which the debt is current, and the fact that the creditor can supply materials for ascertaining the sum by making a demand and specifying the rate of interest cannot alter the character of the instrument.

I agree with your Lordship that this is not a promissory-note, and that the objection founded on the want of a bill-stamp is not well founded. Whether it is a bond or not is a matter we cannot determine at the present stage; that would be a question for the Lord Ordinary to determine, but that (as I understand) it is not intended that the case should be further proceeded in.

LORD KINNEAR—I quite agree with your Lordships. The question seems to be merely whether an obligation to pay "any interest"—that is, any amount of interest—which may be found to be due, without any specification of the rate or character of the interest or of the date to which it is to run, is or is not an obligation to pay a definite sum, and I am quite clearly of opinion that it is not an obligation to pay a definite sum at all, because no one can tell what the sum due will be until it is decided what the rate of interest is and between what dates it is to be calculated. It is not disputed that under the authority of the decided cases an obligation in the same terms as the document we are considering would not be a promissory-note or bill, but it is said that the Bills of Exchange Act of 1882 changes all that and makes it a good bill for a certain sum. I cannot so read the statute. All that it says is, that a bill is an unconditional order for a sum certain in money, and that if it includes interest that fact alone does not prevent it being considered a bill for a certain sum. But before the date of the Act it was quite possible that a bill should be expressed to be payable with interest, and yet that the whole amount due might be clearly ascertainable on the face of the bill, and the statute seems to me to provide nothing more than that if a bill is expressed to be payable with interest, that alone will not prevent it from being a bill for a sum certain in the sense of the statute if it is for a sum certain in fact.

That is a perfectly simple case, because, for example, a promise to pay £100 twelve months after date with interest at the rate of five per cent. per annum is just as clearly a promise for a definite sum as if it had been to pay £105 twelve months after date. A sum is not the less certain because it includes interest if the amount of the interest as well as of the principal is clearly ascertainable on the face of the instrument. And therefore I see nothing in the clause founded on to alter the primary condition that a bill must be for a sum certain.

I quite agree that if we had been of a different opinion, and thought the document required to be stamped as a promissory-note, we should not have been entitled to look at it, notwithstanding that it has been passed by the Commissioners. The question is one for the Court to decide.

The Court adhered.

Counsel for the Pursuer—Clyde—A. D. Smith. Agent—William Cowan, W.S.

Counsel for the Defender—Baxter—Guy. Agent—A. C. D. Vert, S.S.C.

Tuesday, November 28.

SECOND DIVISION.

MOON'S TRUSTEES *v.* MOON.

Succession — Trust — Thellusson Act — 39 *and* 40 *Geo. III. c.* 98 — *Accumulations—Children's Portions—Testate or Intestate Succession — Heritable or Moveable —Conversion.*

A testator conveyed his whole estate, heritable and moveable, to trustees, whom he directed to pay certain annuities, and after meeting these annual payments "to accumulate the balance of revenue of my estate until the death of my said wife," when they were to realise the whole estate and dispose of the proceeds as follows:—(1) to hold certain provisions for his daughters in liferent and their children in fee; (2) to pay certain provisions to his sons; and (3) "to hold and invest the residue and remainder of my means and estate, and accumulations of revenue (if any) for behoof of my sons . . . and of my daughters . . . equally in liferent, for their respective liferent uses allenarly, and their respective children in fee. . . . The testator was survived by his widow and all his children, but his eldest son died a few years afterwards. The trustees administered the estate, and exercised some of the powers conferred upon them—*inter alia*, power to sell heritage—and they paid the various annual sums directed by the testator to be paid, and accumulated the surplus revenue. Twenty-one years after the testator's death his widow was still alive, and questions having arisen with regard to the trustees' power to accumulate further surplus revenue, and with reference to its disposal, a special case was presented to the Court, in which *held* (*diss.* Lord Young) (1) that the purpose for which the trustees were directed to accumulate surplus revenue was not "for raising portions for any child or children of" the granter in the sense of the Thellusson Act; (2) that accordingly the accumulation of surplus revenue beyond twenty-one years after the testator's death was struck at by that Act; (3) that there being no present gift of the capital from which the surplus revenue arose, the same fell into intestacy; (4) that the exercise of the power of sale by the trustees had not operated conversion of the said capital; (5) following *Hamilton's Trustees* v. *Boyes*, 36 S.L.R. 973, that the widow was entitled to terce out of the surplus revenue so far as derived from heritage or the proceeds of herit-

age, and to *jus relictæ* so far as derived from moveables; (6) that the testator's heir-at-law was entitled to the remaining two-thirds of the surplus revenue so far as derived from heritage or the proceeds of heritage; (7) that the heir-at-law was not entitled to share in the revenue arising from the moveable estate without collation; (8) that the heir-at-law's right to two-thirds of the revenue arising from heritage was subject to the burden of the annuities. *Logan's Trustees* v. *Logan*, 23 R. 848, *commented on.*

Question — Whether the heir-at-law within the meaning of the Thellusson Act was the heir-at-law as at the date of the testator's death or at the time when the Act applied.

