to John Graham, Mary Graham, and Jane Graham; (4) the interest payable upon the said provisions; and (5) the destination of William's share of residue.

For the settlement of these points a special case was presented to the Court by (1) the trustees of John Graham, (2) Robert Graham, (3) John Graham with consent of his curators, (4) Mary Graham and Jane Graham, and (5) Isabella Kyle Graham with consent of her curators.

The questions at law were—"1. (*a*) Did right to the estates of Auchengashel and Tannymaws vest in the late William Graham at the death of the truster? or (*b*) do the said estates fall into residue? 2. In the event of the second part of the first question being answered in the affirmative, is the second party entitled to a payment of £4000 out of the proceeds of the said estates? 3. Is the second party entitled to an assignation of the truster's interest in the leases of Kirkconnel and Bargatton, or otherwise, is he entitled to succeed to said leases in terms of the destinations therein contained, and to delivery of (1) the stock, cropping, and others thereon? (2) the stock, cropping, and others upon Auchengashel and Tannymaws? or alternatively, is he entitled to one-half of said stock, &c., under (1) and (2), or either of them? 4. In the event of the second alternative of question 3, or either part thereof, being answered in the affirmative, does the other half of said stock, &c., fall into residue, or is it intestate succession of the late William Graham? 5. Are the third and fourth parties respectively entitled to demand payment out of their pecuniary provisions or a rateable share thereof on attaining the age of twenty-five? 6. Are the sixth parties bound to pay interest out of the trust-estate to the third and fourth parties upon the said provisions after they respectively attain the age of twenty-five at the rate of 4 per cent. per annum, even although the trust funds are insufficient to satisfy all the specific bequests, and if so, out of what part of the trust-estate does any deficiency in the amount of interest yielded by the funds invested to satisfy these provisions fall to be made good? (7) Did William Graham's share of residue accresce to the second and third parties, and if not, is it intestate succession of William Graham or of the truster?"

Argued for the second party—*On the first question*—The estates of Auchengashel and Tannymaws vested in William Graham *a morte testatoris*, and he as William's heir-at-law was entitled to a conveyance of the same at the date when William would have attained the age of thirty. The whole tenor of the deed showed that it had been drawn by the testator in contemplation of the arrival of the period when William would attain thirty, and that he had never contemplated that William might not attain that age, or that the provision to him would fall into residue. The trustees were also given power to make advances to the children from the provisions to them, which direction favoured vesting *a morte*. If vesting of the bequest to William was held to take place at thirty, there would be several periods of vesting under the will. The sole reason for the postponement of the date of payment was to keep the family together. By fixing thirty years of age the testator did not intend to make the attainment of that age a condition-precedent of the gift, but merely fixed a point of time at which payment was to be made—*Hay's Trustees* v. *Hay*, June 19, 1890, 17 R. 961, was an authority in his favour, the only distinction between it and the present case being that the date in *Hay's Trustees* was not one which might never arrive. But in *Mackinnon's Trustees* v. *MacNeil*, June 29, 1897, 24 R. 981, the estate was held to have been vested, although the directions were to pay on the attainment of majority, which was an uncertain event—*Ross's Trustees* v. *Ross*, Nov. 16, 1897, 25 R. 65; and *Ballantyne's Trustees* v. *Kidd*, Feb. 18, 1898, 25 R. 621, also favoured his contention. *On the second question*—Should it be found that the estates of Auchengashel and Tannymaws did not vest in William Graham, but fell into residue, he was entitled to payment of £4000 out of the proceeds thereof. Otherwise he alone of all the family would get no legacy, and the third party, who was a younger brother, would get a great deal more than himself. This was certainly not the intention of the testator. The right of a legatee to his provision was not affected by the lapse of the gift to the heir on which it was charged—M'Laren on Wills (3rd ed.), i. 574; *Wylie* v. *Ross*, June 12, 1857, 2 W. & S. 576; Jarman on Wills (5th ed.) 314; *Wigg* v. *Wigg*, 1739, 1 Atkyns, 381. *On third and fourth questions*—Robert was entitled to the leases of the farms of Kirkconnel and Bargatton in virtue of the destination in the leases. Notwithstanding the predecease of William without attaining the age of thirty, the bequest of the farm, stock, crop, implements, and effects was valid. The bequest included the stock, &c., on Auchengashel and Tannymaws, which were in occupation of the testator as proprietor at the date of the settlement and of his death. If nothing was held to have vested in William, then the bequest was joint, and William's share accresced to Robert—Stair, iii. 8, 27; M'Laren on Wills,

(3rd ed.) i. 663. *On seventh question*—If the third share of residue bequeathed to William was held not to have vested in William, it must be held to have accresced to the second and third parties—*Menzies' Factor* v. *Menzies*, Nov. 25, 1898, 1 F. 128.

