England were applicable, except that the question as to the extent of the agent's authority would most probably have been determined by a judge and jury instead of by the Court. If there be any divergence of view in this class of cases, I think that at most it is no more than such as occasionally occurs where co-ordinate courts of the same country have to apply known principles of law to different states of fact.

The Lord Ordinary has assoilzied the defender from the conclusions of the action, and if your Lordships agree with me the reclaiming-note will be refused.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Defender and Respondent —Vary Campbell—J. Thompson. Agents— W. & J. Burness, W.S.

Counsel for the Pursuers and Reclaimers— Jameson—Burnett. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday November 14.

FIRST DIVISION.

CUMMING'S TRUSTEES *v.* CUMMING AND OTHERS.

Succession—Vesting—Fee and Liferent—Conditional Institution—Vesting subject to Defeasance—Interposition of Two Liferents.

A testatrix in her trust-disposition and settlement directed her trustees to invest the sum of £1300, and divide the annual interest to be derived therefrom equally among her two nieces: "providing that on the death of either . . . without lawful issue the whole of the said annual interest shall be paid to the survivor; but in case either shall die leaving lawful issue, then such issue shall be entitled to their parent's share of said interest; and upon the death of the survivor one-half of the said sum of £1300 shall be paid by said trustees to the lawful issue of each . . . but providing and declaring that if either or both . . . shall die without leaving lawful issue, then the half or the whole of said £1300, as the case may be, shall on the death of the survivor be paid by the said trustees to my brother R." The testatrix died in 1869, one of the liferentrices in 1873, and R in 1894. R bequeathed his whole estate to the surviving liferentrix. *Held* that the legacy vested in R *a morte testatoris*, subject to the liferents, and subject to defeasance to the extent of one-half in the event of either of the liferentrices leaving issue.

Held further that, on the death of the one liferentrix without issue, one-half of the legacy vested absolutely in R, and that the surviving liferentrix, as his sole legatee, was entitled to immediate payment thereof on renouncing her liferent over it.

Miss Mary Carnegie Cumming, who died on 26th March 1869, left a trust-disposition and settlement by which she disponed to trustees her whole estate, heritable and moveable, and *inter alia* directed— "(Thirdly) That my said trustees may, as soon after my death as they conveniently can, lend and place out on good security, heritable or moveable, the sum of £1300 sterling, and pay and divide the annual interest to be derived therefrom equally between my nieces Jane May Cumming Anderson and Isabella Robina Anderson, residing at Newtyle Cottage, during their joint lives, exclusive always of the *jus mariti* and right of administration of any husband they may marry, and declaring that the receipts of the said Jane May Cumming Anderson and Isabella Robina Anderson alone for the said interest shall be valid and sufficient to the receivers: Providing that on the death of either of the said Jane May Cumming Anderson or Isabella Robina Anderson without lawful issue the whole of the said annual interest shall be paid to the survivor; but in case either shall die leaving lawful issue, then such issue shall be entitled to their parent's share of said interest; and upon the death of the survivor one-half of the said sum of £1300 shall be paid by the said trustees to the lawful issue of each of the said Jane May Cumming Anderson and Isabella Robina Anderson; but providing and declaring always, that if either or both of the said Jane May Cumming Anderson and Isabella Robina Anderson shall die without leaving lawful issue, then the half or the whole of said £1300, as the case may be, shall on the death of the survivor, be paid by the said trustees to my brother the said Robert Cumming."

The clause dealing with residue was as follows:—"With regard to the residue and remainder of my estate, heritable and moveable, real and personal, above conveyed, I direct the said trustees, at and immediately after the decease of the said Alexander Cumming, to pay and assign the residue (and including the sums liferented to the said Alexander Cumming) to and in favour of the said Hugh Macpherson Cumming and Robert Cumming, and their heirs, executors, and successors whomsoever."

The sum of £1300 which the testatrix directed to be invested for behoof of her nieces was invested by the trustees, and the interest was paid to them equally down to the death of Miss Isabella Robina Anderson, who died unmarried in May 1873, after which date Miss Jane May Cumming Anderson received the whole income. Robert Cumming died in October 1894, leaving a will by which he bequeathed his whole estate to Miss Jane May Cumming Anderson.

Questions having arisen as to the effect of the bequest of £1300, a special case was raised by (1) Miss Cumming's testamentary trustees; (2) Miss Jane May Cumming

Anderson; (3) Mr Hugh Macpherson Cumming, one of the residuary legatees in Miss Cumming's will; and (4) the representatives of the heirs *in mobilibus ab intestato* of Miss Cumming.