The late William Moon died on 1st October 1876 survived by his widow and six children, James Stocks Moon, John William Moon, George Brown Moon, Walter Stocks Moon, Margaret Robertson Moon, and Annie Moon. His eldest son James S. Moon died in 1880 unmarried. He left a trust-disposition and settlement dated in 1876, by which he conveyed to trustees his whole means and estate, real and personal, for the ends, uses, and purposes therein specified. By the second purpose he directed his trustees to hold his property of Edenfield for behoof of his wife in liferent, and on her death to convey it to his eldest son James S. Moon in liferent, and his children in fee; and in the event of J. S. Moon dying without leaving children, then the said property should become the property of his heir-at-law. By the third and fourth purposes he bequeathed the household furniture, &c., of Edenfield to his wife, and a sum of £100 for mournings. By the fifth purpose he directed his trustees to pay an annuity of £1000 per annum to his wife during her life, with the following declaration — "Declaring further, that the provisions hereby conceived in favour of the said Mrs Ann Moorhouse Stocks or Moon shall be, and the same are hereby declared to be, in full satisfaction to her of all terce of lands, share of moveables, and every other claim competent to her by law, by and through my decease in any manner of way." "*In the eighth place*, after meeting the annual payments hereinbefore directed to be made in the event of my said wife surviving me as aforesaid, I direct my trustees to accumulate the balance of the revenue of my estate until the death of my said wife, and on the death of my said wife, in the event of her surviving me as aforesaid, or on my own death in the event of my said wife predeceasing me, I direct my trustees to realise my whole means and estate, and dispose of the proceeds thereof, as well as the accumulations of the same (if any), as follows, *videlicet*—(*First*) I direct my trustees to set apart, hold, and invest a sum of Seven thousand pounds for behoof of my said daughter Margaret Robertson Moon, and to set apart, hold, and invest a like sum of Seven thousand pounds for behoof of my daughter Annie Moon, and which respective sums shall be held by my trustees for behoof of my said daughters in liferent, for their respective liferent use allenarly, and their children in fee, subject to the declaration after written; (*Second*) In respect I paid to each of my sons the said James Stocks Moon and John William Moon a sum of Seven thousand pounds to put them into business, and I intend to pay to each of my sons George Brown Moon and Walter Stocks Moon a like sum of Seven thousand pounds to put them into business, but in the event of my death happening before a sum of Seven thousand pounds has been paid to each of my two last-mentioned sons, I direct my trustees to pay to them such a sum as will make Seven thousand pounds to each of them: Declaring, however, that the sums hereby directed to be paid to my said sons shall be so paid to them at such times or time as may seem proper to my trustees, and of which they shall be the sole judges; and (*Third*) I direct my trustees to hold and invest the residue and remainder of my said means and estate, and accumulations of revenue (if any), for behoof of my sons the said James Stocks Moon, John William Moon, George Brown Moon, and Walter Stocks Moon, and of my daughters the said Margaret Robertson Moon and Annie Moon, equally in liferent, for their respective liferent use allenarly, and their respective children in fee: Declaring that my trustees, notwithstanding anything herein contained to the contrary, shall have power to advance to each or either of my daughters a sum of Two thousand pounds out of their or her provisions of Seven thousand pounds each, in case of their or her marriages or marriage, and that whether such marriages or marriage shall take place before or after the said period of division, and the balances or balance of the respective sums provided to them as aforesaid, shall in such an event only be held by my trustees as aforesaid: Declaring, in case any of my sons or daughters shall predecease me leaving issue, such issue shall inherit their parent's share equally amongst them, share and share alike, but in case any of my sons or daughters shall predecease me without leaving issue, the share or sum falling to such deceaser shall accresce to the survivors of my children equally among them, and shall be subject to the restrictions and declarations applicable to their own proper shares of my estate: Declaring also that all sums held for behoof of my daughters as aforesaid, and the interest or annual profits thereof, are hereby declared to be strictly alimentary provisions, and shall not be liable for the debts or deeds of my said daughters or for the debts or deeds of any husbands they may marry, neither shall the same be assignable by my daughters nor be subject to the diligence of the creditors of my daughters, or of any husbands my daughters may marry, the *jus mariti* and right of administration of such husbands being hereby expressly excluded and debarred; which provisions above written conceived in favour of my

said children shall be accepted of by them, and the same are hereby declared to be in full of all legitim, portion-natural, bairns' part of gear, executry, and others whatsoever, which they or any of them can ask or demand by and through my decease, or by and through the death of their mother, or in any other manner of may." "*And in the last place*, in the event of all of his children dying before the said period of division without leaving lawful issue, then he directed his said trustees to divide and apportion his said means and estate, or such part thereof as might remain undisposed of as aforesaid (if any), amongst his own nearest in kin, share and share alike, to the extent of one-half thereof, and the remaining half amongst the nearest in kin of his said wife, share and share alike."

