LORD RUTHERFURD CLARK—I am of the same opinion.

LORD TRAYNER—I am also of the same opinion but upon somewhat different grounds. These expenses, if they could in any case have been chargeable as expenses of liquidation, could only be so as incurred under a resolution of a company in voluntary liquidation. Now, that resolution fell by reason of the liquidation being put under the supervision of the Court within twelve months of its being passed, and sanction of that resolution not having been asked. I therefore think the case is to be dealt with as if the liquidator had incurred this expense without any resolution being passed. It was suggested in the course of the argument that the sanction of the Court might be taken as given, as it would undoubtedly have been given and could be given now. I think it doubtful whether, even if given now, it would validate *ex post facto* the expenditure here disputed, and even if it would, whether the Court would now give its sanction.

The Court recalled the interlocutor of the Lord Ordinary, sustained the third plea-in-law for the pursuer, and found no expenses due to or by either party.

Counsel for the Pursuer and Reclaimer—Asher, Q.C. — Lorimer. Agent — A. C. D. Vert, S.S.C.

Counsel for the Defender and Respondent — Graham Murray — A. S. D. Thomson. Agent—A. B. Cartwright Wood, W.S.

Friday, February 6.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

EDWARD'S TRUSTEES *v.* YOUNG AND OTHERS.

Testament—Uncertainty—Direction to Accumulate Income—Thellusson Act (39 *and* 40 *Geo. III., cap.* 98).

A testator after expressly excluding one of his nephews from any share in his estate, and leaving certain legacies to other persons named, directed his trustees to accumulate the interest of his estate for fifty years, and thereafter lay out the money in purchasing "an estate in my name that cannot be sold nor indebted, and the income from it . . . to be divided amongst those mentioned in my will yearly." There was no disposal of the fee of the estate.

Held (1) that the direction to accumulate being clear, must receive effect, although under the Thellusson Act the period of accumulation fell to be limited to twenty-one years; and (2) that it was premature to determine the rights of parties in the capital and interest of the residue.

The late William Edward, surgeon, Letham, Forfar, died there upon 6th August 1889, leaving the following trust-disposition and settlement, dated 13th September 1888, and duly recorded.

"*Letham, 13th September* 1888.

"This is the will of William Edward, surgeon.

"1. Charles Smith Edward, my brother James' son, is to get nothing, not to be allowed to enter my house, that's him settled.

"2. John Young, my sister Ann's son, is to get £5; William Young £5; Jane Young, their sister, £5.

"3. John Ogilvy, stationmaster upon the Caledonian Railway, £20; Jessie Ogilvy £30 yearly, to help to bring her family up and educate them, and also money to college her three sons; and John Ogilvy money to college one son, the amount each year not to exceed £30 for each of them.

"It has taken me hard work fifty years to make the money that I have, and I want it kept for another fifty years, and what is over expenses paying each year added twice a-year to the stock. The estate at present is as follows—£3400 in the Royal Bank at Forfar, £2000 in the Bank of Scotland at Forfar, £2600 in the Commercial Bank at Forfar, all upon deposit-receipt, besides my book accounts, pony, and furniture. I appoint Robert Bruce, agent in the Commercial Bank at Forfar, and John Ogilvy, stationmaster, and Jessie Ogilvy, his sister, and Jane Edward, my sister, my trustees. The trustees always to be four. Haldane Edward Fyfe, if he come up well, to be appointed one at twenty-one years. Everything here is my own, and if any person enter objections beat them off.

"WILLIAM EDWARD, *Surgeon.*"

"It requires no witnesses. See left side."

[*On left side.*]—"After the fifty years is past, the money (*sic*) to purchess an estate in my name that cannot be sold nor indebted, and the income from it, after paying expenses, to be divided amongst those mentioned in my will yearly.

"WILLIAM EDWARD, *Surgeon.*"

The deceased Dr William Edward had three sisters, Innes Edward or Ogilvy, Annie Edward or Young, and Jane Edward, of whom only the last survived him. He also had one brother, James Edward, who predeceased him. Mrs Innes Edward or Ogilvy left two children, John Ogilvy and Jessie Ogilvy or Fyfe (two of the trustees). Mrs Annie Edward or Young left three children, the said John Young, William Young, and Jane Young or Adam. James Edward left one child, the said Charles Smith Edward. These were all the nearest of kin of the testator.

The four trustees, after having accepted office and assumed the administration of the estate, found it necessary to bring—as pursuers and real raisers—an action of multipleponding in order to have the rights of competing claimants to the estate determined by the Court.

