

poses of that suit. I think it is right in the exercise of our duty to further justice, here and elsewhere, that we should enable the English Court to pronounce such orders as are necessary for the purposes of this suit in dependence there. I close by repeating that if this is done it will by no means relax our control over the writs in the Register, but the Court will be vigilant on future occasions, as it is on this, to see that nothing is done to impair the maintenance of the Register in Edinburgh in its integrity. In the special circumstances of the case we grant the authority.

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

The Court pronounced the following interlocutor:—

“The Lords having considered the petition, and heard counsel for the petitioner in the special circumstances of the case, and under the powers of the Act 31 and 32 Vict. cap. 34, sec. 1, grant warrant to, and authorise and appoint Stair Agnew, C.B., Advocate, Depute Clerk Register of Her Majesty's General Register House, Edinburgh, or other person authorised by him, to obey the subpoena issued on 6th June current by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, and to exhibit in said Division of said High Court the principal will of the late William George Borthwick mentioned in the petition for inspection at the hearing of the suit also mentioned in the petition; the said Stair Agnew or other person authorised by him not to part with the said will except only under the order of the said Division of said High Court for the purposes of the said suit, and decern.”

Counsel for the Petitioner—Blackburn.
Agents—Russell & Dunlop, W.S.

Tuesday, June 13.

FIRST DIVISION.

[Lord Low, Ordinary.]

BRODIE AND ANOTHER v. BRODIE AND OTHERS.

Succession—Vesting—Postponed Date of Conveyance—Dies Incertus.

A testator directed his trustees to “transfer, convey, and make over to and in favour of my eldest son . . . on his arriving at the age of twenty-five years complete, so as effectually to vest the same in his person (if not previously disposed of) all my Z landed property in M, and all lands there held by me in lease with their balances and obligations.” There was no destination-over. The trustees had a power of sale under the declaration that “in the event of

any of the properties specially destined to my said sons being sold or disposed of, the price or proceeds thereof shall come in place of the properties themselves and be invested for behoof of and paid over to my said sons respectively.”

Held (aff. Lord Low) that the Z property did not vest in the eldest son until he reached the age of twenty-five, and that he had no right to the income of the estate up to that date, but only to the estate with its balances and obligations as it then stood.

Trust—Supervening Trust by Different Person—Effect on Previous Provisions.

A truster left certain properties to his sons upon their attaining the age of twenty-five, with power to his trustees to pay them respectively out of the general trust-estate £200 a-year, more or less, until they reached that age. The eldest son, when twenty-four, out of respect for his father's supposed wishes, and having regard to the fact that a property destined to his younger brother had become worthless, and that his youngest brother had been born after his father's settlement, executed a trust in favour of his father's trustees by which he divided his own property into three, giving equal shares to himself and his two brothers, and which took immediate effect.

Held (rev. Lord Low) that his trust was entirely independent of that of his father, and that the fact that he had provided for his brothers in no way restrained his father's trustees, if they thought proper, from continuing to pay to them an annual allowance of £200 each until they respectively reached the age of twenty-five.

Trust—Action of Accounting against Trustees—Pursuer the Executor of One of the Trustees—Bar.

Opinion indicated that an executor, unable to specify any error as to their legal rights into which they had fallen, was barred from bringing an action of accounting against a body of trustees where the deceased had himself been a trustee, had granted the trustees a discharge at a particular date, and thereafter had authorised the regular audit of the trust-accounts by a firm of accountants who had annually reported thereon.

Trust—Personal Liability of Trustees—Alleged Improper Renewal of a Loan—Relevancy.

Held that general averments that trustees had, without consulting their co-trustees, continued a loan over heritable securities at a lower rate of interest than formerly and that the securities were now valueless, but which did not set forth that a higher rate of interest could then have been obtained, that the securities could have been realised without loss, and did not specify in what way the trustees had been negligent, could not found an action for

personal liability against them or their representatives.

Opinion expressed by Lord M'Laren that there is great inconvenience in combining in one action questions of personal liability which only affect certain of the trustees of a trust individually in consequence of their individual acts or defaults, and questions of construction and administration which affect the body of trustees in their representative capacity.

Kenneth Sutherland Brodie died in 1868 leaving a trust-disposition and settlement dated 4th May 1863 (with codicil dated 9th February 1864), by which he conveyed his whole means and estate, heritable and moveable, to trustees, whom he directed—“In the fifth place, to transfer, convey, and make over to and in favour of my eldest son Arthur James Brodie, on his arriving at the age of twenty-five years complete, so as effectually to vest the same in his person (if not previously disposed of), all my Zemindary Talook landed property in the district of Mymensing, Bengal, and all lands there held by me in lease, with their balances and obligations. In the sixth place, to transfer, convey, and make over to and in favour of my second son William Alexander George Brodie, on his arriving at the age of twenty-five years complete, so as effectually to vest the same in his person (if not previously disposed of), my indigo factories called and known as the Bagganbarry Indigo Concern, in the said district of Mymensing, with the houses, cattle, stock of every kind, and whole appurtenances thereto belonging. In the seventh place, to set aside the sum of £2000 sterling for each of my daughters, Margaret Alice Brodie, Flora Jane Brodie, Isabella Brodie, Ethell Brodie, Edith Brodie, and Anne Sutherland Brodie; and to lay out and invest on such securities, real or personal, in Great Britain or in India, as to my trustees shall appear eligible, the said respective sums, and pay and apply the interest and produce thereof, or accumulate the same, for behoof of my said daughters respectively until they shall severally attain the age of twenty-one years or be married; and on either of these events happening, to pay or make over the said respective sums and the accumulated interest thereof to my said daughters respectively. . . . In the tenth place, to apply for the suitable maintenance and education of each of my said two sons the sum of £200 sterling per annum, or such other annual sum, less or more, as in the judgment of my said trustees, and considering the profits that may be derived from the estates in India specially destined to them, shall appear proper, and that until they respectively attain twenty-five years of age, and in addition to the sum before provided to be paid to my wife for the maintenance of our children. And lastly, to divide, pay, and make over the whole residue and remainder of my said means and estate, after satisfying the purposes hereinbefore written, equally among my said children and the survivors of them, on

their respectively attaining twenty-one years of age; but declaring, as it is hereby provided and declared, that in the event of there being more children of the said marriage than those above mentioned, such children shall be entitled to share in my said means and estate along with my children before named—that is, such children, if daughters, shall each receive a sum corresponding to the special provisions hereinbefore conceived in favour of each of my daughters above named, and if sons, shall each receive a sum corresponding to the special provisions hereinbefore conceived in favour of each of my sons before named, and shall all participate equally in the residue of my said means and estate with my said other children, all of whose special provisions and shares of residue shall accordingly in that event suffer a proportional abatement. . . . And I empower my said trustees and executors to sell, realise, and convert into money whatever portion of my said means and estate, real or personal, as to them shall appear proper or expedient, and that either by public roup or private bargain, and to grant, subscribe, and deliver all necessary transferences, conveyances, and acquittances in favour of the purchasers and others; and in the event of any of the properties hereinbefore specially destined to my said sons being sold or disposed of by my said trustees, the price or proceeds thereof shall come in place of the properties themselves, and be invested for behoof of and paid over to my said sons respectively.”

Mr Kenneth Brodie was survived by three sons, Arthur, William, and Alexander—the youngest having been born 4th October 1864—and by several daughters.

