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

were entitled to reject the unsold copies on discovering their defective condition.

By letter dated 21st September 1891 Messrs Maclaren & Sons, printers and publishers in Glasgow, ordered 100,000 copies of a coloured plate from Messrs M'Caw, Stevenson, & Orr, printers and chromo-lithographers in Belfast, as a supplement for the Christmas number of the paper *Scottish Nights*, of which they were the proprietors. It was stipulated in the letter that 1000 proof copies should be supplied, and that the orders should be conditional on these proving satisfactory. The price offered was £2, 16s. per 1000 copies—£100 to be paid on delivery, and the balance in January 1892. Messrs M'Caw, Stevenson, & Orr accepted the order, and the proof copies were duly supplied, and were found to be satisfactory. The bulk of the order was subsequently delivered in Glasgow on 25th, 26th, and 27th November, and Messrs Maclaren & Sons paid £100 to account of the price in terms of the contract. On receiving the prints Messrs Maclaren & Sons immediately despatched about two-thirds of them to various newsagents throughout the country with copies of the *Scottish Nights*, and the balance were stored in their premises. In course of being sent out the prints were examined, and appeared to be in good order. On 17th December Messrs Maclaren & Sons found that the plates stored in their premises were sticking together, and at the same time they began to receive complaints from the news-agents that the plates sent to them were sticking together. On discovering the condition of the plates Messrs Maclaren & Sons wrote to Messrs M'Caw, Stevenson, & Orr intimating that they rejected the plates so far as unsold.

Messrs M'Caw, Stevenson, & Orr thereafter raised an action against Messrs Maclaren & Sons for payment of £182, 18s. 10d., as the balance due to them under the contract, and Messrs Maclaren & Sons raised a counter action against Messrs M'Caw, Stevenson, & Orr for payment of £500 as damages for breach of contract.

Messrs M'Caw, Stevenson, & Orr denied that the plates supplied by them had been disconform to contract, and in defence to the action against them they pleaded, *inter alia*—"(5) The pursuers not having timeously rejected the coloured plates in question are barred from suing the present action."

The actions having been conjoined, proof was allowed, the result of which sufficiently appears from the Lord Ordinary's interlocutor.

On 14th July 1892 the Lord Ordinary (KYLLACHY) pronounced this interlocutor—"Finds that by contract contained in letters dated 21st and 23rd September 1891, Nos. 19 and 38 of process, the pursuers Messrs M'Caw, Stevenson, & Orr, Limited, agreed to supply to the defenders Messrs Maclaren & Sons 100,000 copies of the coloured plate therein mentioned and 1000 proof copies, all on paper as sample submitted, and at the rate of £2, 16s. per 1000, the 1000 proof copies being to be delivered within fourteen days, and the balance by 25th November certain: Finds that it was a condition of the contract as expressed in the said letters that if the defenders were satisfied with the proof copies all other copies should be equal to them: Finds that the proof copies were duly delivered, and that the same were satisfactory, and that 100,000 copies, forming the bulk of the order, were delivered in Glasgow on 25th, 26th, and 27th November, and that the defenders thereupon made payment of £100 to account of the price: Finds that about two-thirds of the total quantity was immediately thereafter sent out to newsagents with copies of the Christmas number of the defenders' publication *Scottish Nights*: Finds that when examined in the course of being so sent out they seemed in good order, and in particular did not stick together, or show signs of being likely to do so: Finds that the remaining one-third of the order remained in the defenders' premises, and were stored in a manner which was quite usual, and which the defenders had no reason to expect would prove injurious to the plates: Finds that on or about 17th December the defenders found that the plates so stored were sticking together so as to be incapable of separation, or at least to be so incapable except by skilled manipulation, and even then with considerable risk of injury to the plates: Finds that about the same date the defenders began to receive complaints that the plates which had been sent out to the news-agents in the end of the preceding month were sticking together in the newsshops, and were injuring the sale of the Christmas number of the defenders' paper, with which they had been issued as a coloured supplement: Finds that ultimately about one-half of the plates sent out, being about one-third of the whole, were returned by the news-agents to the defenders, but finds it not proved that the said returns were due exclusively to the defective condition of the plates: Finds that on discovering the condition of the plates the defenders intimated to the pursuers that they rejected the plates as far as unsold, and intimated that the same were at the disposal of the pursuers, and that the defenders claimed damages for breach of contract: Finds that after several meetings and some correspondence the parties failed to adjust their differences, and the present conjoined actions were accordingly raised: Finds as the result of the proof (1) that the plates, being the bulk of the order, were not equal to the 1000 proof copies, and were disconform to contract; (2) that the same, with the exception of about 32,000 sold before the discovery of the defect, were timeously rejected; (3) that the defenders are not bound to pay the price of the 68,000 copies or thereby so rejected, and also that they have suffered damage by the defenders' breach of contract to an extent at least equal to the benefit, if any, derived from the 32,000 copies sold as aforesaid: Finds that the defenders have not proved any further damage, and that on being refunded the said sum of £100 paid to account, with

