to the petition, and made no appearance.

MACONOCHIE, for the petitioners, stated in answer to the Court that in all the previous cases of a petition and complaint under the 97th section of the Public Health Act the respondents had lodged answers—*Local Authority of Montrose*, December 3, 1872, 11 Macph. 170; *Local Authority of Pittenweem*, July 8, 1874, 1 R. 1124; *Local Authority of Galashiels*, December 5, 1874, 12 S.L.R. 111. Though in the present case there were no answers, and there was no precedent as to how the Court should proceed in these circumstances, he submitted that the correspondence with the respondents and the reports of the men of skill produced by the petitioners were *prima facie* evidence of a neglect of duty on the part of the respondents.

LORD PRESIDENT—The documents produced with this petition shew *prima facie* a case for our interference under the statute; and as the local authority when confronted with this charge of neglect of duty have thought fit to lodge no answers and to make no appearance, we must hold that they have no answers to make to this charge, and we are therefore in a position now to pronounce that there has been a neglect of duty, and to remit to a man of skill to report a scheme. The interlocutor will be in terms of the precedents quoted by Mr Maconochie, and we shall remit to the gentleman mentioned by him who is already conversant with the subject.

The Court pronounced this interlocutor:—

"The Lords, no answers having been lodged for the respondents, having heard counsel for the Board of Supervision on the petition and complaint, Find that the respondents have hitherto failed to do what was required of them by the Public Health (Scotland) Act 1867, or otherwise by law, and that obstructions have thereby arisen in the execution of the said Act, and that the respondents are bound to take the proceedings required by statute for carrying out a proper system of drainage in the burgh of Lochmaben and procuring a sufficient and suitable supply of water for the domestic use of the inhabitants of said burgh and for the sanitary and other public purposes of the said burgh: Therefore remit to James Barbour, Civil Engineer, Dumfries, to prepare a scheme for procuring a sufficient and suitable supply of water for the domestic use of the inhabitants and for the sanitary and other public purposes of the said burgh and for effecting the adequate drainage of the said burgh, and to report to the Court within fourteen days."

Counsel for the Petitioners—Maconochie. Agents—Macrae, Flett, & Rennie, W.S.

Thursday, March 2.

SECOND DIVISION.

WHITE AND ANOTHER (CUMMING'S TRUSTEES) v. WHITE AND OTHERS.

Succession—Vesting—Lapsed Share.

A testatrix directed her trustees to hold the residue of her estate for behoof of her grandniece Janet White in liferent, and her issue, if any, in fee, "declaring that in the event of the said Janet White predeceasing me or dying without lawful issue, the whole residue of my estate hereby provided to her shall in any or either of these cases fall and belong to Janet White's four brothers and sister, equally among them, and in the event of any of the saids dying without leaving lawful issue, the share of the predeceaser shall . . . be equally divided among the survivors, but should the predeceaser leave lawful issue, then such issue shall be entitled to succeed to their parent's share, equally among them, and in the same manner and as fully as if such parent had survived." All the beneficiaries named survived the testatrix. Janet White, the liferentrix, died without issue, survived by one brother and the sister. Three of her brothers predeceased her, two of whom left issue. *Held* (1) that the right to the fee of the residue of the testatrix's estate did not vest until the death of the liferentrix, and accordingly that no part of the residue vested in the three brothers who predeceased the time of distribution; and (2) that the issue of the two predeceasing brothers were only entitled to the shares originally destined to their respective parents, and were not entitled to participate in the lapsed share of their uncle who died childless.

Miss Mary Cumming, daughter of John Cumming of Fairfield, died on 11th March 1843, leaving a trust-disposition and settlement dated 17th January 1828, whereby she conveyed to trustees her whole estate for various purposes, and, *inter alia*, she provided—"Fourthly, with regard to the free residue and remainder of my estate and effects, heritable and moveable, real and personal, above conveyed, I appoint my said trustees to realise and hold the same in trust for behoof of the said Janet White, my grandniece, whom I do hereby appoint as my residuary legatee. And I do hereby empower and require my said trustees, as soon as possible after my death, to lend out the residue of my estate upon good security, and to apply the annual proceeds thereof for the benefit of the said Janet White, in such a manner as they may think proper, during all the days and years of her lifetime; and in case the said Janet White shall marry and have children, then the fee of the residue of my estate hereby provided to her shall belong to her lawful children, share and share alike. . . . And declaring that in the event of the said