On the death of his father J. S. Moon exercised his right to take over his father's interest in his business, but he soon afterwards sold the goodwill of the business and went to reside in England, where he died. He left a will by which he appointed J. M. Stocks his executor. The trustees appointed by William Moon's settlement entered upon the mangement of Mr Moon's estate and implemented the provisions in favour of his widow, who accepted this in satisfaction of her legal rights. They also paid the annual sums directed to be paid under the settlement, and paid sums of £7000 to each of his sons George B. Moon and Walter S. Moon, and on Margaret Moon's marriage to Dr Alexander Robertson (since deceased) they exercised the power given to them of paying her £2000. They also sold most of the heritable property, which formed part of the trust estate, with the exception of Edenfield. After meeting the annual payments which fell to be made, the surplus revenue of the estate was accumulated in terms of the trust-disposition and settlement. By 1st October 1897, 21 years had elapsed since the death of the testator, and at 30th June 1898 the trustees had in their hands £861, 2s. 9d. of revenue accumulated since 1st October 1897. The annual surplus for subsequent years, it was estimated, would amount to about £1000 per annum. At the last-mentioned date the amount of the estate was £89,016, 0s. 8d.

Differences of opinion arose in regard to the accumulation of revenue, and a special case was presented for the opinion of the Court. The parties to it were, (1) William Moon's Trustees; (2) His widow Mrs Moon; (3) John William Moon, his eldest surviving son and heir-at-law, and also heir-at-law to his deceased brother James S. Moon; (4) William Moon's other surviving children; (5) the executor of James S. Moon; and (6) the children of John W. Moon and George B. Moon, who were all in minority or pupilarity and to whom a curator *ad litem* was appointed. These parties were the whole surviving grandchildren of the testator.

The second party contended (1) that the Thellusson Act applied to the aforesaid accumulations subsequent to 1st October 1897; (2) that the said accumulations were to be regarded as intestate estate of the deceased William Moon; and (3) that she, as his widow, was entitled to one-third part thereof.

The third party contended that the aforesaid accumulations of income were prohibited by the Thellusson Act from and after 1st October 1897, and fell into intestacy, and that the truster's widow, having accepted the testamentary provisions, as in full of every claim competent to her by law by and through her husband's decease, as aforesaid, he, as heir-at-law and one of the next-of-kin of his father and brother James Stocks Moon, was entitled (1) to the whole income from and after 1st October 1897 of the proceeds derived from his father's heritable property, which had been sold, and the income of the heritable property not yet sold, excluding Edenfield, and also without collation to (2) a one-fifth share of all the other income of the trust-estate derived from personality from and after 1st October 1897, after payment therefrom of the aforesaid annual payments from the trust-estate.

The fourth parties contended (1) that the aforesaid accumulations were not prohibited by the Thellusson Act, because the accumulations were directed to be made for the purpose of raising *pro tanto* portions for the testator's children who were in existence at his death; or (2) that if the Thellusson Act applied, it applied only to the accumulations of income from the expiry of twenty-one years from Mr Moon's death, viz., from 1st October 1897; and (3) that the current provisions under Mr Moon's settlement were a mere burden on the liferent of the residue, and so far as in the form of annuities fell to be paid *primo loco* out of the income of the heritage, and that the third and fourth parties, equally among them, as legatees of the liferent of said residue, were entitled, on and after 1st October 1897, to said liferent, subject to said burdens; or (4) that if said accumulations were held to be intestate estate, the third and fourth parties were entitled, equally among them, to the whole thereof in respect that the second party had accepted provisions in satisfaction of her *jus relictæ*, or at anyrate to four-sixths thereof.

The fifth party contended that the accumulations subsequent to 1st October 1897 fell to be regarded as intestate estate, and that, as representing the deceased James Stocks Moon, he was entitled to one-sixth thereof, or at least to one-sixth of two-thirds thereof.

The sixth parties contended (1) that the Thellusson Act did not apply for the reason stated by the fourth parties; or (2) that if the Thellusson Act did apply, the sixth parties were the only persons to whom there was any gift of the fee, and that consequently the trustees were bound, in terms of the third direction of the eighth trust purpose, to hold and invest any balance of revenue accruing from the testator's estate subsequent to 1st October 1897 for their behoof, because but for the direction to accumulate they would have been entitled to the capital of the revenue so

acquired even though the third and fourth parties might be entitled for the future to the annual income produced by such of the accumulations as have been and shall be made after 1st October 1897.