interest at five per cent. since the date of payment, the claims of parties may be held compensated: Therefore, in the action at the instance of M'Caw, Stevenson, & Orr, Limited, against Maclaren & Sons, assoilzies the defenders from the conclusions of the summons, and decerns, and in the action at the instance of Maclaren & Sons against M'Caw, Stevenson, & Orr, Limited, decerns against the defenders for the sum of £100, with interest thereon at the rate of five per cent. till payment: Finds the said Maclaren & Sons entitled to expenses in the conjoined actions," &c.

"*Opinion.*—[*After expressing the opinion that the plates delivered were not conform to contract*]—On the question of timeous rejection, all I can say is that I see no sufficient reason for disbelieving the defenders' statement that when the plates were received and sent out they exhibited no signs of adhering to one another. It may be that, according to some of the witnesses, they might have been expected to show some signs of adherence, but in point of fact it is not, I think, proved that they did. The result is that the rejection cannot be said to come too late." . . .

Messrs M'Caw, Stevenson, & Orr reclaimed, and argued, *inter alia*—The goods had not been timeously rejected. A distinction was to be drawn between the case of such goods as were here in question and the case of machinery. In the latter case defects as a rule could not be discovered until the machinery was used, and accordingly a purchaser was entitled to reject machinery on discovering it to be defective, although he might have used it for some time before he discovered the defect. In the present case the defect might have been discovered at once if the goods had been subjected to a proper scrutiny, and the purchaser was not entitled to reject them weeks after he had accepted delivery—*M'Cormick & Company* v. *Rittmeyer & Company*, June 3, 1869, 7 Macph. 854; *Pearce Brothers* v. *Irons*, February 25, 1869, 7 Macph. 571; *Fleming & Company* v. *Airdrie Iron Company*, January 31, 1882, 9 R. 473; *Carter & Company* v. *Campbell*, June 12, 1885, 12 R. 1075.

Argued for the pursuers—The evidence showed that the plates were examined on delivery, and that no defect was then apparent. As soon as the defect was discovered the goods were rejected, and they had thus been timeously rejected—*M'Cormick & Company's* case, *supra*; *Spencer & Company* v. *Dobie & Company*, December 17, 1879, 7 R. 396.

At advising—

LORD PRESIDENT—I have come to the conclusion that it is adequately proved that a considerable proportion of the prints supplied by the reclaimers were disconform to sample and unfit for sale. That many of the prints were good enough is not contradictory of this conclusion. But in the case of those which went bad, I think that the reclaimers have failed to prove that their evil condition was produced by the method of storage to which they were subjected. Upon all these matters, which are questions of fact, I have come to be satisfied that the Lord Ordinary has reached sound conclusions.

From the nature of the defect, it was not unnatural that there should be some little time before it was perceived. So soon as it was discovered, intimation was made to the reclaimers that the goods were rejected, and I do not think either that the purchasers were too late or claimed too high a remedy. Nor do I consider that they were bound to be content with the offer of the reclaimers to send someone over to put the prints right, the pecuniary loss having been incurred before it was possible that this remedy could be applied to all the defective copies. Many of them were scattered over the country on contracts of sale and return.

It was strenuously maintained, and with some plausibility, that before the defect was discovered the so-called Christmas Number of *Scottish Nights*, from its literary weakness, had proved a failure, and that this, and not the faults of the prints, constituted the motive of the rejection. So far as this is an element of evidence in the question of fact whether the pictures were really faulty or not, I have given effect to it by examining somewhat critically the evidence of persons as to whom there was at least reason to suspect that they might not be indisposed to find fault with the pictorial part of wares which were expected to be and had not been signally successful. On this, however, my opinion and, what is more important, the opinion of the Lord Ordinary is, that the prints were not conform to contract, and the suggestion that the purchaser had a collateral motive for rejecting can hardly take away his right to do so.

No cause has been shown for our interfering with the award of damages on the ground of excess.

I am therefore for adhering.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Messrs M'Caw, Stevenson, & Orr — Jameson — M'Lennan. Agents — Cumming & Duff, S.S.C.

Counsel for Messrs Maclaren & Sons— Dundas — Deas. Agents — Simpson & Marwick, W.S.