the evidence of such persons is the least trustworthy that can be presented to a Court of Justice. Other wicked people have some sense of honour that may be appealed to, but as regards prostitutes, they are restrained by no scruples of conscience, and their evidence always reflects the views that have been put into them by the last detective that has precognosced them." And a little further on he says—"No number of prostitutes will make up one credible witness, so as to outweigh the denial given to them by the person accused. There must be corroboration of some kind." Now, it appears to me that this would be a very dangerous doctrine to introduce into the practice of the Criminal Courts of this country; if it had ever been acted upon, many crimes would have gone unpunished which have been proved to the satisfaction of judge and jury by very clear evidence indeed. I therefore consider that the Lord Ordinary's doctrine is entirely inconsistent with the practice of the Courts of this country, and one which can never be received. At the same time I fully appreciate the duty there is on the Court, in dealing with evidence of this kind, to examine very carefully, and to give full effect to the considerations arising out of the moral conduct and occupation of the witnesses in considering the weight which is to be attached to their testimony.

[His Lordship then examined the evidence, and arrived at the conclusion that the adultery had not been proved.]

LORDS MURE and SHAND concurred.

LORD DEAS was absent on Circuit.

The Court adhered.

Counsel for Pursuer — Trayner — Graham Murray. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for Defender—D.-F. Macdonald, Q.C.—J. P. B. Robertson—Rhind. Agents—Hagart & Burn Murdoch, W.S.

Friday, July 13.

SECOND DIVISION.

CATHCART'S TRUSTEES *v.* HENEAGE'S TRUSTEES.

Succession—Vesting.

A testatrix directed her trustee to hold the residue of her estate for behoof of the daughter or daughters, and failing them the son or sons, to be procreated of the marriage of a nephew. In the event of the whole of the nephew's daughters being married, the whole trust-estate was to be a fund of division among them. In the event of the nephew leaving a son but no daughters, or leaving daughters who should die without issue, then the fee was to the younger son or sons, or if there should be only one son, to him. The nephew was survived by a son, and by a daughter who was married. *Held* (*aff.* judgment of Lord M'Laren) that the fee vested in the daughter on her father's death.

Succession—Accumulation of Income—Thellusson Act (39 *and* 40 *Geo. III. c.* 98), *sec.* 1.

A truster directed her trustees to hold the residue of her estate for behoof of the children of a nephew, declaring that during the nephew's lifetime the whole income should be accumulated by the trustees, and no part of it paid to the nephew or his children, with power to the trustees, if they saw cause, to insure the life of the nephew for their behoof, so that they might at his death receive a sum to be applied for the purposes of the trust. The trustees insured the life of the nephew as they were empowered to do. He lived for thirty-six years after the death of the truster, and at his death the trustees received the amount of the policies. They had paid in premiums a sum more than equal to that which they received. *Held* (*rev.* judgment of Lord M'Laren—*diss.* Lord Craighill) that this transaction was not an indirect accumulation, and was not struck at by the Thellusson Act.

The Act 39 and 40 Geo. III. cap. 98, section 1, provides—"That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person who under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulation, would for the time being, if of full age, be entitled to the rents, issues, and profits, or the interests, dividends, or annual produce so directed to be accumulated, and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Miss Helen Cathcart died on 15th June 1841 leaving a trust-disposition and settlement dated 17th June 1836. By this settlement she gave to trustees the whole of the heritable and moveable property which should belong to her at her death for certain purposes. The trustees were directed to realise the heritable property, to pay deathbed and funeral expenses, and to pay certain legacies and annuities. The fourth purpose directed them to invest the whole funds under their management in Government funds or bank stock, or on heritable security. By the fifth purpose the trustees were directed to hold the whole residue of the estate (subject to certain annuities) for behoof of the daughter or daughters, and failing them, of the son or sons, to be procreated of the body of her nephew, Sir John Andrew

Cathcart of Carlton, by his then present marriage with Lady Eleanor Kennedy, specially declaring "that during the lifetime of the said Sir John Andrew Cathcart the whole rents, interests, and profits of my said trust-estate, heritable and moveable, shall be drawn by my said trustees, and shall be allowed to accumulate in their hands, and shall from time to time be lent out on heritable security, or in Government funds or bank stock as aforesaid, and no part thereof shall be paid to the said Sir John Andrew Cathcart, or any of his children, during his lifetime, but with power, if they see cause, to make insurances on the life of the said Sir John Andrew Cathcart in name and for behoof of the said trustees, in such way as to enable the said trustees to receive a sum or sums at his death to be then applied for the purposes of this trust; but on the death of the said Sir John Andrew Cathcart, my said trustees shall, at the first term thereafter, ascertain and fix the amount of the capital of my estate, heritable and moveable, as then accumulated: And in the event of the said Sir John Andrew Cathcart leaving a daughter or daughters by his present spouse unmarried, my trustees shall thereafter pay the free rents, interests, or profits of my said trust-estate, heritable and moveable, as then accumulated, accruing subsequent to the said term, to such unmarried daughter or daughters equally among them; and in the event of the marriage of any of these daughters, her right to a share of the interest or profits of my said trust-estate shall cease, and the same shall be divided among the daughters remaining unmarried, or the whole to the last unmarried daughter, it being my intention that the free interest or proceeds of my whole trust-estate shall be paid to the daughters of my said nephew by his present marriage while any of them remain unmarried; but upon the marriage of the whole of the daughters of my said nephew to be procreated of said marriage with Lady Eleanor Kennedy, then my said whole trust-estate, heritable and moveable, shall become a fund of division among the whole of said married daughters, equally among them, and in case any of them shall have died leaving a daughter or daughters, then such daughter or daughters shall be entitled to the share which would have belonged to their mother if alive; and if any of them shall have died leaving a son or sons but no daughters, then such son or sons shall be entitled to the share which would have belonged to their mother if alive: And my trustees are authorised and instructed, either in the marriage-contract of my said nephew's daughters, or in separate deeds to be executed by the said trustees themselves, to settle the share of each daughter, under such conditions and restrictions as they shall think advisable, and particularly with power to restrict the interest of each of my nephew's daughters to a liferent, and to exclude the *jus mariti* and right of administration of their respective husbands, and to declare the same not liable for their debts or deeds, and that the fee of the share falling to each of my nephew's daughters shall belong to her daughter or daughters equally among them; and in case of any of them leaving no daughters, then the fee of her share of my said estate to belong to her son or sons equally among them: And in the event of my said nephew leaving at his death a son or sons by his present marriage with Lady Eleanor Kennedy, but no daughters, or in the event of his leaving daughters by said marriage who shall afterwards all die without issue, then the fee of my said estate, heritable and moveable, shall belong to the younger sons of my said nephew by his present marriage equally among them, excluding the eldest son or heir, but if he shall leave only one son by his present marriage, then the whole shall go to him."