The questions upon which the opinion of the Court was asked were as follows, viz— "(1) Is the accumulation of the income of the deceased's estates, subsequent to 1st October 1897, prohibited by the Thellusson Act? (2) In the event of the first question being answered in the affirmative, does the surplus income of said estates, from and after 1st October 1897, in whole or to the extent of one-sixth, fall to be treated as intestate succession of the deceased William Moon? (3) In the event of the first branch of the second question being answered in the affirmative, is the third party entitled to the whole income of the deceased William Moon's heritable estate (except Edenfield) so far as not yet sold, and to the whole income of the proceeds of his heritable estate so far as sold, and also, without collation, to a one-fifth share of the surplus income of the deceased's personal estate; or if not, what shares of the surplus income of the said heritable and moveable estate is the third party entitled to? (4) In the same event, is the second party entitled to one-third of said surplus income so far as it falls to be treated as intestate succession; and (*a*) are the third and fourth and fifth parties in the proportion of five-sixths to the third and fourth parties and one-sixth to the fifth party; or (*b*) are the third and fourth parties, to the exclusion of the fifth party, entitled to the remaining two-thirds? (5) Or, in the same event, is the second party entitled to no part of said surplus income so far as it falls to be treated as intestate succession; and (*a*) are the third and fourth and fifth parties entitled thereto in the proportion of five-sixths to the third and fourth parties and one-sixth to the fifth parties; or (*b*) are the third and fourth parties entitled to the whole thereof equally, without distinction of heritage and personality? (6) Or does said surplus income in whole or in part, and if so, in what part, vest in and become payable to the third and fourth parties as legatees of the liferent of the residue of William Moon's estate? (7) Or does the said surplus revenue fall to be invested for behoof of the sixth parties, as having, along with any other grandchildren who may come into existence subsequently, the right to the fee of the residue of the estate of the late William Moon, and if so, are the third and fourth parties entitled to the liferent of such investment? (8) In the event of the third party being found entitled to the income of the heritable estate, and of the proceeds of heritage, so far as sold, do the annual payments directed and empowered by the truster fall to be deducted therefrom, or are they chargeable against the income derived from the moveable estate, or against the income derived from both estates, in proportion to the capital of each?"

By the Thellusson Act (39 and 40 Geo. III. c. 98) it is provided "that no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurance directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues, or profits, or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulations shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed: Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed." This enactment was extended to heritable property in Scotland by the Act 11 and 12 Victoria, cap. 36, section 41.

Argued for the second party — The Thellusson Act applies. The principles of its construction are to be found in *Maxwell's Trustees* v. *Maxwell*, 5 R. 248, *per* L.J.C. 250. There is here no present gift, and no vesting in the children. It cannot be determined who are to take till the death of the liferentrix. There is a destination-over. The only direction is to hold and accumulate till the event and then to distribute in a prescribed way. There is no vesting—*Bryson's Trustees* v. *Clark*, 8 R. 142. Rearing a portion means ordering accumulation till a sum has reached a certain amount. A sum named is essential. The Act does not apply to accumulations for raising portions for children, but that is a different thing from accumulations to increase what is provided—Lewin on Trusts, 10th ed., ch. 6, sec. 1, sub-sec. 18; Hargreaves on the Thellusson Act, pp. 191 and

199; *Edwards* v. *Inch*, 23 L.J., Ch. 204. The sums accumulated after 1st October 1897 fall into intestacy. The widow is entitled to her *jus relictæ* out of the accumulations struck at notwithstanding the terms of the settlement in addition to the provision made for her—*Hamilton's Trustees* v. *Boyes*, 25 R. 899, *aff.* 36 S.L.R. 973.