Janet White predeceasing me or dying without lawful children, the whole residue of my estate hereby provided to her shall in any or either of these cases fall and belong to Jane White, John White, James White, Robert White, and Alexander White, her brothers and sister, equally amongst them, and the proportion belonging to each be payable at their respectively attaining the years of majority, or at their marriage, whichever shall first happen, the interest of their respective proportions being payable to them from the time the succession shall open to them until their shares shall respectively become payable; and in the event of any of the saids Jane White, John White, James White, Robert White, and Alexander White dying without leaving lawful issue, the share of the predeceased shall, in the event of the succession to my residue opening to them, go and be equally divided amongst the survivors; but should the predeceased leave lawful issue, then such issue shall be entitled to succeed to their parents' share equally among them in the same manner and as fully as if such parent had survived, and under the same conditions as to the terms when the said share or shares shall become payable."

Miss Cumming was survived by (1) Miss Janet White (the liferentrix under the trust-disposition and settlement), who died unmarried on 22nd March 1892, being then in the 84th year of her life; (2) Jane White (otherwise Jane Cumming White) or Chrystal, who still survived; (3) John White, who died testate on 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 White, otherwise Alexander Campbell White, who still survived.

On Miss Janet White's death questions arose as to the disposal of the residue of the testator's estate, and a special case was presented to the Court by (1) John Campbell White and another, the testator's trustees; (2) Mrs Chrystal's marriage-contract trustees; (3) the trustees of the late John White; (4) the trustees of the late James White; (5) the trustees of the late Robert White; (6) Alexander Campbell White; (7) the children of the late James White; (8) the children of the late Robert White.

The parties of the second part and the party of the sixth part maintained not only that they were each entitled to the share of residue originally destined to Mrs Jane Cumming White or Chrystal and Alexander Campbell White respectively, but also that they were each entitled to one-half of the share originally destined to John White, who predeceased the liferentrix without leaving issue. (2) The parties of the third, fourth, and fifth parts maintained that the shares of residue destined to John White, James White, and Robert White vested in these last-named parties respectively at the date of the death of Miss Mary Cumming, or otherwise during the lives of the said John White, James White, and Robert White respectively, and were accordingly carried by the general conveyance contained in the respective deeds of settlement granted by the said John White, James White, and Robert White respectively, and that each of the said parties was entitled to one-fifth share of the said residue. (3) The parties of the seventh and eighth parts maintained that the shares of residue destined to James White and Robert White did not vest in these parties either at the date of Miss Cumming's death or at any other date during the respective lives of James White and Robert White; or alternatively, that if the same had so vested, such vesting had been subject to defeasance in the event (which happened) of James White and Robert White predeceasing leaving issue. Further, parties of the seventh and eighth parts maintained that in addition to being each entitled to the one-fifth share destined originally to their respective fathers, they were also each entitled along with marriage-contract trustees and Alexander Campbell White to a fourth share of the share destined originally to John White who died without leaving issue."

The questions for the opinion of Court were thus stated—"1. Did the residue of the estate of the late Miss Mary Cumming vest in the respective beneficiaries—(1) At the date of the said Miss Cumming'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 the said beneficiaries dying before receiving payment leaving lawful issue? or (2) At the date when the liferentrix, the said Miss Janet White, survived the period of child-bearing? or (3) At the date of the death of the liferentrix? 2. Are the trustees of the said John White, James White, and Robert White respectively entitled to the one-fifth share of residue destined to each of these said three parties respectively? or 3. Are the children of the said James White and Robert White respectively entitled to the one-fifth share of residue destined to their respective fathers? 4. Assuming that the trustees of the said John White are not entitled to the one-fifth share of residue destined to him, does said share fall to be divided (1) equally between Mrs Chrystal's marriage-contract trustees and Alexander Campbell White? or (2) in equal shares between (1st) Mrs Chrystal's trustees, (2nd) Alexander Campbell White, (3rd) James White's children, and (4th) Robert White's children?"

The second and sixth parties argued—Vesting of the shares in the residue did not take place until Miss Janet White's death, owing to the ulterior destination after the death of Janet White without issue—*Young* v. *Robertson*, February 11, 1862, 4 Macq. 314. It followed that the surviving brother and sister of Janet White took their own shares, and also each took a-half of the share given to the brother who had predeceased Janet without issue, as the term share was a definite amount

to be found at the death of the liferentrix, and the share of a predeceased brother did not accrue to the issue of other brothers who had also predeceased the liferentrix—*Henderson* v. *Hendersons*, January 9, 1890, 17 R. 293; *M'Culloch's Trustees*, May 14, 1892, 19 R. 777; *Haldane's Trustees* v. *Murphy*, December 15, 1881, 9 R. 269; *Graham's Trustees* v. *Grahams*, March 26, 1868, 6 Macph. 820.