His eldest son, Dr Arthur James Brodie, was in 1872, at the age of twenty, assumed as a trustee, and acted upon his reaching twenty-one. In 1876 Dr Brodie executed a trust-disposition by which, after reciting the provisions of his father's trust and referring to the fact of his youngest brother having been born after the date of that trust, he declared that it having been found expedient “in respect of the losses which attended the same, to abandon the working of the Indigo factories called and known as the Bagganbarry Indigo Concern, before mentioned, and that in consequence thereof the provision specially destined to my brother William Alexander George Brodie by my father's said settlement has become valueless and does not now exist for his benefit, and that in consequence thereof, and of the birth of my youngest brother Alexander Kenneth Brodie since the date of said settlement as before mentioned, I have resolved to make a division of the special provision in my favour between myself and my two brothers in equal shares, so as to carry out what I believe to have been my father's wishes and intentions in regard to the succession of his sons to his estate in India; therefore I do hereby direct and appoint . . . as the surviving accepting original and assumed trustees acting under the foresaid trust-disposition and deed of settlement and codicil, and the

survivors and survivor of them, to hold the whole of the Zemindary Talook landed property in the said district of Mymensing, Bengal, and all lands there held by them in lease as trustees foresaid, with their balances and obligations (and which are directed by the said trust-disposition and settlement to be transferred, conveyed, and made over to me on my arriving at the age of twenty-five years complete, so as effectually to vest the same in my person), for behoof, as after mentioned, of myself, the said Arthur James Brodie, and of William Alexander George Brodie and Alexander Kenneth Brodie, my brothers, in equal shares: . . . And further, I do hereby exoner, acquit, and *simpliciter* discharge . . . as trustees foresaid, of the obligations imposed upon them as trustees foresaid by the foresaid trust-disposition and settlement of my said father, to transfer, convey, and make over to me the Zemindary Talook landed property foresaid, and all lands there held by them in lease as trustees foresaid, with their balances and obligations; and I also discharge the said . . . as trustees foresaid, and the factors employed by them, or either of them, of the whole actings, transactions, and management had by them, or either of them, with the trust-estate of the said Kenneth Sutherland Brodie, my father, or in relation thereto in any manner of way, and of the said trust-disposition and settlement and codicil itself, and whole clause therein contained, with all that has followed or is competent to follow thereon, and of all omissions that can be laid by me to their charge in any manner of way, dispensing with the generality hereof, and declaring that this discharge shall be as valid and effectual as if every particular of the said trustees' actings or intromissions had been herein specially engrossed or referred to."

Until Dr Brodie became twenty-five years of age in 1877 the Zemindary Talook estate and its income were treated by his father's trustees as part of the trust-estate.

In March 1879 this property was sold for £29,738, but before this sum was remitted to this country £3000—being the loss upon W. A. G. Brodie's Indigo Concern—were deducted. Mr Brodie's trustees made an annual allowance out of the general trust-estate of £200 to each of his three sons until they reached twenty-five years of age, and upon the death of two of his daughters in 1873 and 1881 respectively, unmarried and minors, they treated the sum of £2000 destined to each of them as having vested in them *a morte testatoris*.

On 1st April 1891 Dr Brodie wrote to Messrs Dall & Miller, C.A., Edinburgh, as follows:—"Gentlemen—I hereby request and authorise you, the accountants upon the trust-estate of my father, the late K. S. Brodie, to examine and audit the state of my account with the agents, Messrs Horne, Horne, & Lyell, W.S., to 31st January last, and likewise to audit and tax the business accounts of these gentlemen embraced in said state, and thereafter to debit my share of my late father's estate

with the balance found due to Messrs Horne, Horne, & Lyell." And upon 11th May 1893 he wrote to the same firm thus:—"Gentlemen—I hereby request and authorise you, the accountants upon the trust-estate of my father, the late K. S. Brodie, Esquire, to examine and audit the whole accounts and vouchers kept by the agents, Messrs Horne & Lyell, W.S., from 31st January 1881 to this date, and likewise to audit and tax the business accounts of these gentlemen for said period, . . . and thereafter to debit my share of my late father's estate, as hitherto, with said whole accounts, vouchers, business accounts, and disbursements, as audited and taxed by you; and I instruct and authorise you, until further notice from me, to continue to examine, tax, and audit Messrs Horne & Lyell's accounts, vouchers, and business accounts against me annually, and to charge same against my share of my late father's estate in the usual way."

Dr Brodie married in 1881, went to America in 1884, and died there in 1888. The accounts were annually duly audited and reported upon by Messrs Dall & Miller up to his death.

In May 1892 Dr Brodie's widow, Mrs Mary Sutherland or Brodie, as his executrix, and her attorney Alfred Sutherland, W.S., brought an action of count, reckoning, and payment against the then acting trustees on Mr Brodie's estate, mainly on the ground that the trust had been erroneously administered in the following ways—(1) that the trustees had not treated the Zemindary Talook property as vesting in Dr Brodie upon his father's death; (2) that they had charged this property with a debt of £3000 incurred in connection with the Indigo Concern; (3) that they had continued the annual allowance of £200 to Dr Brodie's younger brothers notwithstanding the provision made for them by his trust-deed of 1876; and (4) that they had treated the provisions to the deceased daughters of Mr Brodie as vested in them and not as falling into residue.

The pursuers also averred (Cond. 21)—"In addition to the foregoing specific items falling to be added to the late Dr Brodie's share of capital derived from his father's trust, the said share of capital falls to be further increased by addition thereto of various sums improperly deducted for commissions, expenses of management, business charges, &c. The share of revenue effeiring to Dr Brodie and his representatives falls to be similarly augmented. The said trust accounts, as also the business accounts submitted by the present trustees, contain numerous payments and charges, affecting both capital and income, for which the deceased Dr Brodie was not liable. In particular, the trustees have made payments out of the trust funds of the Kenneth Sutherland Brodie trust which they are not empowered to make under the trust-deed, and the business accounts contain numerous charges for work performed by the agents which have no relation to either that trust or the 1876 deed trust. In addition the said trustees debit the deceased

with business accounts and heavy commissions, the whole, or at least the largest part of which they incurred for work done in the general trust-estate administered by the Kenneth Sutherland Brodie trustees. The estate of Arthur James Brodie is not liable for the said accounts or commissions. Even if to a certain extent his estate is liable for the said accounts and commissions, the same have been grossly overcharged. The sum credited by the trustees in the said accounts by way of home business accounts and home commissions amount to some £4300 up to April 1888. Among the business charges are overcharges to at least a sum of £600, even assuming that none of said charges have been covered by the heavy commissions and factor's fees allowed the trust agents for trouble in connection with the administration of the home trust. This sum is in excess of the full charges allowed by the professional table of fees, and in some instances three distinct charges have been made for the same item of work. Further, the trustees have failed to credit several sums received by way of commission from companies to whom they lent trust money from time to time, and on the sale of stocks the trustees have deducted sums by way of commission as well as brokers' commission before crediting the proceeds of the sales in the trust accounts."

The pursuers also sought to make the representatives of Mr Leckie and Mr Lyell, who were trustees on Mr Brodie's trust-estate in 1876, but had since died, personally liable for a loss of £20,000, with £95, 8s. 5d. of interest. They averred (Cond. 24)—"In 1879 a proposal for a loan of £20,000 on postponed heritable security over heritable properties in Caithness and Orkney belonging to the same proprietors (Traill's trustees) as owned the subjects of a previous loan of £3000 was submitted to Mr Brodie's trustees by Messrs Horne, Horne, & Lyell, who acted as agents both for borrower and lenders, and was accepted under a guarantee of $4\frac{1}{2}$ per cent. interest by that firm" [the guarantee in the proposal to borrow was, "Messrs Horne, Horne, & Lyell so long as they continue agents for the trust became responsible for the regular payment of interest"]. This loan would have expired in 1884, but instead of its position being then brought before the trustees an arrangement was in February 1884 made between Mr Leckie and Messrs Horne & Lyell, which firm then included Mr Lyell, S.S.C., one of the Kenneth Sutherland Brodie trustees, and Mr David Lyell, W.S., who subsequently became a trustee, to the effect that the loan should be renewed for three years from Whit-sunday 1884 at the reduced rate of $3\frac{3}{4}$ per cent. interest. By this proceeding, which was *ultra vires* of Messrs Leckie and Lyell, S.S.C., as trustees foresaid, the said Messrs Leckie and Lyell rendered themselves personally responsible for this loan, and also became bound to make up the abatement in the rate of interest below the amount guaranteed to the trustees. They were well aware that the reason for seeking

reduction of interest was the impoverished condition of the borrower, and his inability to meet his obligations, and that had the whole circumstances been disclosed to their co-trustees, the continuance of the loan would not have been authorised. It was not until 1887, when the borrower removed his agency from the said Messrs Horne & Lyell that the real position of these bonds was brought before the other trustees. In particular, Dr Brodie, who went to America in 1884, was not made aware of the said transaction. The difference between the rate of interest guaranteed and that actually received down to 1st May 1892 on the £20,000 loan is £95, 8s. 5d. The said securities cannot now be realised except at a very serious loss, if indeed they have not become absolutely valueless.