The second party contended that the bequest vested in Robert Cumming *a morte testatoris*, subject to the liferents, and subject to defeasance *quoad* the half or whole in the event of either or both of the liferentrices leaving lawful issue; that on the death of the first liferentix his right to one-half of the bequest became absolute; and further, that by virtue of his will in her favour (the second party), had acquired an absolute right to one-half. She offered to renounce her liferent *quoad* this half, and called upon the trustees on receiving her discharge to pay it over to her as her absolute property.

The contentions of the third and fourth parties appear from the arguments *infra*.

The questions for the consideration of the Court were — "(1) Did the legacy of £1300, contained in the third purpose of Miss Cumming's will, vest in Robert Cumming *a morte testatoris*, subject to the liferents, and subject to defeasance to the extent of one-half in the event of Isabella Robina Anderson leaving issue, and to the extent of the other half in the event of the second party leaving issue? (2) Did one-half thereof vest absolutely in Robert Cumming at the death of Isabella Robina Anderson without issue, subject to the liferent of the second party in such half? (3) Is the second party now entitled to payment of one-half of the said sum of £1300 for her own absolute use and behoof on renouncing and discharging the liferent thereof?"

Argued for second party—The rules on vesting subject to defeasance laid down in *Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204, as commented on in *Turner* v. *Gow*, February 20, 1894, 21 R. 563; and *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568, were applicable to the present case. The fact that the liferent was split up between two beneficiaries in no way prevented the application of the rule. Accordingly, there vested in Robert Cumming *a morte testatoris* a right to the fee of the whole bequest, subject to defeasance in the event of the liferentrices leaving issue. On the death of one without issue the right to the fee of her half vested absolutely in Robert Cumming. Accordingly, the second party as his sole legatee was entitled on renouncing her liferent to immediate payment of that half.

Argued for the third party—1. Vesting was postponed till the death of the liferentrices, there being no direct words of gift to Robert Cumming. The absence of such words was an important element in showing that vesting was postponed—*Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H. of L.) 217; *Bryson's Trustees* v. *Clark*, November 20, 1880, 8 R. 142; *Storie's Trustees* v. *Gray*, May 29, 1874, 1 R. 953. 2. If there were vesting *a morte testatoris*, it must be in the residuary legatees—*Storie's Trustees* v. *Gray*, *supra*.

Argued for the fourth parties—There was no vesting in Robert Cumming either *a morte testatoris* or on the death of the first liferentrix. That being so, it was evidently the intention of the testatrix that this bequest should not be included in the residue clause, for she particularly mentioned in that clause the fund which was to be liferented by Alexander Cumming, and omitted to mention this. Moreover, she could not have intended that this fund should go to Robert Cumming first as a direct legacy, and secondly, as part of the residue. Accordingly, it fell into intestacy.

At advising—

LORD ADAM—The question before us arises on the third purpose of the settlement, and is whether the bequest of £1300 vested in Mr Robert Cumming *a morte testatoris* subject to its divesting in the event of certain ladies leaving issue? I am of opinion that it did so. If either of the ladies left issue, then that issue would be entitled to the fee of the half share liferented by the mother, but failing issue of both, the whole was to be paid over to Robert Cumming. Now, as was pointed out by Mr MacWatt, this is nothing more than a gift, if I may apply that term to a right of liferent to one lady and her issue, and, failing such issue, to Robert Cumming. The fact of the sum being split up between two liferentrices is of no moment.

I am clearly of opinion that this case is ruled by that of *Steel's Trustees*, and that it is impossible to distinguish between the two. The conditions of the bequest here, as already described, are precisely those that are dealt with in *Steel's Trustees*, and I can see no reason why the rule laid down there should not be applied here. I am therefore for answering the first three questions in the affirmative.

LORD M'LAREN—The question which is of importance to the parties in this case is that which is first stated, and that question is whether the principle of vesting subject to defeasance is applicable to the legacy of £1300, which is one of the special provisions of the will. In the case which has been referred to on both sides—*Steel's Trustees* v. *Steel*, 16 R. 204, the late Lord President sums up the conditions under which the principle of vesting subject to defeasance had been applied in previous decisions of this Court and the House of Lords. I do not read his Lordship's opinion as necessarily limiting the application of the principle to these cases, but it is needless to consider the possible extension of the principle, because in my judgment the present case falls directly within the category defined in the Lord President's opinion. In *Steel's Trustees* there was a direct bequest to the testator's daughter in liferent, and her issue in fee, and failing such issue to a conditional institute; and it was laid down that the principle of vesting subject to defeasance applied to such a case. Of course if there had been issue in existence at the death of the testator a difficult question

would have arisen, as it would have been impossible to hold that there was vesting in a conditional institute, where there were objects in existence answering to the prior destination.