The third, fourth, and fifth parties argued—The shares given by Miss Cumming to the three brothers of Miss Janet White who predeceased the liferentrix in the event of her dying without issue, vested in them during the currency of the liferent, and the survivorship clause did not prevent that—*Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697; *Waters' Trustees* v. *Waters*, December 6, 1884, 12 R. 253.

The seventh and eighth parties argued—The issue of the brothers who predeceased the liferentrix were entitled equally with the surviving brother and sister to an equal division in the lapsed share of John White. It was true it had been decided in the case of *M'Nish, &c.* v. *M'Donald's Trustees*, October 25, 1879, 7 R. 96, that the issue of a predeceasing brother had not a right to participate with the surviving members of their parent's family, but it had also been decided there that if there was a clear indication to the contrary in the deed of settlement, the Court would give effect to that indication. Here the indication was clear and the issue of predeceasing brothers ought to share equally with the survivors.

At advising—

LORD YOUNG—In this case Miss Mary Cumming, who died in 1843, left a trust-disposition and settlement by which she conveyed to her trustees her whole estate with directions to pay the annual income to Miss Janet White, the eldest of a family of grandnieces and grandnephews, and the fee to be in Janet White's children, if any. The leading question we have to consider is at what time the capital of the estate vested? Her grandniece, to whom she had given the liferent of the estate, lived until she attained the age of eighty-four and died a spinster. The answer to that question depends upon the directions which the testatrix gave to her trustees regarding the disposal of the capital sum, and these directions are fourfold, all having regard and reference to the death of the liferentrix, being directions given for the use and guidance of her trustees when that time came.

The first of these directions merely provided that if Janet White should marry and have issue, the whole capital sum was to be paid to the issue. The second direction provided that if Janet White predeceased the testator, or died without issue, then the trustees were to divide the capital among her brothers and sisters in equal shares. Thirdly, it was provided that if any of them, that is to say, any of Janet White's brothers or sisters, predeceased without leaving lawful issue, then the trustees were to divide his share equally among the survivors; and in the fourth place, if any of Janet White's brothers or sisters predeceased leaving issue, then the share of the predeceased person was to be divided among them.

As I have said, the question then comes to be, at what time did the capital of Miss Cumming's estate vest in the beneficiaries.

Notice, in the first place, the direction to the trustees to pay the capital to her brothers and sisters in the event of the liferentrix dying without issue. I take that event to be a mere contingency. If there had been nothing more than that direction, I should have held, on the authority of *Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H. of L.) 217, that such a contingency did not hinder vesting in the brothers and sisters *a morte testatoris*, in this sense, that those to whom the capital would belong if Miss White died without leaving issue, should be at liberty to deal with it in their wills as if it belonged to them (under the burden of the contingency under which it was given), so that the meaning of the testator was that Janet's brothers and sisters who were alive at her death should get their shares, and if any had died before that time, that their shares should go to their legal or voluntary representatives, or be subject to the claims of their creditors as might happen to be the case in any particular instance. I think that is the result of the decision in the case of *Taylor*.

I do not think that the exigencies of the present case need lead one to say more of that case, but while expressing my appreciation of the judgment, I may be excused for saying that the language used, of interests being vested and divested, grates upon my Scottish ears, as it was only in certain cases under the entail laws that we were accustomed to hear such phraseology.

I think that in that case the error into which this Court had fallen consisted in not distinguishing between two kinds of contingencies. I do not, of course, mean that there are only two kinds of contingencies, but these two may be specially considered here. The one kind of contingency consists in that which must take effect in the life of the legatee. The most common instance of that kind of contingency is where a testator makes a bequest to a certain person, but the bequest is not to take effect until the legatee attain the age of twenty-one or be married. That contingency must occur during the lifetime of the legatee, but there is the other kind of contingency which may take effect either before or after the death of the legatee, and the death of the liferenter is such a contingency, so that when a testator gives a legacy to a person named, subject to the contingency of a liferenter dying without issue, what we must hold, according to the decision in the case of *Taylor*, to be the intention of the testator, in judicially construing his will, is that the legatee he names shall be at liberty to dispose of the

legacy, subject to the contingency under which it is given. I think we can attain that result without the use of the words "vesting" and "divesting," by holding that where a legacy or bequest is given to a legatee subject to a contingency which may happen after the death of the legatee, then the legacy should be disposed of according to his disposition.