In connection with these averments the pursuers pleaded—" (4) The sum of £20,000, and the guaranteed interest thereon at the rate of $4\frac{1}{2}$ per cent. per annum, having been wholly or partially lost to the said trust-estates, or one or other of them, through the fault or negligence of the deceased Mr Leckie and Mr Lyell, S.S.C., the defenders, the representatives of Mr Leckie and Mr Lyell, S.S.C., in their individual capacity, are bound to make good the deficiency in said sum and interest, and to account on that footing to the pursuer as executrix foresaid."

There were no conclusions in the summons specially directed against the representatives of Mr Leckie and Mr Lyell on account of this renewed loan.

The defenders pleaded, *inter alia*—" (1) No title to sue. (2) The trust-disposition, conveyance, and discharge of 16th September 1876 excludes any accounting prior to its date, and, standing said deed, the pursuers are barred from demanding such an accounting." (3) The pursuers' averments are irrelevant. "(6) The pursuers are barred from maintaining their present demands, in respect that Dr Arthur James Brodie was himself a party to, and approved and adopted all the actings and dealings of the trustees now complained of."

Upon 22nd November 1892 the Lord Ordinary (Low) pronounced the following interlocutor:—" Finds (1) that upon a sound construction of the trust-disposition and settlement of the deceased Kenneth Sutherland Brodie, the deceased Arthur James Brodie was not entitled to the income and profits of the estates in India, specially destined to him in the said settlement, between the date of the death of the said Kenneth Sutherland Brodie and the date when the said estates fell to be conveyed to the said Arthur James Brodie in terms of said settlement; (2) That the trustees under the trust-disposition granted by the said Arthur James Brodie in 1876 were not entitled to charge the price of the Zemindary Talook estates and others conveyed to them by the said trust-disposition with the sum of £3000, being the loss incurred in connection with the Bagganbary Indigo Concern; (3) That the trustees

under the said settlement were not entitled to make payment to William Alexander George Brodie or Alexander Kenneth Brodie of the sum of £200 a-year each annually after the said trust-disposition of 1876 came into operation: (4) That the special provision of £2000 made for each of the daughters of the said Kenneth Sutherland Brodie by his said settlement vested in his daughters *a morte testatoris*, and that the provisions falling to the deceased Isabella Brodie and Barbara Innes Brodie were properly dealt with as intestate succession to them; (5) That the pursuer is not barred from having the trust accounts re-stated so as to give effect to the foregoing findings by reason of the deceased Arthur James Brodie having been a trustee under the said settlement and the said trust-disposition of 1876, or by reason of the discharge contained in the said trust-disposition, or by reason of the letters granted by him authorising Messrs Dall & Miller, chartered accountants, Edinburgh, to audit and tax the trust accounts; (6) That the pursuer's averments are not relevant to support the claim made by her in the 24th article of the condescence against the representatives of the deceased William Leckie and David Lyell for £95, 8s. 5d.: With these findings appoints the cause to be enrolled for further procedure: Reserves all question of expenses, and grants leave to reclaim.

Opinion.—The first and most important question raised in this case is in regard to Dr Brodie's right to the income derived from the Zemindary Talook properties, which the trustees under his father's trust-disposition and settlement were directed to convey to him 'on his arriving at the age of twenty-five years complete.' The truster died in 1868, and Dr Brodie attained twenty-five in 1877. His executrix, the pursuer, now claims the income of the estate between 1868 and 1876, when Dr Brodie executed a trust-deed, to which I shall afterwards refer in detail. The pursuer does not claim that the income should have been paid to Dr Brodie year by year, but contends that it was the duty of the trustees to accumulate the income and pay the accumulated amount to him when the conveyance of the property fell to be made.

"The pursuer's claim is, in the first place, rested upon the contention that under the terms of the settlement the property vested in Dr Brodie *a morte testatoris*.

"The considerations mainly relied upon by the pursuer are the following:—1st. There is no ulterior destination of the properties in the event of Dr Brodie dying before he attained the age of twenty-five. 2nd. The trustees are authorised in their discretion to sell the properties, and if they do so, it is provided that 'the price or proceeds thereof shall come in place of the properties themselves, and shall be invested for behoof of and paid over to' Dr Brodie. The pursuer argued that the direction to invest the price for behoof of Dr Brodie, and no one else, showed that the testator intended it to be vested in him, and it could not be said that he was

intended to have a higher right in regard to the price than that which he was given to the property if it was not sold. 3rd. The trustees are directed to pay and make over the residue equally among the truster's children on their respectively attaining twenty-one years of age. The pursuer argued that the residue plainly vested *a morte testatoris*, and that if the Indian properties did not vest in Dr Brodie until he attained the age of twenty-five, and he died before attaining that age, he would still be entitled to a share of the properties as residuary legatee. Such a peculiar result would require to be plainly expressed, and in the absence of such plain expression the sound construction of the settlement was that Dr Brodie was given an indefeasible right to a share of the residue, and also to the Indian estate, although in the one case payment was postponed until he was twenty-one, and in the other until he was twenty-five.

"The pursuer contended, in the second place, that even if vesting was postponed, Dr Brodie having attained twenty-five years of age, took not only the properties but also the intervening profits.

"In support of this view the pursuer founded upon the fact that the intervening profits were not otherwise expressly disposed of, and she argued that they must be dealt with as accessories of the properties. She also founded upon the terms of the fifth purpose of the settlement, whereby the trustees were directed to convey to Dr Brodie not only the properties themselves, but also 'their balances and obligations.' These words, she contended, included the whole free income and profits of the estate while under the management of the trustees prior to the period of conveyance.

"There is much force in these considerations, but in my opinion there are others of greater weight tending in an opposite direction.

"In the first place, in regard to the question of vesting, there is not here, first, a destination of the Indian property to Dr Brodie, and then a direction to the trustees to convey it to him when he attained twenty-five. The estate is conveyed to the trustees, and Dr Brodie's only right is derived from a direction to the trustees to convey it to him 'on his arriving at the age of twenty-five years complete, so as effectually to vest the same in his person.' The direction, therefore, which is the foundation of Dr Brodie's right, is to convey only in the uncertain event of his attaining twenty-five.

"Then in the tenth purpose of the trust the trustees are directed 'to apply for the suitable maintenance and education of my said two sons' (*i.e.*, Dr Brodie and another son of the testator, to whom a similar provision of an Indian property had been made) 'the sum of £200 sterling per annum, or such other annual sum, less or more, as in the judgment of my said trustees, and considering the profits that may be derived from my estates in India specially destined to them, shall appear proper, and that until they respectively attain twenty-five.'

"The trustor therefore made provision for the maintenance of Dr Brodie until the period of conveyance of the Indian estate, and the provision was payable out of the general estate, although it was to have some not very well defined relation to the profits of the Indian estate.

"It seems to me that when a beneficiary's right depends upon a direction to pay or convey when he attains a certain age, when the period of payment or conveyance is not postponed for the purpose of protecting an intermediate interest such as that of a liferenter, and when express provision is made from another source for the maintenance of the beneficiary until the period of payment or conveyance, there is a concurrence of elements which point strongly to a postponement of vesting, and which I do not think are overcome by the fact that there is no destination-over, and that the beneficiary participates in the residue, which if he died before attaining twenty-five would include this special provision.