Argued for third party—*On first question*—The estates of Auchengashel and Tannymaws never vested in William. There was no direct gift to William, only a direction to convey—*Bryson's Trustees* v. *Clark*, Nov. 26, 1880, 8 R. 142. The date at which the conveyance was to be made was uncertain, and therefore the presumption was against vesting—*Alves' Trustees* v. *Grant*, June 3, 1874, 1 R. 969. The power to make advances did not of itself show that there was vesting — *Fyfe's Trustees* v. *Fyfe*, Feb. 8, 1890, 17 R. 450, opinion of Lord Rutherfurd Clark, 453. In the present case there was a destination-over in this sense, that there was a clause dividing the residue among the three sons — *Brodie* v. *Brodie's Trustees*, June 13, 1893, 20 R. 795. That case was so similar to the present that it might almost be held to be a ruling authority. The general intention of the deed was in favour of no vesting. The intention of the testator was that the two eldest sons should get equal shares, but he never contemplated that if the eldest died the second should take so large a proportion of his estate as he now sought to acquire. The whole tenor of the trust-deed supported the argument for postponement of vesting. *On second question*—If these estates did not vest in William, then the second party was not entitled to payment of the sum of £4000 out of the proceeds of the estates, but the legacy of £4000 lapsed along with the bequest of the estates. It was a condition-precedent of the second party getting his legacy that William should attain the age of thirty and succeed to the estates. The second party had only a personal right as against William to get a bond and disposition over the estates. The case of *Ross*, *supra*, did not bear out the doctrine founded upon it in M'Laren on Wills (3rd ed.) i. 574, and the English case of *Wigg*, *supra*, failed to meet the circumstances of the present case. *On third and fourth questions*—The bequest of the leases, farm stock, and others failed because the death of William without attaining the age of thirty had made it impossible that the condition of the bequest could be purified. The subjects of this bequest therefore lapsed to residue. There was no room here for the application of the principle of accretion. This bequest did not include the stock, crop, &c., on the farms of Auchengashel and Tannymaws; it only included the stock, &c., on the farms leased by the testator at the time of his death. If the condition that William should attain thirty were held not to suspend vesting, then the right to one-half of the farm stock, &c., vested in William, and passed to his heirs *in mobilibus*. *On fifth question*—As the whole beneficial interest in his legacy of £4500 belonged to him on attaining the age of twenty-five, he was entitled on that event, upon the assumption that the estate was sufficient to pay all the pecuniary legacies in full, to immediate payment thereof, or to payment of a rateable share if the estate proved insufficient —*Miller's Trustees* v. *Miller*, Dec. 19, 1890, 18 R. 301; *Ballantyne's Trustees* v. *Kyd*, Feb. 18, 1898, 25 R. 619. *On sixth question* —The trustees were bound to invest at 4 per cent., and pay over the interest on the sum invested. After investment they were not entitled to require the first parties to encroach on the capital of the trust-estate to make up deficiencies in the interest. *On seventh question*, he adopted the argument of the second party.

Argued for fourth parties—*On the first and second questions* they adopted the argument of the third party. *On third and fourth questions* they maintained that the right to one-half of the farm-stock was vested in William, and passed to his heirs *in mobilibus*. They did not press for an affirmative answer of the fifth question. *On sixth question* — They were entitled to be paid interest at the rate of 4 per cent. per annum whatever might be the annual return from the invested funds of the trust, even although the trustees in order to pay this interest had to encroach on the capital of the trust-estate. If the trust-estate had been yielding more than 4 per cent. they would have been entitled only to 4 per cent. on their provisions; therefore if it yielded less than 4 per cent. they were nevertheless entitled to that interest. *On seventh question*—There was here no room for accretion, as the residue was left to persons named, "equally among" them—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191. William's share of residue was therefore either intestate succession of William, as having vested in him, or intestate succession of the truster.

The fifth party adopted the argument of the third party *on the first, second, and sixth questions*, and the argument of the fourth party *on the third, fourth, and seventh questions*.

On behalf of the first parties it was mentioned that if the first part of the sixth question was answered in the affirmative the payment of interest at 4 per cent. might to some extent encroach on capital.