Argued for the third party—The arguments of the second party as to no vesting and accumulations therefore falling into intestacy are adopted. On the assumption that the Act applies and intestacy follows he is entitled as heir-at-law of the testator and of his brother to the accumulations of rents of heritage and to a share of moveables along with the others. Rents of heritage go to the heir-apparent for the time being—*Logan's Trustees* v. *Logan*, 23 R. 848; Lord Rutherfurd Clark's opinion in *Campbell's Trustees* is unsound, seeing *Lord* v. *Colvin* was before him. According to the interlocutor in *Logan's Trustees*, he is also entitled to a share of moveables. No collation is necessary, because that is only required when the heir takes by disposition of law—Bell's Pr., sec. 1912. That means common law, and does not include the operation of the Thellusson Act. The annuities are not payable out of heritage. That is no doubt the ordinary rule, but here the testator has given special directions as to the source from which they are to be paid, viz., from the general fund. Further, this does not arise because the question is as to accumulations of surplus, and surplus does not arise until after the annuities have been met. There has been no conversion by the sale of heritage, because that was not by specific direction but in the exercise of a power—M'Laren on Wills, i. 237; *Tainsh* v. *Dunbar*, M. 5842; *M'Farlane* v. *Greig*, 22 R. 405, p. Lord M'Laren, 409; *Sheppard's Trustees* v. *Sheppard*, 12 R. 1193, p. Ld. Pres. 1198. James S. Moon's will is not sufficient to carry heritage. The third party succeeds to his heritage as heir-at-law. The second party is not entitled to *jus relictæ*. *Hamilton's Trustees* does not apply. *Jus relictæ* is a share of the goods in communion at death. Here are no goods *in bonis* at death, but goods accumulated afterwards, and from which no *jus relictæ* is payable—*Campbell's Trustees* v. *Campbell*, 18 R. 993. The date at which the next of kin are to be ascertained is the date when the succession opens, not the date of the testator's death. *Lord* v. *Colvin* does not apply to a case of intestacy as to accumulations struck at by the Thellusson Act.

Argued for fourth parties—The Thellusson Act does not apply. The accumulations here are for a special provision for children. What they got originally was residue, which is distinguished by the testator from accumulations. This is not a case of accumulation for increasing a fund originally provided, but institutes a new fund. Assuming it does apply, vesting under the 8th purpose is not postponed. The first, second, and third purposes all point against postponing it, and the declarations in the third are inconsistent with it. If there is vesting, then the children take under the residue clause and the widow gets no share. The same effect follows from a vesting of the liferent, which took place here. There is a clear gift of liferent—*M'Kenzie* v. *M'Kenzie's Trustees*, 4 R. 962. If there is intestacy, then under *Campbell's Trustees* and *Logan's Trustees* we must look at what was heritage and what was moveable at the testator's death to ascertain how the accumulations struck at are to be divided. Annuities should be paid out of heritage in so far as possible when the heir takes *ab intestato*, and this notwithstanding a direction in the will as to the source from which it is to be derived—*Crawford's Trustees* v. *Crawford*, 5 Macph. 275. Annuities are primarily payable out of heritage—*M'Intosh* v. *M'Intosh*, 11 Macph., (H.L.) 28; *Wallace* v. *Ritchie's Trustees*, 8 D. 1038; *Smith* v. *Wighton's Trustees*, 1 R. 358. The clause in this settlement directing a sum to be set apart for annuities does not say set apart out of moveables. The heir is in any case not entitled to a share of moveables without collating.

Argued for fifth party—The argument of the second party is adopted as to the application of the Act. There is here intestacy and a share vested in James S. Moon—*Lord* v. *Colvin*, 23 D. 111; *Muirhead* v. *Muirhead*, 15 R. 254, *rev.* 17 R. (H.L.) 45. The income from heritage goes to the heir, who is to be looked for as at the date when it accrues, but the heirs *in mobilibus* are to be looked for at the date of the testator's death—*Lord* v. *Colvin*, *cit.* The heir takes subject to payment of annuities. There is here a case of conversion, and the direction of the testator to convert on the widow's death draws back to the time of the testator's decease—*Cowan* v. *Cowan*, 14 R. 670; *M'Gilchrist's Trustees* v. *M'Gilchrist*, 8 Macph. 689.

Argued for sixth parties—The argument of the fourth parties with reference to the application of the Act, and as to there being here a present gift, are adopted. Under clause third of the eighth purpose there is a gift of fee to the sixth parties, and the effect of the operation of the Act is to accelerate the enjoyment of that fee.

At advising—

LORD TRAYNER—The first question put to us is, whether the accumulations of the income of the testator's estate made subsequently to 1st October 1897 (being twenty-one years after the testator's death) are prohibited by the terms of the Thellusson Act. I am of opinion that this question must be answered in the affirmative. Being accumulations made by the testator's direction during a period more than twenty-one years after his death, they appear *prima facie* to be struck at by the terms of the Act. It is maintained, however, by the fourth parties that this is not so, because the accumulation was made for the purpose of raising a portion for the testator's children, and are therefore within the exception provided by the Act.