"There is another consideration, however, which seems to me to deserve notice, although it was not mentioned in argument, probably because it was not consistent with the position which the pursuer takes up in another part of the case. The special provision to Dr Brodie is in the fifth purpose of the trust; a precisely similar provision is made for his brother William Brodie in the sixth purpose; and in the seventh purpose a special provision of £2000 is made for each of the trustor's daughters. I think that the latter provisions vested in the daughters *a morte testatoris*, and it is difficult to understand why the provisions to daughters should vest and those to sons should not do so. There is, however, one important distinction between the two sets of provisions. The trustees are directed to apply the interest of each daughter's provision for her behoof, or to accumulate it until the period of payment, when the accumulated interest is to be paid to her as well as the capital. There is no such direction in the case of sons, but, on the contrary, the sons are, until the period of conveyance, to be paid £200 a-year out of the general estate. I therefore do not think that much aid is to be derived from the terms in which the provisions to daughters are made.

"The question appears to me to be one of difficulty, but upon the whole I think that the balance of the considerations upon which such questions fall to be determined, points to the postponement of the vesting until the period of payment.

"But whatever may be the sound view in regard to vesting, I am of opinion that Dr Brodie was not entitled to the profits of the Indian estate between the death of his father and his own attainment of twenty-five years of age. The special provision to which I have referred—of £200 a-year for the maintenance of Dr Brodie during that period—is, I think, inconsistent with the idea that he had right to the whole profits of the estate. Then the seventh purpose of the trust shows that when the testator intended accumulation he said so. Fur-

ther, the settlement includes various purposes, for which immediate income was required, and which the testator might well have looked to the Indian property to provide. Indeed, if it had not been for the profits of the Indian property the trust could not have been carried on at all.

"As I have mentioned, the pursuer relied greatly upon the fact that the trustees were directed to convey to Dr Brodie not only the Zemindary Talook properties, but also 'their balances and obligations.' I think that these words are explained by the character of the properties. I understand that the testator held the land of the Crown for a certain yearly payment. The land was cultivated by natives who grew indigo crops. The testator advanced money at interest to the cultivators, and he also intervened in the preparation of the crop for the market. The returns therefore from the properties were not of the nature of rent, but were rather profits (as the testator himself calls them) of a business. In such circumstances, I think that the direction to convey the properties 'with their balances and obligations,' meant that when the appointed time arrived Dr Brodie was to step into the trustees' place, and to take the properties with any balances then outstanding and under the burden of any obligations then current.

"I am therefore of opinion that the claim for the income of the Indian estate prior to Dr Brodie attaining twenty-five falls to be repelled.

"The next question has regard to a sum of £3000 which the pursuer alleges the trustees have improperly charged against the Indian properties specially destined to Dr Brodie. The circumstances under which this question arises are as follows:—By the sixth purpose of his trust Mr Brodie, the testator, directed his trustees to convey his indigo factory called the Bagganbary Indigo Concern to his second son William Brodie on his arriving at the age of twenty-five years complete, in precisely the same terms as those which he had used in regard to the Zemindary Talook properties in the fifth purpose of the trust. Then in the residuary clause, after providing that the residue should be divided equally among his children, the testator proceeded:—'But declaring, as it is hereby provided and declared, that in the event of there being more children of the said marriage than those above mentioned, such children shall be entitled to share in my said means and estate along with my children before named—that is, such children, if daughters, shall each receive a sum corresponding to the special provisions hereinbefore conceived in favour of each of my daughters above named, and if sons shall each receive a proportion corresponding to the special provisions hereinbefore conceived in favour of each of my sons before named, and shall all participate equally in the residue of my said means and estate with my said other children, all of whose special provisions and shares of residue shall accordingly in that event suffer a proportional abatement.'

“One son, Alexander Brodie, was born after the date of the settlement.

“The Bagganbary Indigo Concern turned out to be unprofitable, and resulted in a loss of £3000. There was therefore no estate to be conveyed to William Brodie under the seventh purpose of the trust.

“In these circumstances Dr Brodie in 1876 executed a trust conveyance in favour of the trustees acting under his father's settlement of the Zemindary Talook properties. The deed proceeded upon the narrative of the special destinations of the Indian properties in the fifth and sixth purposes of the settlement, and of the declaration in the residuary clause which I have quoted. It also narrated the birth of Alexander after the date of the settlement, and the failure of the special provision of the Indigo Concern to William. The deed then proceeds:—‘I have resolved to make a division of the special provision in my favour between myself and my two brothers in equal shares, so as to carry out what I believe to have been my father's wishes and intentions in regard to the succession of his sons to his estate in India.’ Dr Brodie then directed his father's trustees to hold the Zemindary Talook properties, and disposed the properties to them as if they had been already conveyed to him in trust for behoof of himself and his brothers in equal shares *pro indiviso*, and directed the trustees to pay and apply the free rents, proceeds, and profits thereof for behoof of himself and his brothers in equal proportions.

“The Zemindary Talook estates were subsequently sold, and realised it is said about £29,000. The trustees have debited the price with the loss of the £3000 incurred upon the indigo business, and the question is whether they were entitled to do so. I am of opinion that they were not. I can find no authority given in the settlement of Mr Brodie senior for charging the estate specially destined to Dr Brodie with the loss upon the estate specially destined to William Brodie, and it is clear that no power is given to the trustees to do so under Dr Brodie's trust. The trustees say that they regarded all the Indian properties as forming one estate, and also as forming a separate trust-estate, seeing that Mr Brodie senior provided that certain of the trustees who were resident in India should have the entire management of the Indian properties. I do not think that that view is sound, but it seems in any case to be met by the fact that Mr Brodie had large means in India to which the £3000 could have been debited.

“The next question has regard to a sum of some £1900 said to have been improperly paid to William and Alexander Brodie. It appears that after Dr Brodie's trust came into operation the trustees paid to each of William and Alexander, not only one-third of the income of the Talook property (or of the price after it was sold), but also £200 a year out of the general estate of Mr Brodie senior. The trustees say that they paid the £200 a-year to each of the brothers in terms of the tenth purpose of Mr Brodie's

settlement. They contend that they were bound to make these payments in terms of the settlement, and that they were also bound, as trustees under Dr Brodie's trust, to make the payments directed in his deed.

“It seems to me that in this case also the trustees have gone wrong.

“As regards the younger brother Alexander, I have great difficulty in understanding where the trustees found their authority in the settlement to pay him £200 a-year. The tenth purpose is limited to the two sons in existence when the settlement was made, viz., Dr Brodie and William Brodie. I suppose that the trustees would justify their action by the part of the residuary clause (which I have already quoted), in which the testator provides for the case of sons born after the date of the settlement. The clause is no doubt very obscure, but I think that it is difficult to spell out of it a direction to the trustees to pay £200 a-year to a son in a position which Alexander occupied.

“As regards William the action of the trustees is more intelligible, but I do not think that the payments to him now in question can be sustained. Dr Brodie's deed no doubt in one sense constituted a trust distinct and separate from that of his father, but the trustees were the same, and Dr Brodie's object as declared in his deed was to carry out what he believed to be his father's intention, which had been defeated by the failure of the indigo business. Dr Brodie's trust was therefore truly supplementary to that of his father. He in substance threw his estate into his father's trust, in order that his father's wishes might be carried out. In such circumstances I do not think that William (and the argument applies as strongly to the case of Alexander) could claim both the third of the Talook estate, capital and income, and the £200 a-year provided to him under the tenth purpose of the settlement. The latter provision was made for him only until he attained the age of twenty-five, the intention obviously being to give him a fund of maintenance until he succeeded to his special provision. But his special provision having failed, he accepted in lieu thereof one-third of Dr Brodie's provision. It seems to me that he could not be allowed to do so, and also to retain an annuity, provided only until his special provision should become exigible.