At advising—

LORD TRAYNER—The answers to be given to the questions here put to us depend on the construction which is put on the deed of settlement of the late Mr John Graham. That deed is in some respects defective, in so far as it does not provide for certain contingencies which might readily enough have presented themselves to the conveyancer who prepared it, or to the mind of the testator himself. But the provisions which are found to be expressed in the deed do not appear to be difficult of construction; and I cannot say I have experienced great difficulty in forming my opinion on the several questions submitted in the case, and argued before us. I shall take the questions in their order.

(1) The first question I take to be already decided by the judgment in the case of

Bryson's Trustees, 8 R. 142. In that case the Lord President said—"When nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event . . . if he does not survive the period, he takes no right under the settlement." Now, that describes exactly the position of matters under the deed before us, in so far as concerns the disposal of the lands of Auchengashel and Tannymaws. There is a direction to the trustees (to whom these lands were conveyed by the testator) to convey these lands to the testator's son William on his "attaining the age of thirty years." There is no direct gift to William, nor any words from which a gift can be implied. There is nothing beyond a direction to the trustees to convey to William on his attaining the age of thirty. William predeceased this period, and therefore, in the words of the Lord President, he took "no right under the settlement" to those lands. The only expressed purpose of the testator having failed as regards those lands, I think they fall into residue.

2. In the same clause in which the testator directed his trustees to convey the foresaid lands to William, he declared that William should, immediately on receiving the conveyance, pay to the testator's son Robert the sum of £4000, or execute in his favour a bond and disposition in security for that sum over the said lands. The second party (Robert) maintains that, assuming there was no vesting of the lands in William, there is nevertheless a valid legacy to him payable out of the lands or their proceeds; while the other parties to the case (other than the first parties) maintain that there was no such legacy left by the testator, but merely an obligation put upon William to pay the sum of £4000 on getting the conveyance in his favour—that as no such conveyance was granted or could now be granted, the obligation was not prestable, and that there was no obligation on the trustees to pay the £4000 to Robert. It is no doubt the case that the testator put on his son William the obligation to pay to Robert the £4000. But that sum was to be provided by William out of the testator's bounty to him; and in effect I regard the provision of the testator's settlement as if it had said that Robert was to have a legacy of £4000, which was to be charged upon and payable out of the lands of Auchengashel and Tannymaws. I think it not open to question that the testator intended to leave a legacy of that amount to Robert; and while he made the conveyance of the lands to William contingent on his surviving a certain age, the legacy was not to depend on the same contingency. The view which is maintained by the second and other parties, if successful, would result in this, that Robert alone of all the family would receive no legacy, there being a legacy bequeathed to each of the other members of it. If this was the necessary result of the testator's settlement, it would of course require to be given effect to, however inequitable it might appear. But I think this is not the result; for it appears to me, as I have said, that the testator intended to bequeath, and did validly bequeath, to Robert a sum of £4000, charged upon and payable out of the properties before named. I therefore think the second question should be answered in the affirmative.

3. I think the second party takes the leases of Kirkconnel and Bargatton as in his own right and under the destination therein. He is the survivor of the three joint-tenants, to whom "and the survivor of them" the leases were granted. The testator could not assign the leases (nor direct his trustee to do so) in favour of Robert, because the right to the leases was already in Robert. The stock, cropping, and others upon these farms, however, belonged to the testator alone, as was acknowledged by his sons the co-tenants in their letters, which are referred to in the case. This stock and cropping the testator disposes of by his settlement, where he directs his trustee to "deliver it over to his sons William and Robert." This was also to be done when William attained the age of thirty, and before that time the testator's sons could not have demanded it. But I do not think the gift to Robert was to be contingent on the arrival of that event any more than was the legacy of £4000 I have already spoken of. The more difficult question is, whether the gift or direction to deliver was of the nature of a joint gift or bequest or whether the testator's sons were each to take a half. I adopt the view that it was not a joint gift. It is a gift, no doubt, "to my sons," but it is to "my sons William and Robert." He had another son who is not here named, so that it was not to his sons as a class that the testator gave the stock, &c., upon the farms. I think he meant each son named to have a share, as their interests and management of those interests could not in his expectation continue to be mutual, and when the time arrived for the separation of their interests and management I think the testator intended each son to have his separate and independent share. The stock, cropping, &c., which were thus to be divided were the stock, &c., on the farms of Kirkconnel and Bargatton, "and any other farms I may occupy at the time of my death." Did this include Auchengashel and Tannymaws? I think not. These lands were dealt with in the settlement as property possessed and not as farms occupied, and the fact that Auchengashel is mentioned in the first purpose of the trust as a farm then occupied by the testator, along with the farms of Kirkconnel and Bargatton, whereas in the second purpose of the trust Auchengashel is omitted and the other two mentioned, rather points to the view that in the second purpose of the trust Auchengashel was intentionally omitted. This part of the case is attended with more doubt than any other part, but on the whole I have come to the opinion that only the stock, &c., on the two leased farms was intended to be divided between William and Robert, and the stock on any other farms (but there were none, as it turned

out) occupied by the testator, as he occupied Kirkconnel and Bargatton, that is, as tenant. Robert therefore takes one-half of the stock, &c., on Kirkconnel and Bargatton, the other half falls into residue.