The trustees claimed "to retain the residue of the estate forming the fund *in medio* until 6th August 1910 (being the period to which accumulation of the inte-

rest was by the Thellusson Act restricted), the free balance, after paying expenses of administration, and providing for the legacies in deceased's will, being added to the capital at the two terms of Whitsunday and Martinmas in each year."

Charles Smith Edward claimed "to be ranked and preferred to one-fourth of the whole estate; or to be ranked and preferred to one-fourth of the whole estate after paying or providing for the special pecuniary legacies left to the Youngs and the Ogilvys under heads 2 and 3 of the will." And pleaded—"(1) The said will being contrary to the provisions of the Thellusson Act and illegal, or otherwise void from uncertainty, or otherwise not habile to convey any part of Dr Edward's estate, this claimant should be ranked and preferred in terms of the first branch of his claim. (2) *Separatim*—The said will being only effectual so far as the special legacies in heads 2 and 3 are concerned, this claimant should be ranked and preferred in terms of his alternative claim."

Miss Jane Edward lodged a similar claim and similar pleas-in-law.

Messrs John Young and William Young maintained that on a sound construction of the will of the deceased William Edward he thereby directed his trustees to purchase an estate, and to entail it for behoof of the five persons taking benefit under said will, viz., the claimants, and Jane Young, John Ogilvy, and Jessie Ogilvy. The said directions, however, being defective, the claimants contended that the whole of the testator's means, under burden of the annuities conferred by the will, and under deduction of the special legacies thereby given, fell to be paid or conveyed equally among the said five persons. Alternatively, the claimants contended that the trustees were bound to hold and accumulate the fund *in medio* as directed by the will for a period of twenty-one years, and thereafter to divide the estate among the said five persons, or their issue as coming in place of them, on the footing that the will truly imported a gift of the fee of the said estate among them; or, in any event, that the trustees were meantime bound to give effect to the testator's direction to accumulate for a period of twenty-one years, leaving the questions as to the disposal of the fund and the income arising therefrom to be determined at the end of said period, and claimed accordingly.

Mrs Jane Young or Adam lodged alternative claims (1) on the footing that the will was void from uncertainty; and (2) under the will. John Ogilvy and Mrs Jessie Ogilvy or Fyfe each claimed (1) their provisions under the second head of the will; and (2) to succeed *ab intestato* to one-eighth of the residue, in respect that the bequest of residue was void from uncertainty.

The Lord Ordinary (WELLWOOD) upon 1st November 1890 pronounced the following interlocutor:—"Finds that the pursuers and real raisers, trustees of the deceased Dr William Edward, are bound to implement and satisfy the provisions in the second and third heads of the will, and to retain the residue of the trust-estate until the 6th August 1910, being twenty-one years from the date of the truster's death, the free balance, after paying expenses of administration and providing for the said special legacies, being added to the capital at the two terms of Whitsunday and Martinmas in each year: Further, finds that it is premature to determine *in hoc statu* the rights of parties in the capital and interest of the said residue: Therefore sustains the claim stated for the said pursuers, and repels the remaining claims in the competition in so far as inconsistent with the foregoing findings: Finds the claimants entitled to their expenses in the competition out of the funds of the trust-estate, &c., and grants leave to reclaim.

"*Opinion.*—It is to be regretted that the parties have not agreed to a division of the fund *in medio*, because I am unable to hold that the testator's directions as to the disposal of the residue of his estate are so radically bad from uncertainty as to warrant an immediate division of the fund. The will contains a very clearly expressed direction to accumulate the free income of the estate for a period of fifty years; the reason assigned being that it had taken the testator fifty years to make the money and that he desired it kept until it reached a sum sufficient to purchase a landed estate. This direction, so far as accumulation is concerned, can only receive effect for twenty-one years, the time limited by statute. But, subject to that restriction, the direction must receive effect unless the directions as to the ultimate disposal of the fund are so inextricable and uncertain as to lead to the bequest being annulled.

"The directions are as follow:—'After the fifty years is past the money to purchase an estate in my name, that cannot be sold nor indebted, and the income from it, after paying expenses, to be divided amongst those mentioned in my will yearly.'

"Now these directions are confused and incorrectly expressed; but it is pretty clear that what was in the testator's mind was, that he wished his trustees to purchase a landed estate and settle it by deed of strict entail, and that the heirs of entail should adopt his name. Of course the direction to entail (if it can be so read) cannot receive effect, because no tailzied destination, and indeed no destination at all, is given. There still, however, remains a direction to purchase an estate with the residue.