“Further, the tenth purpose of the settlement does not direct the trustees in any event to pay the £200 a-year. They are to pay that sum to each of the sons, ‘or such other annual sum, less or more, as in the judgment of my said trustees, and considering the profits that may be derived from the estates in India specially destined’ to the sons, should appear proper. The trustees therefore were authorised to reduce the amount of the annuity, and the main consideration which was to guide them was the profit which might be derived from the respective Indian properties. The property destined to William having become not only worthless, but in debt, I think that it is difficult for the trustees to maintain that

they had no choice but to continue to pay the £200. It seems to me that in the circumstances which have emerged, viz., the extinction of the indigo business and the provision made by Dr Brodie, it would have been quite consistent with the tenth purpose of the settlement to have stopped the annuity altogether, while, on the other hand, that course was the only one which was consistent with Dr Brodie's trust.

"The next question has regard to the share to which Dr Brodie was entitled of the special legacies of £2000 each to two of his sisters who died in minority, unmarried and intestate. The legacies were divided as intestate succession upon the assumption that they had vested in the sisters upon their father's death. I think that the legacies were properly so dealt with, because, as I have already said, the daughters in my opinion took a vested right *a morte testatoris*.

"I have dealt with all the questions, which I have up to this point considered upon their merits, without adverting to the first and sixth pleas for the defenders. Both of these pleas are founded upon the fact that Dr Brodie was himself one of the trustees, and it was argued that it is incompetent for his executrix to challenge payments or accounts for which he himself was responsible.

"Now, in the first place, there is no question here of demanding repayment of sums already paid away by the trustees, nor (so far as regards the questions with which I have dealt) is there any question of personal liability of trustees. It is not disputed that the trustees have considerable funds in their hands, and that if the pursuer's objections are given effect to, it involves nothing more than a re-statement of accounts, and a re-adjustment of the manner in which the estate remaining in the hands of the trustees is to be distributed.

"Then it is important to observe that the payments and statements of accounts now challenged were not made as the result of any transaction to which Dr Brodie was a party, nor is it said that the questions now raised were ever brought under the notice of or considered by him or by his co-trustees. Further, I see no reason to doubt, notwithstanding the suggestions to the contrary which are made in record, that everything was done in good faith, and if the trust funds were dealt with contrary to the legal rights of the beneficiaries, it arose from error on the part of the trustees, or of the law-agents by whom they were advised.

"In such circumstances I do not think that Dr Brodie would have been barred, if he had been alive, from asking that the common error should be put right, and that the accounts should be re-stated and the balance of the estate divided according to the legal rights of the parties. The pursuer cannot, of course, be in a better position than Dr Brodie, but I do not see why, in regard to the questions with which I have dealt, she should be in a worse position. I am therefore unable to sustain the

first and sixth pleas-in-law for the defenders.

"The next question is in regard to certain very general allegations in the twenty-first article of the condescendence, to the effect that the trust accounts contain certain payments which the trustees were not authorised to make, and that there have been overcharges in the business accounts of the law-agents of the trust, and in regard to commissions.

"I am not sure whether the pursuer demands that the whole accounts of the trust from its commencement in 1868 should now be investigated, but I understand that that is her claim. The defenders, on the other hand, maintain that the accounts cannot be opened up, at all events upon mere general averments, because, as regards the accounts prior to 1876, Dr Brodie granted a full discharge to his father's trustees in the trust-deed executed by him in that year; and as regards the subsequent accounts, they have been audited by Messrs Dall & Miller, chartered accountants, Edinburgh, with the consent of Dr Brodie, as evidenced by letters written by him to Messrs Dall & Miller authorising them to examine, tax, and audit the accounts.

"The pursuer seeks for reduction of the general discharge in the trust-deed of 1876, and also of the letters to Messrs Dall & Miller, but it seems to me that the averments which she makes are not sufficient, assuming them to be well founded, to entitle her to reduction. The question therefore is, how far the discharge and the letters debar the pursuer from challenging the accounts.

"I am of opinion—and in considering the points with which I have already dealt I have proceeded upon the view—that where the pursuer can point to any specific error, or omission, or overcharge, it is competent for her to ask that matters shall be investigated and put right. The *onus*, however, is on the pursuer, and I think that the defenders are entitled to demand that before accounts discharged by Dr Brodie, or audited in the way authorised by him, are opened up, there must be specific objections to specific items, and not mere general averments such as are contained in the 21st article of the condescendence.

"The averments in that article, however, although general, are—or at all events some of them are—of such a nature, that if they were made specific the pursuer might be entitled to investigation. Further, it is said that certain of the accounts are subsequent to Dr Brodie's death, and that it cannot be pleaded that any audit which may have been made of them was by his authority or acquiesced in by him. If, therefore, the pursuer had asked that she should be allowed to lodge a statement setting forth her objections specifically and in detail, she might perhaps have been allowed to do so, but no such proposal was made.

"In the 22nd article of the condescendence there is another specific objection, to the effect that the trustees have charged

Dr Brodie with interest upon the income which was payable to him under the two trusts. The answer of the trustees is that the objection proceeds upon an entire misapprehension of the position of matters. The trustees say that Dr Brodie and his brother were in the habit of getting advances from them against future income, and that in order to keep equality it was necessary to credit and debit interest upon these advances. The question is therefore one of bookkeeping, and if the parties themselves cannot adjust the matter—which I think they should have no difficulty in doing—I must make a remit to an accountant.

“The only remaining question has regard to a claim for £95, 8s. 5d., for which two of the trustees, Mr Leckie and Mr Lyell (both now dead), are said to have incurred personal liability.

“It appears that £20,000 of the trust-funds were invested in a bond and disposition in security over certain properties in Caithness and Orkney. The pursuer avers that the loan, which bore interest at the rate of 4½ per cent, would have expired in 1884, and that in that year Messrs Leckie and Lyell took it upon themselves, without consulting their co-trustees, to renew the loan for three years at 3¾ per cent interest. The reason for the reduction of interest is said to have been the impoverished condition of the borrower, and his inability to meet his obligations. The claim made against the representatives of Messrs Leckie and Lyell is for the difference between 4½ per cent, and 3¾ per cent, upon the sum of £20,000 between 1884 and 1892.

“I am of opinion that the pursuer has not stated a relevant case upon the point. Granting that it was *ultra vires* of two out of four trustees to agree to continue the loan at a reduced rate of interest, it does not necessarily follow that the beneficiaries have any claim against them. The beneficiaries can only claim if they have been injured. Now, to continue the loan at a reduced rate of interest might quite well be the most prudent thing which could be done in the administration of the trust. The pursuer does not say that payment of the principal sum could have been obtained, nor that interest at a higher rate could have been obtained. She no doubt avers that, if the whole circumstances had been disclosed to the other trustees, the continuance of the loan would not have been authorised. In my opinion, however, that averment is much too vague and general to entitle the pursuer to a proof. The amount at stake is small, but that does not the less render it incumbent upon the pursuer, claiming as she does upon the ground that the trustees have incurred personal liability through fault or failure of duty, to state with the utmost precision the ground of her claim.”

The pursuers reclaimed, and argued—(1) *As to vesting*—The Lord Ordinary had found this question attended with difficulty. Admitted presumption was against vesting where there was a *dies incertus*, but here attaining twenty-five years of age

was not a condition of the grant, but only of its enjoyment. The power of sale was not destructive of this argument, because the price was to be carefully earmarked. Further, a slight indication of contrary intention was sufficient to overcome the presumption. That was to be found here in the absence of any destination-over, and also in the curious fact that if the estate did not vest in Dr Brodie until twenty-five, had he died between twenty-one and twenty-five, it would have fallen into residue in which he had a share vesting at twenty-one. Therefore (a) the estate vested *a morte*—*M'Laren on Wills*, ii. 22; *Burnet v. Forbes*, 1783, M. 8105; *Ralston*, July 8, 1842, 4 D. 1496; *Hewat v. Grant*, November 22, 1867, 6 Macph. 47; *Alves' Trustees v. Grant*, June 3, 1874, 1 R. 969; *Hay's Trustees v. Hay*, June 19, 1890, 17 R. 961—but alternatively (b) upon Dr Brodie attaining twenty-five he took the estate “with its balances and obligations,” viz., with its whole income and accumulations since his father's death—*Pursell v. Elder*, 1865, 3 Macph. (H. of L.) 59; *Ferguson v. Smith*, December 4, 1867, 6 Macph. 83. (2) It was agreed that the second finding of the Lord Ordinary should be remitted to his Lordship on amendment being made in one of the defenders' answers. (3) The Lord Ordinary was right in treating Dr Brodie's trust as supplementary to and requiring to be read with his father's, and not as conferring double provisions upon his brothers. (4) They acquiesced in the fourth finding. (5) The Lord Ordinary was with them in holding they were not barred by Dr Brodie having been a trustee, but he required more specific objections. They had made as specific averments upon record as they could or required to—*Laing v. Laing*, July 17, 1862, 24 D. 1362. More specific objections could only be stated after they had got access to the accounts. (6) The averments in Cond. 24 were sufficient to found a case of personal liability against trustees not only for loss of interest but also for that of the principal—*Binnie v. Binnie's Trustees*, 1889, 16 R. (H. of L.) 23. The guarantee by Horne, Horne, & Lyell was to be read as a guarantee of 4½ per cent. interest while the loan lasted.