In 1845 the trustees effected insurances in their names on the life of Sir John Cathcart for the sum of £25,000, and thereafter applied the income of the residue of the trust-estate in the following manner—1st, the expenses of the management; 2d, the payment of annuities as directed in the trust-deed till the death of the last annuitant; and 3d, the payment of the premiums on the policies of insurance. The surplus income accumulated in their own hands down to the date of Sir John's death in 1878 as after mentioned. Sir John had one daughter, Miss Florence Cathcart. On the occasion of and prior to her marriage to Colonel Heneage in 1864, she executed a trust-disposition, in which, with the consent of her future husband, her father, and the trustees under Miss Cathcart's will, she assigned to the trustees therein named the whole of her interest in Miss Cathcart's settlement. The consent of Miss Cathcart's trustees was declared to be in virtue of the powers conferred on them by her settlement to settle the trust-estate on the marriage of Sir John's only daughter, but that in so far only as she had then a vested right under Miss Cathcart's settlement. Sir John Cathcart by his consent declared that he expressly ratified Miss Cathcart's settlement, and assigned to the trustees of Mrs Heneage's settlement his right in Miss Cathcart's estate, or in the produce and accumulations thereof. He also by a separate letter declared his daughter's trust-disposition had been assented to and signed by him in the knowledge of the effect of the Thellusson Act.

Sir John Cathcart died on 25th March 1878. He was survived by one son Sir Reginald Cathcart, and also by his daughter Mrs Heneage. Mrs Cathcart's trustees, as directed by her settlement, ascertained and fixed the capital of her trust-estate as at Whitsunday 1878, the first term after Sir John's death. It consisted of (1) the sum of £28,291, 17s., as the amount of the residue of moveable estate and the price of heritage sold by them; (2) of £35,619, 9s., being the sums due under the policies on Sir John's life with bonus additions. The amount of the estate was thus in all £63,911, 6s. After Sir John's death they paid the income of the capital of the trust-estate as accumulated to the trustees of Mrs Heneage. The amount which had been paid in premium more than equalled that recovered under the policies.

The next-of-kin of Miss Helen Cathcart at the time of her death in 1841 were her three nephews—Sir John Cathcart, George Cathcart, and Andrew Cathcart. George died in 1860, leaving his estate to Andrew. Andrew died on 11th January 1882, leaving a trust-disposition and settlement, in which he gave to Baron Colville of Culross, K.T., and Sir James Fergusson of Kilkerran, Bart., K.C.M.G., as trustees, the whole of the estate belonging to him at his decease, and directed them, after paying certain legacies and annuities, to apply the remainder of his estate in paying off the bur-

dens upon the family estates of Carlton and others. These trustees having been advised that all accumulation of the income of Miss Cathcart's trust-estate, so far as moveable, after 15th June 1862, twenty-one years after her death, was illegal and inoperative under the Thellusson Act (39 and 40 Geo. III. cap. 98), and that the income of it after that date was intestate succession falling to the next-of-kin of Miss Cathcart at the date of her death, and that they, as representing her nephews George and Andrew, were entitled to two-thirds thereof, raised this multiplepoinding, the fund *in medio* in which consisted of the accumulated income of the trust-estate of Miss Helen Cathcart in so far as the same consisted of moveable estate from 15th June 1862 to 25th March 1878, with interest. They claimed in terms of the contention just explained.

The trustees under the trust-disposition which Mrs Heneage had executed on the occasion of her marriage, averred that Andrew Cathcart had acquiesced in and approved of the alleged accumulations. They claimed the whole fund *in medio*, or alternatively one-third of it.

They pleaded—"(1) Upon a sound construction of the said trust-deed, the said Mrs Heneage was entitled to the accumulations of the income of the moveable portion of the trust-estate between 15th June 1862 and 25th March 1878, and the claimants in virtue of her trust-disposition are now in right thereof. (2) In the event of it being held that the provisions of the said trust-deed directing an accumulation of the income of the trust-estate are void in whole or in part, under the provisions of the Act 39 and 40 Geo. III. chapter 98, the said Mrs Heneage had right thereto as the person who in the circumstances condescended on would have been entitled to said income if the said accumulation had not been directed, and the claimants as her assignees are entitled to payment thereof. (6) The payment of premiums of insurance by the trustees being authorised by the truster, and not being accumulations in the sense of or prohibited by the said Act 39 and 40 Geo. IV., c. 98, said premiums ought, in so far as made out of the income of the moveable estate, to be deducted in estimating the amount of accumulations of said income."