"So much as to the subject. As to the objects of the bequest, they are described as 'those mentioned in my will.' It was strongly maintained by all the claimants, except John and William Young, that there was radical uncertainty as to the persons referred to in these words. The words certainly need construction, but I do not see any insuperable difficulty in putting a reasonable construction upon them. I do not wish to prejudge any questions which may hereafter arise, but I may say, in illustration, that *prima facie* there is a good deal to be said for the contention of the claimants John and William Young.

They maintain that by 'those mentioned in my will,' the testator meant those beneficially interested under it, namely, his nephews and nieces (five in number), to whom he left specific bequests; that the expression clearly did not include his nephew Charles Smith Edward, who is disinherited in very emphatic terms; and that it would be unreasonable to hold the words to refer to the persons named as trustees, other than those who are already named as legatees. The remaining trustees other than those already mentioned as legatees are Robert Bruce, agent in the Commercial Bank at Forfar, who was not apparently connected with the family, and Jane Edward the testator's sister. As to the latter, there would have been much to say in favour of its being intended that she should get a share of the residue, had it not been that the time contemplated for payment cannot in human probability arrive during her lifetime. I do not say that this argument should prevail, but it is certainly stateable and not extravagant.

"There is more difficulty as to the extent of the interest which the persons favoured are to take. It may be that when the time for decision comes it will be held that the testator died intestate *quoad* the capital of the residue. But assuming that it is clear who the persons are who are described as 'those mentioned in my will,' the will says that they are to receive at least the free yearly income of the estate when purchased.

"I therefore think that the truster's directions to accumulate must receive effect in so far as allowed by law, and at the expiry of twenty-one years from the date of his death it will fall to be decided who are then entitled to the income and capital of the estate. It may be that even then the trust may not be brought to a close; but as a question will then arise as to the disposal of the income which can no longer be legally accumulated, it is not necessary at present to look further ahead.

"This being my opinion, I think the trustees must continue to hold the fund for twenty-one years, accumulating the free income, and in the meantime satisfy the provisions of the second and third heads of the will."

Charles Smith Edward reclaimed, and argued—Saving the legacies there was intestacy, for the will was inextricable. The ruling idea was accumulation for fifty years, but accumulation of interest beyond twenty-one years was forbidden by the Thellusson Act. As the testator's directions could not be given effect to *in toto*, there was no reason for accumulation at all. There were no directions instructing a valid entail. There was no disposal of capital. There were no persons "mentioned in the will" except as legatees—Thellusson Act 1800 (39 and 40 Geo. 111), c. 98, and Hargreaves' Treatise thereon; *Griffiths* v. *Vere*, November 9, 1803, 9 Vesey 127; *Strathmore* v. *Strathmore's Trustees*, March 23, 1831, 5 W. and S. 170; and case of *M'Culloch* v. *M'Culloch*, November 28, 1752, reported in note on p. 180; *Mason* v. *Skinner*, March 6, 1844, 16 Jur. 422; *Ogilvie's Trustees* v. *Kirk-Session of Dundee*, July 18, 1846, 8 D. 1229; *Mackenzies* v. *Mackenzie's Trustees*, June 29, 1877, 4 R. 962; *Maxwell's Trustees* v. *Maxwell*, November 24, 1877, 5 R. 248.

Argued for John Young and William Young—The reclaimer had been plainly and emphatically disinherited, and had no right to any part of the estate. The testator had evidently an entail in his mind, but whoever might be found ultimately entitled to the estate and its income, there was an unambiguous direction to accumulate which must be given effect to although statute limited the time to twenty-one years. In any case, the five persons beneficially mentioned in the will were clearly those whom alone the testator intended to benefit.

At advising—

LORD JUSTICE-CLERK—This is undoubtedly a very curious will. The question we have to determine, so far as it requires to be dealt with at present, is whether or not it is intelligible. It clearly is so with regard to Charles Smith Edward, who is to get nothing, and with regard to the legatees that are to be paid, and with regard to certain educational provisions. But then it goes on to express a desire that the money should be "kept for another fifty years, and what is over expenses paying each year added twice a year to the stock."

The question we have to decide is, whether or not there is a distinct direction to accumulate? I have no doubt that there is. The law says, although there is a direction to accumulate for more than twenty-one years, the accumulation shall be limited to twenty-one years, and therefore the accumulation here can only be for twenty-one years, but if there is a good direction to accumulate given by a testator able to give such direction it must receive effect. There may doubtless be some difficulty at the end of the twenty-one years as to what is to be done with the money, but the problem may work itself out by that time. We at any rate have no ground for considering what may then be done with the accumulated money. "Sufficient unto the day is the evil thereof."

I think the Lord Ordinary's judgment is right, and should be affirmed.