Argued for respondents—(1) The Lord Ordinary was right. The terms of the deed were plainly against vesting. There was not a direction here to hold and at twenty-five to pay over, but a distinct instruction upon Dr Brodie reaching twenty-five to convey to him “so as effectually to vest the same.” The power of sale was against vesting, and Dr Brodie's discharge in 1876 was against his reserving any right to claim income. It was said the words “with its balances and obligations” implied vesting. They merely meant the estate when it was conveyed was to be conveyed with its claims or debts as they then stood. *On vesting*—*Bryson's Trustees v. Clark*, November 26, 1880, 8 R. 142; *Reeve*, July 14, 1892, 19 R. 1013. On the third finding the Lord Ordinary was wrong. Dr Brodie's trust conferred benefits on his younger brothers at once, and not merely upon

their reaching twenty-five. Although made in consequence of his father's settlement it no way affected it. He did not put his brothers to any election, and his father's trustees remained as free as ever, even if not bound, to allow the younger sons £200 a-year each. Upon the fifth finding, Dr Brodie's discharge of 1876 unless reduced—and the Lord Ordinary found there were not averments upon which to found a reduction—was a complete bar to any claim for accounting before that date. Since that date it was now admitted the accounts had been taxed by a firm of accountants of whom Dr Brodie approved. Admitted that would not be a bar to any specific objections, but these, as the Lord Ordinary finds, have not been made. The case of *Laing* was very special. It was a question between a committee and their inspector, who was virtually charged with fraud. (6) As to the guarantee of interest, it was clearly to continue only while Horne, Horne, & Lyell remained agents of the borrower's trust. There was no relevant averment of loss to Dr Brodie's estate due to the actings of the trustees. It was not said that the renewal of the loan at a lower rate of interest was unwise. It was not said wherein the trustees had acted wrongly, nor that they could have realised the sum lent if they had called up the bond. Even if the averments were relevant, the action as laid was incompetent, as there were no conclusions under which the question could be raised—*cf. Barr v. Neilsons*, March 20, 1868, 6 Macph. 651; and *Taylor v. M'Dougall & Sons*, July 15, 1885, 12 R. 1304.

At advising—

LORD M'LAREN—This is an action of accounting and payment directed against the surviving testamentary trustees and the representatives of deceased trustees of Mr Kenneth Sutherland Brodie, partly in their representative capacity as accountable for the due administration of the trust-estate, and partly for the purpose of establishing claims of personal liability resulting from alleged wrongful or negligent administration.

The pursuer is the widow of the trustee's eldest son Arthur James Brodie, a member of the medical profession, and she sues this action for herself and as guardian of her two pupil children. Mr Kenneth Brodie's trust came into operation at his death in 1868. The proposed accounting is intended to cover the intervening period of twenty-five years, and involves the reopening of what purports to be settled accounts under a trust in which large discretionary powers were given to the trustees. The Lord Ordinary has examined with great care the various points that were brought before him in argument, and I shall consider them in the order in which they are treated in his Lordship's judgment.

The first question is, whether the pursuer's husband Dr Brodie was entitled to the income and profits of the estates in India conditionally destined to him by the fifth purpose of his father's trust? The

Lord Ordinary has decided this question in the negative, and I believe your Lordships are all of opinion that this question has been rightly decided and on right grounds. The direction is "to transfer, convey, and make over to and in favour of my eldest son Arthur James Brodie, on his arriving at the age of twenty-five years complete, so as effectually to vest the same in his person (if not previously disposed of), all my Zemindary Talook landed property," &c. The deed contains no clause specifically appropriating the intermediate income of these estates, but it does contain a residuary clause expressed in perfectly general terms as regards the estate disposed of, and which is therefore sufficient to pass the income of these estates if such income be not otherwise disposed of.

As there is no special destination of the income of the Zemindary estates, it is a necessary condition of the pursuer's argument that the fee vested in Dr Brodie *a morte testatoris*—in which case the unappropriated income would presumably belong to the *fiar* as fruits of his estate, although it might not be immediately payable to him. But the hypothesis of a vested interest in Arthur Brodie distinct from the right which he was to acquire by transfer is one that receives very little support from the terms of his father's trust-deed. If Arthur Brodie had died without attaining the age of "twenty-five years complete," I fail to see that his heirs or personal representatives would have been able to establish a claim to these estates. Their claim would necessarily be founded on the direction to the trustees to convey to Arthur on his attaining the age of twenty-five, and the answer would be conclusive that the condition had not been and never could be satisfied.

It is true that in the construction of wills, where the maker's intention is to be gathered from the scope and tenor of the will as a whole, the principle that an uncertain event is equivalent to a condition is subject to exceptions, and especially where a testator gives the income or usufruct of a subject to a legatee or heir, and at the same time directs that the capital shall be made over to him on his attaining majority, the inference has been drawn that the right intended to be taken by the legatee is the sum of the rights expressly given—in other words, a vested right of fee—and that the postponement of payment is only an administrative provision with a view to the preservation and management of the estate during the legatee's minority. But the pursuer cannot found on this principle of construction except by moving in a vicious circle, because he must then assume the existence of an intention to give him the income (the very thing in question) in order to found on this circumstance the argument that the fee had vested.

It was also argued that in this case the residue was made to vest at the testator's death, and that there is a presumption against two periods of vesting applicable

to different estates. But it appears to me that the residue clause is if possible more clearly conditional than the special provision, because the residue is there made payable to the children or the survivors of them on their respectively attaining twenty-one years of age. There are then two distinct periods of vesting, and the presumption must in this case give place to the clearly expressed will of the truster. I agree with the Lord Ordinary that the provision as to the Zemindary estates is the case of a proper conditional provision; that the claim of Arthur Brodie's representatives to the income accruing on these estates before he attained the age of twenty-five is not well-founded, and that this income in so far as not applied to the maintenance of the truster's family falls into residue.

2. The second point, which relates to the incidence of the debt or loss arising on the account of the truster's indigo factory, comes before us in a different form from that in which it was submitted to the Lord Ordinary. The defenders have tabled an amendment of their twelfth answer which may give a new complexion to the act of the trustees in writing off this loss. We have intimated that we shall allow this amendment, and I understand that your Lordships in remitting the case to the Lord Ordinary will leave this second finding open to reconsideration by him.

On the subject of the third finding I am unable to agree with the Lord Ordinary. The question is, whether Mr Kenneth Brodie's trustees were entitled to continue the payment to William Alexander George Brodie and Alexander Kenneth Brodie (the truster's second and third sons) of the sum of £200 a-year each after there came into operation a supplementary deed executed by Arthur Brodie in 1876. I shall consider separately the cases of the second and third sons, as the Lord Ordinary has done. By the tenth purpose of Mr Kenneth Brodie's trust-deed the trustees were empowered to apply towards the maintenance of each of his sons Arthur and William the sum of £200 sterling per annum. It is not and cannot be disputed that this was a discretionary power, and that the action of the trustees in paying the full sum of £200 per annum to William is within the letter of their powers. But the argument of the pursuers is founded on the fact that Arthur Brodie, for reasons which were of course most honourable to him, made over his Zemindary estates to himself and his two brothers, and thereby secured to his brothers an independent income. As I understand the argument to which the Lord Ordinary has given effect, it is supposed the acceptance of a share of the Zemindary estates by William raised a case of election, and that William could not be allowed to draw the £200 a-year provided to him by his father after accepting a gift from his brother which was intended to come in place of the special provision made for him by his father, which had failed.