Sir Reginald Cathcart maintained that under Miss Helen Cathcart's settlement Mrs Heneage was only entitled to a liferent, with fee to her children in the event of their surviving her, and in the event of their predeceasing her, that he was entitled to the fee under the ulterior destination of the settlement. He claimed that, "in so far as the capital of the fund *in medio* is claimed by or on behalf of Mrs Heneage or her children, as beneficiaries under Miss Helen Cathcart's trust-disposition and settlement, the nominal raisers should be ordained to retain said capital in their hands until it be seen whether the ulterior destination of the residue in favour of the claimant does not take effect."

The Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds (1) that in carrying out the directions of Miss Helen Cathcart's will the pursuers made accumulations of income of her personal estate during a period of over thirty-six years, which, in so far as exceeding the period of twenty-one years permitted by statute, are to be accounted for to Miss Helen Cathcart's next-of-kin: Finds (2) that the application of income to the payment of premiums of assurance on Sir John Cathcart's life was, in the circumstances disclosed on record, an indirect accumulation of income, and consequently that Miss Helen Cathcart's next-of-kin are entitled to a share of the proceeds of such policies corresponding to their interest in the accumulations, and to be ascertained by actuarial valuation: Finds (3) that the accumulations made of the income of heritable estate are effectual, being excepted from the operation of the statute libelled: Finds (4) that on the death of Sir John Cathcart the claimants Mrs Heneage's marriage trustees became entitled to the residue of the trust-estate, except so much thereof as consists of the proceeds of illegal accumulations, and that they are also entitled in virtue of the marriage-contract to Mrs Heneage's share of the accumulations falling to the next-of-kin: Continues the cause for further procedure, reserves expenses, and grants leave to reclaim.

"*Opinion.*—The questions argued before me relate to the effect of certain directions contained in Miss Helen Cathcart's will, which are alleged to be in contravention of the Thellusson Act. The will was made in August 1836, and is in the form of a conveyance of property, heritable and moveable, to trustees, with directions for its disposal.

"By the fifth trust purpose Miss Cathcart directs that the residue of her estate shall be held by trustees for behoof of the daughter or daughters, and failing them, of the son or sons, of her nephew Sir John A. Cathcart, and during his lifetime the rents, interests, and profits are to be allowed to accumulate; and it is added, 'No part thereof shall be paid to the said Sir John Andrew Cathcart or any of his children during his lifetime.' On the death of Sir John the residue is to be divisible in terms which I shall afterwards consider.

"Miss Helen Cathcart died in June 1841; Sir John Cathcart died in March 1878. The accumulation directed by the will extended over the period limited by these dates, being nearly thirty-seven years, and to the extent of the excess of that period over twenty-one years it is admitted that there has been accumulation in contravention of the express provisions of the statute.

"(1) The question that first arises is—Who is entitled to the prohibited accumulations?

"In the case of *Stirling Maxwell*, 5 R. 248, the Lord Justice-Clerk stated the rule as follows:—'If the fund directed to be accumulated is not the subject of any present gift, then the right of the eventual beneficiary will not be accelerated or arise at the term of twenty-one years, but the heir-at-law *in mobilibus* will take it as intestate succession. But if there be a present gift of the fund itself, and the direction to accumulate be only a burden on the gift, then the burden will terminate at the expiration of twenty-one years, and the gift will become absolute in the person of the donee.' I accept this definition, which is in accordance with the opinions of Lord Westbury and Lord Justice Turner, as the criterion for determining the present question.

"For Mrs Heneage, Sir John Cathcart's only daughter, it is contended that the direction to Miss Cathcart's trustees at the commencement of the fifth purpose, to hold the residue for behoof

of Sir John Cathcart's daughters, whom failing his sons, imports a present gift, with a direction to accumulate superadded. But I am satisfied that it is not so in reality. If the words quoted were complete in themselves they would import a fee in Mrs Heneage *a morte testatoris*. But it appears from the expanded destination which comes in at the end of the direction to accumulate that there is to be no vested interest in anyone until Sir John Cathcart's death, nor even then if he should have an unmarried daughter. If Mrs Heneage had not survived her father or left issue, the accumulated fund would have gone under the will to her brother. How, then, can it be said, in any just acceptation of Lord Moncreiff's definition, that the will contains 'a present gift' in favour of Mrs Heneage? If it is admitted that there is no such gift *a morte testatoris* of the fund to be accumulated, but is contended that the introductory words are to be taken by themselves for the purpose of operating a transfer of the income arising after the lapse of twenty-one years, I think, if I were to give effect to that contention, I should be doing the very thing which Lord Westbury held he was unable to do—that is, giving to a term or description contained in the will a meaning which it would not have had if the trust for accumulation were good instead of bad. I cannot hold that the annual rents accruing after the lapse of twenty-one years are to be treated as in suspense during Sir John Cathcart's life, until it is seen whether his daughter is to survive him, because that would be accumulation. I cannot hold that Mrs Heneage was entitled to the immediate perception of these annual-rents, because this would be putting a forced construction on the will for the purpose of reconciling it with the statute—treating an interest which is not vested under the will as if it were vested, and disregarding the plain direction that no part of the income should be paid to any of Sir John's children during his lifetime. I therefore come to the conclusion that the fund ineffectively accumulated by the trustees is lapsed residue, and falls to the testator's legal representatives.