I do not concur in that view. The accumulation was certainly not directed to be made for the purpose of raising any specific provision for the testator's children or any of them; the purpose rather was to increase the amount of the residue to be ultimately divided, and of course in so far as the residue was increased the provisions in favour of the children were enhanced. But the provision which the testator made in favour of his children was not dependent on the accumulations, for they were to take the very same interest or benefit under the testator's disposition whether there were any accumulations or none. There might never have been any accumulation, and this was present to the mind of the testator when he directed the division of his estate to be made, "as well as the accumulation of the same, *if any*." Accumulations or none, the residue of the testator's estate was to be divided equally among his children in liferent, and their children in fee. I cannot read the direction in this case as meaning anything else than a direction to accumulate surplus income for the purpose of increasing the residue. If so, the direction comes within the prohibition of the Act. If it were otherwise, then the Act would never apply where the testator's children were his residuary legatees. The increase of the residue could always be said to raise (in the sense of increasing) the portion of the children. But that is not the meaning of the Act. The Act prohibits accumulations being made more than twenty-one years after the testator's death in order to enhance or increase the aggregate estate, but allows such accumulations if out of them a provision is to be made or raised for the testator's children. The accumulations in this case were not directed to be made, nor when made were they dedicated to the raising of such provision. The provision made by the testator in favour of his children was, as I have said, independent of the accumulation. It was the same —an equal division of and interest in whatever the residue might be, whether the accumulations were great or small, or whether there were none.

In regard to the second question, my opinion is that the prohibited accumulations must be regarded as intestate succession. The testator disposed of that part of his estate which consisted of accumulations lawfully made, but he has not disposed of that part of it which arises from accumulations of income prohibited by law. The only direction concerning that part of his estate which he has given is to accumulate it, which direction cannot now be regarded. There being, therefore, no disposal of that part of his estate to which effect can be given, it falls to be distributed as intestate succession. It was argued by the fourth parties, that as they were entitled to the liferent of the residue under the testator's settlement, they were entitled to the accumulations in question as the parties to whom the income of the estate would have gone but for the illegal direction, subject of course to the burden of the current provisions. I am unable to give effect to that argument, because it appears to me that the settlement of Mr Moon makes no present gift of the residue to anyone, and that no right in the residue, either of liferent or fee, can vest until after the death of Mrs Moon. Excluding thus the residuary legatees, the persons entitled to the accumulations in question must be determined according as the estate claimed shall be declared to be heritable or moveable—to the heirs-at-law if heritage, to the next-of-kin if moveables. The accumulations are now in the hands of the trustees in the form of money—that is moveable estate. But part thereof consists of the interest on the price received for some parts of the testator's heritable estate which under his direction was sold by the trustees. The next-of-kin accordingly claim the whole accumulations as moveable succession divisible among them. The heir-at-law, on the other hand, claims such part of the accumulations as have been derived from the price of heritage sold by the trustees, on the ground that the direction of the testator to his trustees to sell, and the sale by them, only operated conversion for the purposes of the testator's settlement, but did not so operate in reference to estate not disposed of by the settlement. I think the contention of the heir-at-law is sound and in accordance with many decisions, some of which were cited in the course of the debate. The heir-at-law, however, in my opinion, can only take the share he claims under burden of the heritable debts—that is say, under burden of the amounts provided to the widow and daughters of the testator. I am of opinion also that if the heir-at-law claims any part of the accumulations which are regarded as moveables, he can only do so on condition of his collating what he receives as heir-at-law. It is a well-established rule of our law that when a heir takes up heritage by force of law he cannot also claim a part of the moveable estate without collating. I cannot regard what appears in the interlocutor of the Court in *Logan's* case as an authority to the contrary. Nothing appears, in the opinion of the Judges who decided that case, to warrant the finding in the interlocutor. The question whether it is the heir-at-law at the date of the testator's death, or the heir-at-law at the date when the rents or interest on the price of the heritage fell due, does not require to be considered here, because the third party to this case now represents both these interests. Had it been necessary to decide the question, I should have followed the decision pronounced in the cases of *Campbell* and *Logan* to which we were referred.

As regards the moveable succession, I think the widow is entitled to a share as *jus relictæ*. That her claim to this has not been excluded by her acceptance of the conventional provisions made in her favour by the testator, and in the discharge in respect thereof of all her legal rights, has been decided in the case of *Hamilton's Trustees*.

I would answer the questions put to us in accordance with these views.

LORD JUSTICE-CLERK—In consequence of being somewhat indisposed I have not been able to write an opinion in this case, but having given it my best consideration I concur with Lord Trayner.