4. The fourth parties concede that they cannot maintain the affirmative of the question. But the third party does. He maintains that the provision in his favour vested *a morte*, and that when he attained twenty-five years of age both capital and interest of the provision became his indefeasibly, and that therefore he may insist on payment now without awaiting the arrival of the more postponed term of payment fixed by the testator. The case of *Miller's Trustees* was cited as an authority for this contention. I deem it unnecessary to consider whether this question is ruled by the case of *Miller's Trustees*, because it appears to me that there is sufficient ground for refusing effect to the contention of the third party in the fact that there are purposes of the trust yet to be fulfilled which forbid the trustees paying to the third party just now the provisions in his favour under the testator's settlement. The ground I refer to is this—The trustees are directed (and are bound) to pay certain beneficiaries interest on the amount of their bequests at the rate of 4 per cent. for some years to come. We are informed that the income of the estate will not suffice for this, and that to some extent this direction will require to be met out of capital. It is at present impossible to say how far this application of the capital may reduce the amount of the legacy or provision to each beneficiary, and (as was observed by the Lord President in *Miller's* case) "where there are trust purposes to be served which cannot be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees . . . the right of the beneficiary must be subordinated to the will of the testator." The fifth question therefore should be answered in the negative.

5. I have already answered this question. The direction to pay interest at 4 per cent. is explicit, and the trustees must obey it. The right to interest at 4 per cent. on their respective provisions for the period mentioned by the testator is as clearly due to the beneficiaries as the provisions themselves. If the income of the estate does not suffice to pay the interest the deficiency must be supplied from capital.

6. I think the residue vested in the residuary legatees *a morte*. There was nothing to suspend vesting although the period of payment or division was postponed. The residuary legatees named were the three sons of the testator, and they were to take the residue "equally." Under such a provision I think, in conformity with the decision in *Paxton's* case, that the share of William, who predeceased, did not accresce to the other two. That third must be dealt with as intestate succession of William Graham.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

"Answer the first alternative of the first question therein stated in the negative, and the second alternative of the said question in the affirmative: Answer the second question therein stated in the affirmative: Answer the third and fourth questions therein stated by declaring that the second party is entitled to succeed to the leases of Kirkconnel and Bargatton in terms of the destination therein contained, and to delivery of one-half of the stock, cropping, and others thereon, but not to the stock, cropping, and others upon Auchengashel and Tannymaws, and that the other half of the stock, cropping, and others upon Kirkconnel and Bargatton, as well as the whole stock, cropping, and others upon Auchengashel and Tannymaws, falls into residue: Answer the fifth question therein stated in the negative: Answer the first part of the sixth question in the affirmative, and the second part of said question by declaring that any deficiency falls to be made good out of residue of the deceased John Graham's trust-estate: Answer the seventh question therein stated by declaring that the residue of said estate vested *a morte testatoris*, and that the deceased William Graham's share did not at his death accresce to the second and third parties but became intestate succession of the said deceased William Graham: Find and declare accordingly, and decern."

Counsel for the First and Second Parties—Jameson, Q.C.—C. N. Johnston. Agents—Scott & Glover, W.S.

Counsel for the Third Parties—H. Johnston, Q.C.—Inglis. Agents—J. C. & A. Steuart, W.S.

Counsel for the Fourth and Fifth Parties—W. Campbell, Q.C.—Hunter. Agent—Alex. Wylie, S.S.C.

Thursday, November 30.

SECOND DIVISION.

[Sheriff of Renfrewshire.

CARSLAW *v.* ROBERT M'ALPINE & SONS.

Railway—Construction of Railway—Use of Private Road — Interdict — Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 33), *secs.* 25 *and* 51.

By section 51 of the Railway Clauses Consolidation (Scotland) Act 1845 it is provided—"If in the course of making the railway the company shall use or interfere with any road, they shall from time to time make good all damage done by them to such road; and if any question shall arise as to the