"(2) The clause in which the trustees are directed to accumulate the trust-funds during Sir John Cathcart's lifetime also empowers the trustees to effect insurances on Sir John's life, in order, it is said, 'to enable the trustees to receive a sum or sums at his death, to be then applied for the purposes of this trust.' Insurances were effected in terms of the power, and a large part of the income of the trust was applied annually in payment of the premiums. Is this accumulation? This is the second question which arises for decision. I find this question to be more easy of solution than some of the hypothetical cases which were suggested in argument. Where a testator has himself insured the life of his debtor, or other person in whose life he has an insurable interest, and directs his executors to continue the payment of the premiums during the currency of the policy, such payments when continued for more than twenty-one years from the testator's death, although they do unquestionably contribute to the production of an accumulated fund, are not held to fall within the prohibition of the Thellusson Act. It was so adjudged in the Court of Chancery. My own opinion is that the Act of Parliament does not interfere with contracts entered into in the ordinary course of business; and that the fulfilment of such contracts, though involving annual payments extending over a long period of time, is not a 'settling or disposing of any real or personal property in such manner that the rents, &c., shall be wholly or partially accumulated.' But it is a different case where a testator, being under no obligation to an insurance company, and having no insurable interest in the life of his kinsman, directs his trustees to insure that kinsman's life, and to pay the premiums out of the income of his estate, for the very purpose of postponing the beneficial enjoyment of that income and augmenting the capital. The statute proceeds on a preamble reciting the expediency of restraining dispositions, whereby the profits and produce of estate are accumulated and the beneficial enjoyment thereof is postponed. These effects follow from the insurances directed by Miss Cathcart. There can be no doubt that her object was indirect accumulation, because the power to effect insurances is given as an alternative to the power to accumulate directly, and with the explanation that no part of the trust income is to be paid to the beneficiaries until Sir John Cathcart's death. There is also here the element of appropriation of the income of property under a settlement, which is the thing prohibited or restrained by the enacting words of the statute. On these grounds I am of opinion that this is a species of indirect accumulation through the medium of life assurance. I am not moved by the consideration that the transaction was legitimate in its inception, and that its validity depended on the duration of Sir John Cathcart's life. The same thing may be said of any direction to accumulate for an uncertain period. In this case there might be difficulty in actually discontinuing the payment of premiums, and I do not say that this Court would have interdicted the further payment of premiums after the lapse of twenty-one years, so as to cause the lapse of the policies. The nullity of the statute is not directed against the acts of the trustees or administrators of the estate, but it is directed against the testator's instructions, in so far as these withdrew the income from the persons who would be entitled to it if accumulation had not been directed. In the present case I think there must be an actuarial apportionment of the proceeds of the policies, so that the legal representatives may obtain decree for a sum representing the produce of the annual rent or income of the trust for the period commencing twenty-one years after the truster's death.

"(3) Part of the accumulated fund represents the income derived from heritable estate, or its price. On this part of the case I shall do nothing except to repel the pleas on constructive conversion, which I do on the ground that the third section of the statute expressly excepts from its operation dispositions respecting heritable property in Scotland. The trust was within the exception so far as the heritable property is concerned, and although that property was sold in pursuance of a power, yet as this did not involve the execution of any new trust, there is nothing to which the prohibition of the statute can attach. It is not accumulation *per se* which is prohibited; it is accumulation in virtue of any deed, surrender, will, codicil, &c.—that is, in virtue of any deed other than deeds of the class excepted in the third section of the statute. Indeed, I cannot see how the principle of constructive conversion can be

legitimately invoked for the purpose of giving the statute a retrospective operation in reference to accumulations which were legal, regard being had to the state of the property at the time of the testator's death.

"(4) A separate question has been raised with reference to the share of the accumulated fund to which Mrs Heneage is, in my opinion, entitled. I mean the share which represents capital and lawful accumulations. As to this, it is contended that no right vests in anyone under the will until the death of Mrs Heneage. I think, however, that Miss Helen Cathcart meant that her estate should be distributed after the death of Sir John Cathcart and the marriage of his daughters, and that her meaning is expressed with reasonable clearness. Mrs Heneage is the only daughter, and she married in her father's lifetime, consequently the fund vested in her at her father's death, and immediately passed to her marriage trustees by the assignation contained in her contract of marriage. In another view, it vested in the marriage trustees by the direct operation of the will. The result is the same, and I merely indicate a preference for the first of these views. I think that the competing claimants mistake the meaning of the destination entirely when they suppose that the vesting is to be kept open in case of the possibility of Mrs Heneage dying without issue. The words 'who shall afterwards all die without issue' evidently refer to the possible event of death after Sir John Cathcart, and before the property should become 'a fund of division' by the marriage of all the daughters. These words are part of a destination or direction to distribute, all the parts of which have relation to one period of division, and are connected in construction by proper referential words, although the interjection of a power to settle in the middle of the clause makes it a little difficult to read. I therefore sustain the claim of the marriage trustees to the fund *in medio*, minus the prohibited accumulations."

The defenders and claimants, the trustees under Mrs Heneage's trust-disposition, reclaimed, and argued—The Lord Ordinary's interlocutor should be recalled, and particularly the second finding, in which he held that Miss Cathcart's next-of-kin were entitled to a share of the proceeds of the policies of insurance on Sir John Cathcart's life, as the application of income to payment of the premiums was indirect accumulation so far as they had paid them beyond the period of twenty-one years allowed by the Thellusson Act. Here there was no accumulation; the trustees had been permitted by the trust-deed under which they acted to effect policies of insurance upon the life of Sir John Cathcart, and if they had not paid the premiums upon them up to the death of Sir John Cathcart the policies would have lapsed, and the estate suffered greatly. So far from the premiums being accumulation, their payment was merely an expedient to prevent loss. A similar question had been already considered in England, and it had been held that such payment of premiums was not indirect accumulation—*Bassil* v. *Lister*, July 22, 1851, 9 Hare, 177; *in re Vaughan, Halford* v. *Close*, May 7, 1883, W.N. No. 19, 89.