Now, in order that a beneficiary should

be put to an election between provisions, it must be made to appear that the gratuitous benefit which he proposes to take was given on condition of his renouncing some other benefit to which he had a claim, or at least that the gratuitous benefit would not have been given if it had been understood that the donee was going to claim adversely to the donor. But I see no evidence of such a condition or understanding in this case. The gift by Arthur Brodie was an unequalled gift to each of his brothers of a one-third share of his Zemindary estates, and I think it must be taken that this was intended as an addition to their patrimony. After acceptance of this gift William Brodie was just as much entitled to his allowance of £200 a-year as he was to his eventual share of residue, and it is not suggested that he was under any obligation to renounce the latter. The only difference between the case of William and that of Alexander, the third son, is that Alexander was born after the date of the father's settlement, but there is a general direction to the trustees of the settlement to make equivalent provisions for any other sons that might be born to the truster, and I think that under the continued effect of the residuary clause and of the tenth trust purpose the trustees were entitled to pay the allowance of £200 a-year to Alexander as well as to William until such time as their shares of residue should become payable.

Passing from the fourth finding (which is acquiesced in) we have next to consider the argument addressed to us on the subject of the Lord Ordinary's fifth finding, which is in these terms—"That the pursuer is not barred from having the trust accounts re-stated so as to give effect to the foregoing findings by reason of the deceased Arthur James Brodie having been a trustee under the said settlement and the said trust-disposition of 1876, or by reason of the discharge contained in the said trust-disposition, or by reason of the letters granted by him authorising Messrs Dall & Miller, chartered accountants, Edinburgh, to audit and tax the trust accounts."

The material facts are (1) that the accounts of Mr Kenneth Brodie's trust were regularly audited by an independent firm of accountants, Messrs Dall & Miller, and it appears from the inventory that these accounts were annually reported on for the whole period from 1869 to 1888; (2) that the pursuer's author Arthur Brodie was himself a trustee, having been assumed as such in 1872, the year before he attained majority; (3) that by letters dated 1st April 1881 and 11th May 1883, Arthur Brodie authorised Messrs Dall & Miller to examine and audit the trust accounts on his behalf and to debit the share of his father's succession with the charges affecting it, "and to continue to examine, tax, and audit Messrs Horne & Lyell's accounts, vouchers, and business accounts against me annually, and to charge same against my share of my late father's estate in the usual way." This was done, and we have

now to consider whether there are relevant averments for re-opening accounts which were thus settled by Dr Arthur Brodie, presumably in the knowledge of all material facts and circumstances. If there was error in the adjustment of accounts, it was not error induced by Arthur Brodie's co-trustees or co-beneficiaries. I mean this is not alleged, but the admitted facts are inconsistent with such a ground of action. There may be cases where all parties concerned have acted under an erroneous view of their legal rights, and where a settlement of accounts ought not to stand in the way of a rectification on legal grounds. I do not find such a case presented in the pursuers' condescendence, and indeed on the points which I have considered, if your Lordships agree with me, there are no errors in law to be rectified. But as the case is to go back to the Lord Ordinary on one of the points, I would suggest that the Lord Ordinary's fifth finding may be recalled *hoc statu*, leaving the question of settled accounts for consideration along with the remaining points in the case.

There remain the questions of personal liability. The Lord Ordinary in his sixth finding disposes of one of these, a claim against the representatives of the deceased William Leckie and David Lyell for £95, 8s. 5d., being interest alleged to be guaranteed by Messrs Horne and Lyell, who were agents of Brodie's trustees, and also agents of Traill's trustees who borrowed £20,000 from Brodie's trust-estate. This loan originally carried interest at 4½ per cent., which was guaranteed by Horne, Horne, & Lyell "so long as they continued agents for the trust." In 1884 it is said Mr Leckie and Mr Lyell took it upon themselves, without consulting their co-trustees, to renew the loan for three years at 3¾ per cent. interest, but it is not said that this was an improvident arrangement, or that in that year a higher rate of interest could have been got for money lent on heritable security. The guarantee given by Messrs Horne, Horne, & Lyell was given in their capacity as agents for Traill's trustees, and in 1884 the agency no longer subsisted, and as observed by the Lord Ordinary it may have been the most prudent thing which could be done in the administration of the trust to continue this loan at a reduced rate of interest. I agree with his Lordship that the pursuer has not stated a relevant case inferring personal liability for the difference of interest here claimed.

The claim for £20,000, being the capital sum originally lent to Traill's trustees and afterwards to Mr J. C. Traill, is not dealt with in the Lord Ordinary's judgment, but we had a full argument on it. It seems to me to be at least doubtful whether the claim is raised by this summons in a competent form. There is great inconvenience in the course proposed by the pursuer of combining in one action questions of personal liability which only affect certain of the trustees individually in consequence of their individual acts or defaults, and questions of construction and

administration which affect the body of trustees in their representative capacity. Supposing this were competent, it is necessary to a relevant claim of liability that the pursuer should set forth distinctly the acts of negligence with which the individual trustees are respectively chargeable. It will not do merely to set forth the fact that a contract of loan was made by the two trustees named, and that the security under present circumstances cannot be realised. Yet this is in substance what the 24th condescendence amounts to, and I propose to your Lordships that we should find that the pursuer has not stated relevant grounds for inferring personal liability against any of the trustees for the capital sums lent on the security of Traill's estates.

If your Lordships agree with me, our judgment will affirm the first, fourth, and sixth findings of the Lord Ordinary with the declaration last mentioned, the third finding will be altered to the effect of repelling the objections to the allowances of £200 a-year to the truster's sons, and the second and fifth findings will be recalled *in hoc statu*, and the case remitted for consideration on the record as amended.

LORD ADAM—The first and principal question as regards amount certainly is, whether Dr Brodie is entitled or was entitled to the profits of certain Indian estates bequeathed to him from the date of his father's death, which occurred in 1868, till he attained the age of twenty-five in the year 1877? Now, the tenor of the deed under which this question arises is that his father conveyed his whole estates, heritable and moveable, including *nominatim* certain Indian estates, to trustees, and having so conveyed to trustees the whole of his estates, he directed them to dispose of them for certain purposes set forth in the deed, which purposes were sufficient to exhaust the whole capital and income.

Now, this question arises, in the first instance, under the fifth purpose of the deed, by which the trustees were directed, when his eldest son Dr Brodie had attained the age of twenty-five, to convey certain estates to him, so as effectually to vest the same in his person if not previously disposed of.