That case has no further bearing here, and if I were convinced that there was nothing here but the contingency of the liferenter dying without issue, I should hold that the legacy had vested *a morte testatoris*.

But then there is another direction by which the testator provides that if any of Janet White's brothers or sisters should die before her, then the share of the predeceaser is to go to his issue if he leave issue, and to the survivors of the family if he leaves no children. That provision, to my mind, brings the case within the rule of *Young* v. *Robertson*, February 11, 1862, 4 Macq. 314. This is a direction as to the ulterior destination of the legacy, and according to the authority of that case the period which the testator contemplated as the time during which, if any of the persons died, they were to be held to have predeceased, was the time that elapsed between his death and that of the distribution of the estate, so that if any of the persons named in the settlement outlived him but predeceased the period of distribution, the trustees were directed to pay no attention to any provisions he (the predeceaser) might have made in his will for the disposal of his estate. The legatees by no act of theirs can defeat the ulterior destination of the legacy. Now we have that destination here in a double form.

In this case the liferentrix died at the age of eighty-four without issue, so that the direction to the trustees to pay over these legacies to her brothers and sisters came into operation. Two of these, a brother and sister, were alive at the time of Janet White's death and they take their shares in their own right. Three of her brothers, however, had predeceased her—one died without issue, but the other two both left children. The destination in Miss Cumming's will as regards survivorship must come into operation, and the share of the predeceasing brother, who died without issue, must be equally divided between the brother and sister who were alive at the death of the liferentrix. But then that part of the settlement which deals with the case of the brothers who predeceased the period of payment leaving issue, also comes into operation, and the destination as set forth in the settlement must also receive effect, and each of the families of the brothers who left issue will receive a one-fifth share of the estate as their father's share, but they take it under the directions in Miss Cumming's will, and not under any direction from the father.

Lord Trayner—Miss Cumming by her trust settlement directed her trustees to hold the residue of her estate for behoof of her grandniece Janet Whyte, for her liferent alimentary use, and in the event of her having issue, then the fee of the residue to belong to such issue, share and share alike. She further provided that in the event of Janet Whyte predeceasing her (the truster) or dying without issue, the said residue should fall and belong to Jane, John, James, Robert, and Alexander Whyte (the brothers and sister of Janet) equally; that in the event of any of them dying without lawful issue, the share of the predeceaser should be equally "divided amongst the survivors," but should the predeceaser leave issue, such issue should succeed to their parents' share "equally among them in the same manner and as fully as if such parent had survived." All the beneficiaries above named survived the truster, and Janet, the liferentrix, died in March 1892, survived by Jane and Alexander, but predeceased by John, testate, without issue, and by James and Robert, who both died testate and leaving issue.

The first question raised is, at what period did the right to the fee of Miss Cumming's estate vest in the beneficiaries to whom it was destined. In the questions submitted to us there are three periods suggested at which vesting might be held to have taken place—(1) the testator's death, (2) the liferentrix's death, (3) the date when the liferentrix "survived the period of childbearing." This last suggestion may be dismissed at once—it was not maintained in argument before us by any of the parties; and it is a period which it is impossible to fix. As between the other two periods suggested, I entertain no doubt that the second is the right one—that vesting did not take place until the death of the liferentrix. Failing issue of Janet, the fee of the residue was destined to her brothers and sister, and failing any of them, without issue, then to "the survivor." Under such a destination it is clearly settled that vesting does not take place until the period of distribution, which in this case was the date of the liferentrix's death. The result of that view is that no part of this residue vested in John, James, or Robert. It follows that no part of this residue was carried by their respective testamentary dispositions to their trustees.

The remaining question is, whether the children of James and Robert are entitled to share in the lapsed share of John. Here, again, I think the question is not an open one, but one which has already been decided. A child who is called, either expressly or under the implied condition, *si sine liberis*, &c., to take a parent's share, is entitled only to the parent's original share, and not to any participation in a lapsed or accrued share. This is necessarily so in a case like the present where there is a clause of survivorship—the survivors take the share of a predeceaser, and the children of a predeceaser cannot take what is specially destined to another beneficiary. But even where there is no clause of survivorship, the same rule applies unless there be some clear indication of the testator's intention that a different rule is to

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