LORD YOUNG—It is not said here that this testator was not of sound mind. He was possessed of that legal soundness of mind which entitles a man to make a will, although we can see from the terms of the will made that he must have been a little odd. I think the parties interested would act sensibly if they committed their interests to sensible people, so as to have more sensible will substituted for this one. No doubt the parties have thought over the matter for themselves but they can still think over it for some time to come.

The only direction dealt with by the Lord Ordinary was the direction to accumulate, and that direction is not doubtful. No doubt the direction is to accumulate for fifty years, and that period must, in terms of the Thellusson Act, be reduced to

twenty-one years, but why should the direction not receive effect? The only objection stated is of this nature—It is said that at the end of the twenty-one years it will be found that the accumulation has been all in vain, and that there will be an unworkable will still to be dealt with. Like your Lordship and the Lord Ordinary I do not see my way to affirm that proposition. If I could I would. If I were sure that there would then be no will capable of execution, I should find that now and interpose, but it may then turn out that there are certain persons then in existence who may be entitled to the interest of the funds so accumulated.

I therefore agree with your Lordship that the interlocutor of the Lord Ordinary should be affirmed.

LORD RUTHERFURD CLARK—I agree with your Lordships in thinking that the only question at present before us is as to whether this is a good will or not, and on that question I concur in the opinions expressed by your Lordships. It is impossible for us to hold that the accumulation directed by the testator can be of no possible avail. On the contrary, there may at the end of the twenty-one years be persons entitled to take the benefit of the provisions of this will, even although they may no longer have the capacity to enjoy them. I do not think anyone is pointed out to take the fee, and I think the accumulation can only be for the benefit of the persons named in the will, and under it entitled to take the benefit of the income at the end of fifty years, but whatever may be my impressions upon these matters I cannot decide such questions now. They may possibly have to be decided in a new multiplepoinding then to be raised, but I may say that surely it is possible for these people to come to an arrangement by which they may get the benefit of this not very large sum now.

LORD TRAYNER—I concur entirely in the views stated by Lord Young.

The Court adhered.

Counsel for the Trustees (Pursuers and Real Raisers) and for the Claimants John Ogilvy and Mrs Jessie Ogilvy or Fyfe—Baxter. Agent—Archibald Menzies, S.S.C.

Counsel for the Claimant Charles Smith Edward (Reclaimer) — Dickson — Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Claimants—John Young and William Young—D.-F. Balfour, Q.C.—Salvesen. Agent — Alexander Stewart, S.S.C.

Counsel for the Claimant Mrs Jane Young or Adam—Law. Agent—John Rhind, S.S.C.

Counsel for the Claimant Miss Jane Edward—Hay. Agent—Archibald Menzies, S.S.C.

Friday, February 6.

FIRST DIVISION.

[Sheriff of Banff.

WALKINGSHAW AND OTHERS (MACDONALD'S TRUSTEES) *v.* STEWART.

Process—Application for Order to Sist Mandatory where Defender had Left the Country.

Circumstances in which the Court *refused in hoc statu* to ordain a defender who had left the country to sist a mandatory.

This was an action by Alexander Walkingshaw and others, the trustees of James Macdonald for behoof of his creditors, to have Elsie Stewart interdicted from selling two stots pointed by her upon the farm of Newley, the stocking of which, according to the averment of the pursuers, belonged to the trust-estate.

The Sheriff having granted the interdict sought for, Elsie Stewart appealed, but pending the appeal she left this country for America.

Thereafter counsel for pursuers applied to the Court to ordain the defender to sist a mandatory, stating that, according to his information, the defender had gone out to a sister in America, and intended to settle there, and founding on the case of *Taylor* v. *Kerr*, December 1, 1829, 8 S. 151.

Counsel for the defender stated that the defender had left this country for the merely temporary purpose of nursing her sister in America, who was unwell, but her agent was unable to say whether she intended to return to this country or not. He submitted that *Taylor* was an old and peculiar case, and was not a sufficient authority for the present application, which should therefore be refused.

At advising—

LORD PRESIDENT—I think we should refuse this motion *in hoc statu*. Whether we would refuse it absolutely on another occasion would depend a good deal on whether the defender does return to this country, or what we should hear of her intentions.

LORD ADAM—I am of the same opinion. The defender's representative should be aware of her intention. He says he knows nothing about it, and cannot say that she intends to come back to this country. If the motion is repeated, and he cannot give the Court a more explicit answer, I do not say what may be the result.

LORD M'LAREN—If the defender has only gone to nurse her sister, she will probably be home before the case comes on for hearing, and I think therefore it would be premature to require her to sist a mandatory. I agree that we should refuse the motion *in hoc statu*, but before the case is put out for hearing I should expect the representative of the defender to give us some further information.