LORD YOUNG—I cannot say that I have found this case unattended with difficulty, and I am sorry to say, after the best consideration I have been able to give it, I am not able to take the view which has been expressed by Lord Trayner and agreed to by your Lordship, and in which I understand Lord Moncreiff also concurs. The case, which is a very peculiar one, although it seems simple enough from the general statement of it, depends on the construction of a will in which the testator divided his property really equally among his family. He died in 1876 and was survived not only by his widow but by six children—four sons and two daughters. The general import of his will is to give the heritable property called Edenfield to his widow in liferent, she surviving him, and after her death his eldest son is to have the liferent of it, and the fee is to go to the children of this son, and if he leaves no children then to his heirs-at-law. That is the only heritage which he desired to retain undisposed of. With respect to the rest of his heritable property, which appears to have consisted chiefly of house property in Dundee, he empowered the trustees to sell it—to turn it into money. He authorises them, and one cannot read the will without seeing that although there is nothing directing them to sell, that that was his meaning. He must have contemplated that they should; and they did—they turned it all into money with the exception of Edenfield, the destination of which I have already referred to. And after it was turned into money, and on the lapse of the twenty-one years referred to in the Thellusson Act, the amount of his property, exclusive of Edenfield, was £89,000. There were considerable accumulations of income, and there was that amount at the end of twenty-one years. That was the income of purely personal property, and the directions in respect to that are what I shall immediately refer to. I have said that it was the equitable and equal division of his whole property among his children. I have stated what he gave to his widow. There were some sums in addition to the liferent of his heritable estate. There was also the power to her to require the trustees to pay annual sums to certain people during her lifetime; and she did direct certain sums to be paid in liferent, and these up to the present time have been paid by the trustees accordingly. He states in his will that he had given £7000 to his eldest son—given it in his lifetime—and he requires his trustees to give an equal sum to his second son and also to give £7000 to each of his daughters—that is, £7000 to each of his four sons and £7000 to each of his two daughters. The trustees were directed to invest the money so as to enable them to pay the testamentary provision of £1000 a-year to his wife, and the annual sums which she might require to be paid within the power given to her by the will; and then in the eighth purpose of the will he proceeds—"After meeting the annual payments hereinbefore directed to be made"—and there is no question about them, and no notice need be taken of them more than I have already taken—"in the event of my said wife surviving me as aforesaid, I direct my trustees to accumulate the balance of the revenue of my estate"—that is, the balance remaining after meeting these annual payments—"until the death of my said wife, and on the death of my said wife in the event of her surviving me, as aforesaid, or on my own death in the event of my said wife predeceasing me, I direct my trustees to realise my whole means and estate, and dispose of the proceeds thereof, as well as the accumulations of the same (if any), as follows," and then he requires certain payments to be made to his children—£7000 to each of the daughters and younger sons, which I have already referred to. And then the next direction is, after these payments are made—and the trustees inform us that they have made them. They say in statement 4 of the special case—"On William Moon's death his trustees entered into the possession and management of his estate, which consisted partly of heritable property and partly of personal property, and have implemented the provisions conceived in favour of his widow Mrs Moon." I have already stated that they sold the heritage in Dundee before the twenty-one years expired, so that no question under the Thellusson Act can arise as to that. "She accepted these as in full satisfaction to her of all terce of lands, share of moveables, and every other claim competent to her by law and through her husband's decease, in terms of the provisions to that effect in the said trust-disposition and settlement. The trustees have also paid to Miss Annie Moon and Mrs Margaret Robertson Moon, now Anderson, the annual provisions of £100 each, and have also paid the £100 per annum to persons named by Mrs Moon, and to George Brown Moon and Walter Stocks Moon the above-mentioned sums of £7000, with interest thereon at 4 per cent.; and they likewise paid to Mrs Margaret Robertson Moon or Anderson on her marriage £2000 out of the above-mentioned provision of £7000, in terms of a power to that effect contained in the settlement." This is a statement of the extent to which the payments have been made; and the payments in so far as not made are to be made on the widow's death under the third sub-division of the eighth purpose, which runs—"I direct my trustees to hold and invest the residue and remainder of my said means and estate and accumulations of revenue (if any) for behoof of my sons the said James Stocks Moon, John William Moon, George Brown Moon, and Walter Stocks Moon, and of my daughters the said Margaret Robertson Moon and Annie Moon, equally in liferent, for their respective life-

rent uses allenarly, and their respective children in fee." Now, that is a distinct direction for donation of the residue after meeting all claims which are due, and to which the Thellusson Act can have no application. The residue is to be so disposed of—it is to be given to those children who are named in liferent and to their issue in fee. Now, the residue, the trustees tell us, in 1897 amounted, as I have stated already, to about £89,000. They say—"Upon 1st October 1897 the total amount of the estate held by the first parties, excluding Edenfield, was £89,016, 0s. 8d., or thereby." Now, is not that residue disposed of to the extent of about £800 at that date? To the extent of £800 at that date it consisted of surplus income for that year. That is surplus income, and that surplus remaining after meeting all the annual payments; and the trustees inform us that in future they think there will be about £1000 a-year of surplus after meeting the annual payments. Now, that £800 of surplus in the first year, and that surplus of £1000 in the second year, and £1000 during each year during which thereafter the widow may live, is the part and the only part of the fund to which the Thellusson Act can apply. Now, I assume its application. If it does apply to that small sum, the rest of the £89,000 is undoubtedly vested in these children. I shall refer immediately to the provision of the deed about all these children being dead without issue at the time of the testator's widow's death; but irrespective of that the whole of the £89,000 and any surplus income thereafter, irrespective of the Thellusson Act, would go to these children in liferent and to their children in fee.