If I have correctly stated the result of the case of *Steel's Trustees*, it is difficult to see why different principles should be applied to the cases of a legacy to a daughter and to any other favoured person in liferent. At all events, where the person to whom the liferent is given is a person to whom the testator stood *in loco parentis*, I think there can be no doubt that the same principle is applicable.

Another distinction is suggested between this case and *Steel's Trustees*. It is pointed out that here there are two liferents, and that they are so closely connected that on the death of one liferentrix the survivor takes the liferent enjoyed by the predeceaser, but I think it is quite clear that if the principle of vesting subject to defeasance is applicable to the case of two gifts, each of one-half of a particular fund in liferent, with the destination, which I need not repeat, in fee, the mere circumstance that the survivor is to take the life interest previously enjoyed by the predeceaser can have no bearing on the presumed intention of the testator with regard to the fee.

With these explanations I think that we have here the very case in which the doctrine of vesting subject to defeasance has always been applied, and that we should therefore answer the first question in the affirmative.

The second question is really consequential on the first, because, if there was vesting in Robert Cumming, subject to defeasance in the event of the liferenters having issue, then on the death of one of the liferenters without issue, when the possibility of there being issue ceased, Robert Cumming's right to the fee of the sum liferented by the deceased became absolute.

I may remark on the third question, viz., whether the second party is entitled to payment of one-half of the £1300 absolutely, the circumstances which raise the question are, that the second party takes the liferent previously enjoyed by her deceased sister by immediate gift under the will, and also takes the fee of the same share or sum as representative of Robert Cumming. I think that the lesser right of liferent is absorbed in the more comprehensive right of fee. Questions are sometimes raised in relation to such rights, which depend on the consideration that the liferent rights are alimentary. Nothing was said in argument on this point, and I do not find that the liferent in question was declared to be alimentary.

LORD KINNEAR—I am of the same opinion. The truster directs that the annual interest of £1300 is to be divided equally between his two nieces, and that if either leaves legitimate issue the fee of the parent's share is to go to such issue; but failing legitimate issue to either lady, on the death of the survivor the fee of the whole is to go to Mr Robert Cumming.

Now, the gift to Robert Cumming is to take place on the occurrence of a certain event, namely, the death of the surviving liferentrix, subject to one contingency only, the birth and survivance of issue to the liferenters. Accordingly, the legacy to him was liable to be defeated only by the occurrence of that event.

That is a normal instance of the sort of case to which the decision in *Steel's Trustees* directly applies, and no reasonable ground has been stated for our refusing to follow that decision.

The LORD PRESIDENT concurred.

The Court answered the first, second, and third questions in the affirmative.

Counsel for the Second Party—MacWatt. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Third Party—Macphail. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Fourth Parties—W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Saturday, November 16.

FIRST DIVISION.

[Junior Lord Ordinary.

HOWDEN (SIMSON'S JUDICIAL FACTOR), PETITIONER.

Trust—Discretionary Powers of Trustees—Judicial Factor—Special Powers.

A testator directed his trustees to hold the sum of £4000 for behoof of his son D in liferent, for his liferent use allenarly, and of his lawful issue in fee, and upon D's death, failing his issue, to pay the capital to the three other sons of the testator. The trustees were further granted full power to pay over to the said D, as his own absolute property, the whole or any part of the principal sum of £4000, if in the exercise of their own judgment and discretion they should think it prudent and advisable to do so. A petition was presented by the judicial factor on the trust-estate, appointed in room of the trustees, for special power to invest a portion of the capital fund in the purchase of an annuity for the lives of D and his wife, and the survivor of them, in order to enable D to make a provision for his wife, which he was otherwise unable to do. The petition was opposed by all others in existence having an interest in the fund.

On the statement by the judicial factor that he considered the proposed application of a portion of the fund prudent and advisable, the Court (*rev.* judgment of Lord Low) granted the special power craved.

Observations (by Lord M'Laren) as to the exercise by a judicial factor,