Argued for respondents—In this case there was indirect accumulation. Under the trust-deed there was only a power to the trustees to effect policies of insurance on Sir John Cathcart's life; this was placed among the clauses of the deed which ordered the accumulation of funds, and in effecting these policies the trustees made the insurance offices the means of accumulation. The purpose of the Thellusson Act was to prevent the stoppage of the beneficial use of income after the lapse of twenty-one years from the death of the testator, and the trustees were liable for all the sums paid out of income for the keeping up of policies of insurances beyond the twenty-one years. A private arrangement ought to have been made between the trustees and the next-of-kin as to keeping up the policies, so that the estate should suffer no loss—1 Jarman on Wills, 4th ed., 316.

At advising—

Lord Justice-Clerk—I am of opinion, concurring with the Lord Ordinary, that the bequest did not vest in Mrs Heneage until the death of Sir John Cathcart, and that it did vest at that date. The Lord Ordinary has fully explained the reasons which have led him to that result, and they are entirely satisfactory to me.

There remains the very important, and with us novel question, relative to certain insurances effected by the trustees on the life of Sir John Cathcart, in terms of a power conferred on them by the settlement. The terms in which this power was given are the following—"And it is hereby specially declared that during the lifetime of the said Sir John Andrew Cathcart the whole rents, interests, and profits of my said trust estate, heritable and moveable, shall be drawn by my said trustees, and shall be allowed to accumulate in their hands, and shall from time to time be lent out on heritable security, or in the Government funds, or bank stock as aforesaid, and no part thereof shall be paid to the said Sir John Andrew Cathcart or any of his children during his lifetime, but with power if they see cause to make insurances on the life of the said Sir John Andrew Cathcart in name and for behoof of the said trustees in such a way as to enable the said trustees to receive a sum or sums at his death, to be then applied for the purposes of this trust."

In pursuance of this direction the trustees effected insurances on the life of Sir John Cathcart to the extent of £25,000 in 1846. The testatrix died in 1841, and was survived by Sir John Cathcart for nearly thirty-eight years, he having died in 1878. The income of the estate has been applied during that interval in paying the premiums as they fell due; and the amount so paid more than equalled the amount recoverable under the policy.

It is maintained by the next-of-kin that all these payments, made after the expiration of twenty-one years from the death of the testatrix, were illegal and that the power to make them was null and void under the Thellusson Act, in respect that such employment of the income constituted an accumulation under the provisions of that statute. It seems to follow that as the accruing income thereby fell into intestacy, and vested in the next-of-kin, it was the duty of the trustees to have allowed all these policies of insurance to drop in 1862, and to have sacrificed the expenditure then incurred, and the whole sums assured, amounting to £25,000, leaving only to the estate the surrender value of the policies.

The Lord Ordinary seems to have felt the difficulty of arriving at this conclusion; and proposes to take the sum assured as representing the amount of the premiums, and to divide these in the proportion which the lawful payments bear to the unlawful. But I find it hard to accept that view; for if these payments were accumulations they ought not to have been made, and if they were unlawful they were not accumulations. But I think a little closer examination of their true nature will show that no part of them constituted an accumulation under the Thellusson Act.

A transaction of this kind has very little analogy to the evil which was the object of the Thellusson Act. A direction to effect an insurance on the life of one living at the testator's death, so far from savouring of perpetuity, is as temporary and transitory an application of income as could be devised. But a direction to keep up a policy on which 21 years had run seems as far as possible removed from the kind of accumulation prohibited by the statute. Accumulation is a term entirely inapplicable to the result of such a transaction. Any gain which the trust estate could have acquired by it had been created contingently before, and so far were the continued payments from augmenting the estate that they only saved it from loss. By the time the twenty-one years were out a great part of the anticipated benefit was swallowed up, and when nearly forty years had run it wholly disappeared.

All this shews that the notion that a transaction like this is identical with accumulation rests on a fallacy. If Sir John Cathcart had died in 1847 the estate would have gained enormously, but not one penny of the gain would have been the result of an accumulation of income. It would only have arisen from the application and expenditure of it. The income which had been spent in paying the premium was gone beyond recall, and never could by possibility form any part of an accumulated fund. The £25,000 which would have fallen to the estate did not arise out of accumulations but out of contract. It would in that case have been a very losing contract for the insurance companies, but that only shows that the advantage or the loss on either side had no relation to accumulation, but rested on the chances of life.

What precise meaning is to be attached to the phrase "indirect accumulation" I do not quite understand. The heap must either grow larger, remain stationary, or grow less. All accumulation must carry with it a progressive increase in the aggregate of the accumulated product. In this case the lapse of time simply carried with it an increasing burden, which year by year diminished the prospective benefit.

In the argument from the bar it seemed to be thought that the fact that the next-of-kin were excluded from the income thus spent after twenty-one years had elapsed from the death of the testator lent force to the plea founded on accumulation. But it plainly does not affect it. If this is a legal bequest the next-of-kin are properly excluded, but the fact that they are excluded raises no presumption that it is illegal. Life interests are created by testators every day for much longer possible periods than twenty-one years, but these are not in any degree in derogation of any right which the next-of-kin can pretend. Before the next-of-kin can allege a right the income must be retained, and not expended, so that in consequence of its retention it grows progressively larger.

Lastly, it was maintained that these insurances were dealt with by the testatrix herself as part of a system of accumulation. I do not so read her words. I think the power which she gave was very clearly an exception to the direction to accumulate, not a part of it. It was no doubt a part of a general scheme to benefit her legatees at Sir John Cathcart's death, part of which was to be effected by accumulation and part by insurance. I think the words used in the settlement prove this quite distinctly.