It appears to me, with regard to these Indian estates, that the only right which Dr Brodie has under this deed is to demand from the trustees, in terms of the fifth purpose, a conveyance of those Indian estates, and nothing more. The deed is perfectly silent upon the matter of intervening profits; all that the trustees are directed to convey to Dr Brodie is the Indian estate as at that date—neither more nor less. It is true that there is a provision in the trust-deed to the effect that the trustees during the years until Dr Brodie shall attain the age of twenty-five, have power to sell, but I think the provision in the deed in reference to that event—which did not take place—only goes to confirm what I have said with reference to the fifth purpose, because if the trustees should sell,

the direction to them is to make over to Dr Brodie the price or proceeds of the sale, and nothing else; there is not a word said about profits. It is quite true, as Lord M'Laren has remarked, that in construing a deed we must go to the whole provisions of the deed to find out what is the true intention of the truster. Now, if we do that in the case of this deed, it appears to me that it all goes to confirm what I think is the sole right of Dr Brodie under the fifth purpose, because when we look into the seventh purpose, it shows quite clearly that when the truster wished intervening profits to accumulate he said so, because by the seventh purpose he directed his trustees to set aside the sum of £2000 for each of his daughters, payable in the event of their attaining the age of twenty-one or in the event of their marriage. He expressly directs the trustees to accumulate the intervening profits till the time for the payment of the principal comes, and they are to pay the principal sum, along with those accumulated profits, to each of the daughters. There is another purpose in the deed which is in the same direction, and that is the tenth, which has been already referred to. By it the truster directs his trustees to apply for the suitable maintenance and education of each of his two sons who are to have the estates in India, the sum of £200 sterling per annum, less or more, until they shall respectively attain the age of twenty-five. Now, this £200 which is to be made payable for their maintenance and education is made payable, not out of the income of the Indian estates, but is made payable out of the general estate. Having regard to the amount of the payment to be made to these two sons, the trustees are to take into consideration the profits which may be derived from the Indian estates, clearly meaning that if the profits were large the general estate might be able to admit of their getting a larger sum than £200, while if the profits were small, the trustees might say they could not give the sons the full £200. All this points in the same direction. The truster did not intend that the profits from the Indian estates should be accumulated and paid over to those who came eventually into possession of those estates. I confess I do not share the doubts of the Lord Ordinary upon this matter. I think it is clear on the deed that the truster did not intend to give to those who might eventually succeed to the Indian estates the rents or profits upon those estates till the period of conveyance to them.

But there was another point which was made upon this matter by the pursuers. The words of the deed are that the estates are to be conveyed "with their balances and obligations." It was contended to us that the true meaning of these words covered the whole past rents and profits of the estate. I cannot put that interpretation on the words. I think the meaning of the words "all lands there held by me in lease, with their balances and obligations," is that if there are balances and obligations due to or by the estate at the

date of the conveyance—that is to say, certain debts due by the estate at the date of the conveyance, and certain debts due to the estate at the date of the conveyance—these were to be taken into consideration, but that has nothing to do with the past profits realised and paid over to the trustees in past years. To use a phrase, which I think was made use of by Mr Dickson, I think it means sums due to or by outsiders, and has no reference to past profits. Therefore upon this part of the case I concur with Lord M'Laren and the Lord Ordinary.

The next point relates to sums paid to William and Alexander, the two younger brothers, after the execution of a certain disposition made in their favour by Dr Brodie in 1876. By that deed Dr Brodie very generously—it having turned out in the course of the seven years that the Indian estates destined to his younger brother William had become entirely worthless, so that his brother was left without any special provision, and the third brother Alexander not having been provided for by the deed, he having been born after the date of his father's trust-deed—in these circumstances Dr Brodie, as I say, very generously divided his Indian estate into three parts, taking one to himself, giving one to his second brother, and the third to his younger brother, thereby providing for them to some extent. Notwithstanding that, the trustees continued to make certain payments to both these younger brothers, these being made in terms of the tenth purpose, by which the trustees were authorised to apply for the maintenance and education of each of the truster's two sons a sum of £200 sterling. They continued to make these payments after the elder brother had given his brothers such a share of the estate.

Now, I think the question here is simply this—Whether or not these payments so made were *ultra vires* of the trustees upon a construction of their own trust-deed? I do not think that we have anything to do with whether or not the trustees in continuing to make those payments exercised a proper discretion. The discretion was left to the trustees under the deed, and it appears to me that we cannot touch what they have done if they had the power to do it. Now, as regards the brother William, for whom there is provision in the deed, let us take the case as if this deed by the elder brother had never been granted in his favour. Can it be maintained that in that case even the trustees would have had no power to make those payments? I do not think it can be so maintained. Such payments would have been made under the distinct powers given to the trustees by the tenth purpose. Now, what effect had the execution of this deed by the elder brother upon their powers? In my humble opinion that deed and what was conveyed by it was a pure gift by an elder brother to his two younger brothers. It had nothing whatever to do with the trust-deed or the construction of it; it was a pure gift. Probably the trustees might have exercised

a sounder discretion if, taking the fact into consideration that those two brothers were now to some extent provided for, they had not continued to give the £200 which they had power to do under the tenth purpose, but that was purely a matter of discretion. In this case I think it is the same as if the income that was given to the younger brothers had come from an entire stranger. Upon these grounds, with reference to this part of the deed, as far as the case of William is concerned, I entirely concur with Lord M'Laren and differ from the Lord Ordinary.

Now, I do not think the case of the other brother Alexander can be different from that of William at all, because by the deed, as it appears to me, with regard to the special provisions, of which the £200 is one, Alexander is put in exactly the same position as William. The testator, though he might have other children after the date of the deed, did not care to make another will, but he provides for children coming into existence; he provides for daughters, and then he says that if sons shall come into existence after the date of the will they "shall each receive a proportion corresponding to the special provisions hereinbefore conceived in favour of each of my sons before named." It appears to me that the proper construction of that direction is that Alexander having come into existence after the date of the deed is put exactly in the same position as sons already born. Therefore it appears to me that if the trustees—as I think they had—had power to make those payments to William, they had power to make such payments to Alexander, and I agree with Lord M'Laren that there can be no distinction between the cases of William and Alexander.

I also concur with Lord M'Laren in everything he said with regard to the other points in the deed. With reference to the small matter of interest, I would in addition say that the guarantee given by the two gentlemen under which they are sought to be made liable for £95 was only during and so long as they continued agents in the trust. It is perfectly clear that the trustees' meaning was, not so long as they continued agents in the Brodie trust, but so long as they continued agents in the Traill trust. They were agents for Mr Traill's trustees (the borrowers), and it is perfectly clear on the construction of the obligation that it applied to the time during which they continued agents in that trust. Upon the whole matter I entirely concur with Lord M'Laren.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

"Adhere to the 1st, 4th, and 6th findings of the interlocutor of 22nd November 1892 under the declaration that the pursuers have not stated relevant or sufficient grounds for inferring personal liability against any of the defenders for the capital sums lent on the security

of the Traill estates: Recal the 3rd finding of the said interlocutor: Repel the objections stated to the allowances of £200 a-year to each of the truster Kenneth Sutherland Brodie's two sons: Find that the trustees were entitled to make payment to each of the said two sons of the sum of £200 a-year after the trust-disposition of 1876 granted by Arthur James Brodie came into operation: Recal the 2nd and 5th findings of the said interlocutor *in hoc statu*, and decern: Find the defenders entitled to expenses since the date of the interlocutor reclaimed against."

Counsel for Pursuers and Reclaimers—Comrie Thomson—M'Lennan. Agent—Alfred Sutherland, W.S.

Counsel for Defenders and Respondents—Dickson—Salvesen—Craigie. Agents—Horne & Lyell, W.S.

Tuesday, June 13.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DOUGLAS v. MAIN.

Reparation—Slander—Wrongous Apprehension—Privilege—Malice—Repetition of Charge of Theft on which Apprehension had Followed, to Members of Public.

In an action of damages for slander and wrongous apprehension the pursuer averred that on a date mentioned he travelled by rail from Glasgow to Wemyss Bay in the same compartment as the defender. There were other passengers in the compartment, and the defender sat at the farthest side from him. At Wemyss Bay he went on board the steamer for Millport, and the defender thereafter caused him to be apprehended on a charge of having stolen her watch. The defender persisted in this charge, though she was assured by some of the other passengers that he was a respectable person. On the way to Millport, after pursuer's apprehension, the defender frequently repeated in a loud tone before the other passengers that the pursuer had stolen her watch. The defender had never lost her watch.

Held that the pursuer had sufficiently averred facts and circumstances from which malice might be inferred, and that he was entitled to two issues—(1) An issue (in which malice and want of probable cause were inserted) relating to his alleged wrongous apprehension; and (2) an issue (in which malice and want of probable cause were not inserted) relative to the alleged repetition of the charge of theft to members of the public subsequent to the pursuer's apprehension.

James Peden Douglas brought an action in the Sheriff Court at Airdrie for slander