In short, these premiums were not accumulated; they were expended. They were parted with as the stipulated price of a future contingent benefit, and therefore could not be accumulated. The benefit which they were intended to secure was one in which the next-of-kin had no concern, to which they contributed nothing, and in which they ran no part of the risk. The sum ultimately recovered did not in any juridical sense represent the payments made. It was a commercial transaction—a purchase the price of which was payable by instalments, and no accumulation took place or was possible during the whole course of it.

This question, as I have said, has never been presented in our Courts for decision. It has occurred twice in the English Courts, and on both occasions with the result of substantially confirming the views which I have endeavoured to illustrate. The first of these cases was decided by Sir George Turner as Vice-Chancellor in 1851. The second was decided as recently as May last by Mr Justice Chitty. The first case was that of *Bassil* v. *Lister*, 9 Hare 177, in which Sir George Turner in an elaborate judgment found that a direction by a testator to pay the premiums of insurance on a policy effected by himself was found not to be a direction to accumulate within the meaning of the Thellusson Act. There can be no higher authority on such a question, and his full and comprehensive judgment deals with the considerations I have tried to illustrate in a manner equally clear and unhesitating; and although Mr Jarman in his work on Wills questions the soundness of his views, the same decision was given by Mr Justice Chitty in the recent case *in re Vaughan, Halford* v. *Close*, Weekly Notes, May 7, 1883. It is true that the latter case seems to have been an amicable suit, but that does not detract from its authority, and Mr Justice Chitty, notwithstanding Mr Jarman's doubts, said that he could not distinguish the case from that of *Bassil* v. *Lister*.

The fallacy which seems to me to run through the detailed criticism of that learned author is that he assumes that effecting policies of insurance on lives constitutes accumulation within the meaning of the Thellusson Act, and tries to show that if it be a mode of accumulation it does not signify that it is not the ordinary mode. I have endeavoured to show, following the high authority of Sir George Turner, that it is not necessarily a mode of accumulation at all. Whether by the application of the principle of life assurance an astute evasion of the Thellusson Act could be devised I need not inquire, but I am quite satisfied that the method suggested by the in-

genious author would fail, and all such attempts would probably be frustrated by the uncertainty of human life.

LORD YOUNG—I am of the same opinion. The case strikes me thus, Was the direction to effect insurances on the life of Sir John Cathcart a valid direction? if it was, was it validly followed out by the trustees? I think it clear that it was a valid direction, and the trustees could not be restrained from effecting an insurance upon the life of Sir John Cathcart. I am dealing with the question as if the permission to effect policies of insurance had really been a valid direction, because in that case it would have been the same thing, and it was well fulfilled by the trustees. What was their position then after the policies had been taken out? That of course depends upon the terms of the policy, but if these were in the usual terms the condition of affairs would be this—The office contracted to pay a certain sum of money to the insurers, and engaged to continue that contract till the death of Sir John Cathcart; they could not put a stop to the contract. Usually there is no obligation on the person whose life is insured, because the obligation is usually enforced on him by the consideration that if the premium is not paid the policy falls. Practically both parties are under a contract which is to last a longer or a shorter period according as the life of the person insured is longer or shorter. The Thellusson Act was not framed for putting an end to a contract like that. The annual payments are not an accumulation—there is nothing heaped up. I think it would be contrary to the intention of the Thellusson Act if we held that this was accumulation. The phrase accumulation is sometimes used in arguments to induce people to insure their lives and induce thrift, but the language in cases of that kind is figurative. It was almost superfluous to have made these observations, as I entirely agree with the opinion of your Lordship.

LORD CRAIGHILL—On the first, third, and fourth questions decided by the Lord Ordinary I do not mean to say anything, because we are all agreed that the views on which he has proceeded and his decision are correct; but on the second there is a difference of opinion among us, and it is proper therefore that the grounds on which I proceed should be explained. As, however, I concur with the Lord Ordinary not only in holding that the application of income to the payment of premiums of assurance on Sir John Cathcart's life was, in the circumstances disclosed on the record, an indirect accumulation of income, but in the reasons for this finding, a brief explanation on my part is all that is required.

Miss Cathcart in her trust-deed directed her trustees to hold her estate during the lifetime of Sir John Andrew Cathcart, and she thereby specially declared "that during the lifetime of the said Sir John Andrew Cathcart the whole rents, interests, and profits of my said trust-estate, heritable and moveable, shall be drawn by my said trustees, and shall be allowed to accumulate in their hands, and shall from time to time be lent out on heritable security, or in the Government funds or bank stock as aforesaid, and no part thereof shall be paid to the said Sir John Andrew Cathcart, or any of his children, during his lifetime, but with power, if they see cause, to make insurances on the life of the said Sir John Andrew Cathcart, in name and for behoof of the said trustees, in such way as to enable the said trustees to receive a sum or sums at his death, to be then applied for the purposes of this trust."

This accumulation till Sir John died was a specified purpose of the trust, and insurance on his life was one of the ways in which the fulfilment of that purpose might, according to the wishes of the truster, be accomplished. The truster died in 1841; policies were taken out upon the life of Sir John Andrew Cathcart for sums amounting in all to £25,000 in 1845; premiums were paid upon these till the death of Sir John in 1878, and so it happened that moneys, part of the income of the trust, were disbursed for fifteen years after the expiry of twenty-one years from the truster's death, during which last period alone, according to the Thellusson Act, these could lawfully be accumulated. Whether this application of trust income was or was not a contravention of that statute is the thing which is now to be decided, but that it was an accumulation of trust income appears to me to be clear. That was its character, and that was its result. The way taken to reach the end might be unusual, though certainly not unprecedented, but the end was the same in everything except the consideration, first, that it involved an element of speculation, and second, that the sums paid as premiums became the property of the insurance companies, and were not loans made to them as an ordinary investment. The trustees, provided they paid so much year by year while Sir John lived, were to receive at his death the sum insured. This was the transaction, and the result was, as I think, accumulation. The sum in consideration of which premiums were to be paid might be more or less than would have been realised had the money been laid out on another investment. Whether it should be one or the other depended on the length of time Sir John lived, but that income year by year was disbursed that the trustees might receive at his death the sum or sums insured, to be then applied to the purposes of this trust, is as matter of fact an absolutely true proposition. Thus the result is accumulation—the question is, whether the prohibition of the Thellusson Act (39 and 40 Geo. III. cap. 98) strikes at such an accumulation. It may or it may not. If the expenditure of income in every way which results in an accumulation is prohibited, that which follows when premiums are paid on life insurances will be illegal; but if only some modes and not all modes of accumulation are struck at, the one which was followed on the occasion in question may not be carried by the Act. Let us, therefore, turn to the enactment. In section 1 of the statute, with which we are all familiar, and which has been often referred to, and more than once read while the case has been before the Court, the words which are at present material are these —"That no person or persons shall after the passing of this Act by any deed or deeds, surrender or surrenders, or will, codicil, or otherwise, howsoever settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such granter or

granters, settler or settlers, or the term of twenty-one years from the death of such granter, settler, devisor, or testator." This is as comprehensive a prohibition as probably could be framed, and once we arrive at the conclusion that there has in fact been an accumulation in carrying out the will of the truster according to its meaning, by paying premiums to keep up policies of insurance out of income drawn after the expiry of twenty-one years from the truster's death, the case, as far as I can see, will be within the action of the statute. Manner or mode of accomplishing the result is immaterial. Given accumulation as the result of the application of money, the income or produce or profits of the estate, the nullity is as a consequence incurred.

The reclaimers, however, argued, first, that there is in paying premiums no accumulation, because the income is not accumulated but spent; secondly, that the payment is made under contract; and third, that the money which in the end is received from the insurance offices is not accumulated money, but a sum purchased and paid irrespective of any accumulation. These objections to the application of the Act seem to me to leave unshaken the conclusion that the result of all is accumulation. Practically the same arguments were used in the case of *Smyth's Trs.* v. *Kinloch*, July 20, 1880, 7 R. 1176, where the controversy arose out of the purchase of an estate in the course of trust administration, the price of which was to be provided for out of income accruing in part 21 years after the truster's death. The Court there held that after the lapse of 21 years from the date of the testator's death his trustees were not entitled to apply the surplus revenue in paying off the debts incurred by them in the purchase of lands during the 21 years, such payments being accumulations in breach of the Thellusson Act, whether the debts were incurred by the direction of the testator or not. Lord Ormidale there said—"Even if according to any reasonable construction of his trust-deed, the granter in the present instance could be held to have empowered his trustees to purchase lands by borrowed money to be paid off by accumulation of the rents or revenue of the trust-estate after the lapse of 21 years, I should entertain very little doubt that such accumulation would be struck at by the statute. Were it otherwise the enactments of the statute might be very easily evaded, and accumulation might go on for an indefinite length of time. Just suppose that in the present instance the trustees had shortly before the expiry of the 21 years, in virtue of powers given them to that effect, purchased lands to the extent of £200,000, or some other very large sum, with borrowed money, to be repaid out of the accumulation of subsequent rents and revenue of the trust-estate, for it might be a very long period of time after the lapse of 21 years from its commencement, I cannot doubt that such an accumulation would be an evasion of the statute, and consequently illegal. And if so in the extreme case suggested, the illegality must be the same, although more limited in its operation, where the purchase money or price paid and sum borrowed are small." This view of the law is as apposite to the present case as it was to the case of *Smyth's Trs.* v. *Kinloch*, and is, as I think, full warrant for the conclusion that the payment of premiums out of an income 21 years after the death of the testator is a contravention of the Thellusson Act.

The reclaimers also maintain that such payments could not result in accumulation, because the sum assured remained the same whether one or more premiums were paid to the insurance offices, the suggestion being that payments subsequent to the first had no connection with the ultimate acquisition of the sum assured. This, it need hardly be said, is a fallacy. One payment will be enough should the person whose life is insured die within the year, but when he survives, subsequent payments are as necessary as the first, and each consequently is requisite, and becomes, as it is disbursed, a portion of the money resulting in the accumulation represented by the sum received from the insurance office.

The reclaimers cited the judgment delivered by Vice-Chancellor Turner in *Bassil* v. *Lister*, 9 Hare 177, as a precedent. I have read and re-read the report of that case, and if the decision or rather the Judges' opinion on the general question were binding on me as an authority I would guide myself by it, whatever might be my individual opinion upon the question which was the subject of the judgment. But while it is entitled to and will receive the greatest respect, it is not obligatory here; and as I, agreeing on this matter with Mr Jarman (who reviews the decision referred to in his Treatise on Wills, 4th ed., pp. 313-16), consider the reasoning on which the decision is rested inconclusive, I, having the liberty, feel called upon to act upon my own persuasion of the true interpretation of the Thellusson Act. On the latter of the two English cases referred to in the argument, I make no observation, because the short report in the books does not enable me to appreciate either facts or the grounds on which this decision was pronounced.

For these reasons I think that the second as well as the other findings of the Lord Ordinary ought to be affirmed.

LORD RUTHERFURD CLARK—If I were to decide, according to my own impression of it, the only point on which there is a difference of opinion, I should be disposed to hold that the direction to accumulate came to an end with the expiration of twenty-one years after the death of the testator, and that the power to apply the income in taking out or maintaining policies of insurance fell with the direction of which it was a mere accessory. The result would be that after the twenty-one years the income would belong to the testator's next-of-kin, and that the trustees would be bound to account to them for it. This would be the true claim of the next-of-kin; but it is possible that they might have, if they preferred it, a right to a share of the proceeds of the policies, on the ground that these proceeds were obtained by the use of moneys belonging to them.

But the judgments of Sir George Turner and Mr Justice Chitty are against me, and the majority of your Lordships concur in these judgments. I think that I am bound to defer to so much and so weighty authority, and to agree with the majority of your Lordships.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the defenders, the trustees of Mrs Heneage, against

Lord M'Laren's interlocutor of 6th February last, Recal the said interlocutor in so far as regards the second finding thereof, and in lieu thereof Find that the application of the accruing income to payment of premiums on policies of insurance on the life of Sir John Cathcart did not constitute an illegal accumulation within the meaning of the Thellusson Act, and that the next-of-kin have no interest in the sums so paid or thereby assured: *Quoad ultra* adhere to the said interlocutor, and remit the cause to the Lord Ordinary, with instructions to proceed therein as accords."

Counsel for Mrs Heneage's Trustees (Reclaimers)—Muirhead—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Major Cathcart's Trustees (Respondents) and Miss Cathcart's Trustees—Mackintosh—Pearson. Agents—A. & A. Campbell, W.S.

Friday, July 13.

FIRST DIVISION.

[Lord Adam, Ordinary.

ALEXANDER'S TRUSTEES *v.* DYMOCK.

Arbitration—Clause of Reference—Decree-Arbitral—Death of Party to Reference—Trust—Personal Obligation by Trustees in Trust Matter.

Testamentary trustees duly authorised by their trust-deed entered into a reference with the representatives of a firm with whom the truster had had cash transactions, for the purpose of having the true state of the accounts ascertained and the balance due by the one party to the other fixed. The minute of reference contained a provision by which the parties bound themselves and their respective heirs, executors, and successors to implement and fulfil whatever award should be issued. During the dependence of the reference, and before an award was issued, the trustees who had entered into the reference died. Thereafter the new trustees maintained that the reference had fallen by the death of one of the contracting parties. *Held* that the contracting party being the trust, which as represented by the new trustees continued to exist notwithstanding the death of the original trustees, the submission had not fallen. *Opinions* that such a reference would not have fallen by the death of the truster had he entered into it during his life, and that the new trustees were in the special circumstances of the case barred by their actings in regard to the submission from maintaining that it had fallen.

This was an action of reduction of a minute of reference, and of a decree-arbitral following thereon. The circumstances out of which it arose were as follows:—By minute of reference dated 25th and 26th August 1873, James Ritchie Dymock, as factor, and as taking burden on him for the trustees of the late Robert Lockhart Dymock, and for the dissolved firm of Dymock & Paterson, solicitors-at-law in Edinburgh, of the first part, and Alexander Learmont and Edward Black, the sole accepting trustees of the deceased John Alexander, builder in Edinburgh, who died on 4th January 1869, of the second part, agreed, on the narrative that Dymock & Paterson, and afterwards Dymock, had acted for several years as law-agents for Alexander, during which time business accounts were incurred by him, and cash transactions took place between them, and whereas "the said accounts were complicated, and it was desirable that the true state of accounts between the said parties should be ascertained," to refer to Mr Baxter, W.S., Auditor of the Court of Session, the whole cash transactions between Dymock and Dymock & Paterson on the one part, and Alexander on the other part, that he might inquire into the same, and settle and ascertain the true state of accounts between the parties, and fix the balance due by and to the other, as also tax the whole business accounts incurred by Alexander to the firm, and to Dymock, and include in his decree-arbitral the taxed amount thereof; which decree-arbitral was to be binding upon both parties.

The last clause of the minute of reference was in these terms—"And the parties hereto bind and oblige themselves, and their respective heirs, executors, and successors, to implement and fulfil whatever award the said referee shall issue." Mr Baxter accepted the reference by minute dated 2d October 1873, and various proceedings took place therein, in which Messrs Curror & Cowper acted as agents for Alexander's Trustees, and Messrs J. & A. Hastie acted on behalf of the other party. In March 1881 David Curror and Charles Neaves Cowper were assumed by deed of assumption to act as trustees in Alexander's trust along with Alexander Learmont and Edward Black, and they accepted and acted as such. Mr Black died in July 1881, and Mr Learmont in November of the same year. Mr Baxter proceeded with the reference, and had various meetings with the parties which are referred to *infra* in the narrative of his award. He prepared a draft of his proposed award, and handed it to Curror & Cowper on March 15th 1882 for perusal. Thereafter they intimated for the first time to Mr James Ritchie Dymock that Messrs Black and Learmont were both dead, and contended that by their death the reference had fallen.

On 21st March 1882 the arbiter appointed the acting trustees to sist themselves as parties to the reference. In a note to this interlocutor he explained that in his view the subsistence of the reference was not affected by the deaths of Learmont and Black, they having been parties to the reference, not as individuals but as representing a continuing trust which still survived. He also expressed the opinion that Mr Curror had by his actings made himself a party to the reference.

Mr Curror and Mr Cowper declined to sist themselves, and the arbiter proceeded in the reference without them, and upon 30th May 1882 issued the decree-arbitral which was sought to be reduced in this action. This decree-arbitral proceeded on the narrative of the reference made to him, and of his meetings with the parties, and of the assumption of Mr Curror and Mr Cowper into the trust, and the deaths of Mr Black and Mr Learmont, of a meeting with Mr Curror and the agent for Mr Dymock's trustees on 9th Feb-