Now, assuming the Thellusson Act to apply, the purpose of that Act is to prevent the accumulation of these sums of £800 in the first year and of the anticipated £1000 in the years thereafter, only one of these years having expired. The Thellusson Act says there is to be no accumulation of these. It does not apply to the accumulations before that date, but only to those small accumulations thereafter. And what is the effect—what is the purpose of the Thellusson Act in applying to these? It is to prevent, as it really is expressed in the title of the bill, "postponing for an undue period of time the beneficial enjoyment of this £800, and of the £1000 in the years thereafter. It is to be paid—so that there will be an immediate enjoyment—not a postponement of the enjoyment. With respect to the £89,000, so far as not paid as a provision distinct, and to which the Thellusson Act has no application, the enjoyment is not postponed for it; the income of it is only sufficient to meet the annual outlays except for the surplus income of £800 during the first year and the £1000 a-year thereafter. If the will is not struck at by the Thellusson Act the enjoyment of this surplus would be postponed by its being accumulated till the widow's death. If he had postponed it by his will till the accumulation of £800 and £1000 a-year thereafter came to £40,000, with respect to that the postponement made by the will would have been interfered with by the Thellusson Act. But so far as I can see the Thellusson Act does nothing else. This is still residue—necessarily residue—for residue means nothing except what is not otherwise disposed of by will. Now, the Thellusson Act says—"The enjoyment of this part of the residue is not to be postponed." The enjoyment of the rest of the residue is not postponed, for the children have it—they get all the enjoyment of it until the widow's death—it is only that part the enjoyment of which is to be postponed. Now, how does the testator postpone it with respect to that? Simply by saying—"It is not to be divided—not to be paid to those to whom he destines the residue, of which this is necessarily part, till the widow's death, she having now lived twenty-one years after the death of her husband, but it is to go to those who would have taken it if there had been no such postponement as he contemplated. Now, who are they? We see that in this will he makes an equal destination to his children—he destines the enjoyment when the whole comes to them, but he meant the time not to be till the widow's death; but that postponement of the enjoyment is interfered with by the Thellusson Act, and I think the fair and reasonable effect of that is to give the enjoyment not to heirs-at-law or anybody else but to the persons to whom the testator by his will destines it, and to give it earlier than he contemplated, not having the operation of the Thellusson Act in view.

I shall state my reasons immediately for thinking that the statute does not operate in a case of this kind. But assuming that it does operate, it operates only to prevent the postponement of the enjoyment after the lapse of twenty-one years from the testator's death; but I think the fair and true and reasonable meaning is that those are to have the enjoyment whom the testator points out in his will, in a will which I have already said is an example in this, that it makes an equal division among his children and their issue. Now, I have perhaps said enough to express my view with respect to that provision of the deed. "In the last place, in the event of all my children dying before the said period of division without leaving lawful issue, then I direct my trustees to divide and apportion my said means and estate amongst my own nearest in kin, share and share alike, to the extent of one-half thereof, and the remaining half amongst the nearest in kin of my said wife, share and share alike." I think the meaning of that, whatever the legal effect of it might be, is this—"if these children whom I name, all of them, die childless before their mother, then there are none left of those whom I contemplate to benefit by my will—namely, my own family" (and he benefits no others, with the exception of the few who are named, as authorised, by the widow)—"if these are all gone, then my family are all gone, and my own next-of-kin shall take the one-half and my wife's next-of-kin take the other half." But why should that deprive them of the enjoyment—and the Thellusson Act

I presume, is provided so that it should not be postponed—with respect to this £1000 a-year? I therefore think that under the destination of residue in the will this sum to be equally divided among these children is really income, and they take that income the enjoyment of which is not to be postponed, and the fee of what is yielding that income will go to their children at their death. But the whole of this is income—this of which the enjoyment is no longer to be postponed, is income; and he meant that the income and the fee which is producing that income—that is, the fee producing this surplus of £1000 a-year—is to go to their issue. Now, that disposes of the case very simply, and I do not think anybody can doubt that it is in accordance with the purposes and intention of the testator that his children should have everything, and so far as he admits them to the liferent-interest they and their children should have everything.

Now, my reason for thinking that the Thellusson Act is not applicable to the case, and that this direction to accumulate this really little bit of income during the years of his widow's old age is, that it is a provision for his children, for nobody else takes a shilling of it except his children under the will. "Hargreaves' Thellusson Act" was referred to at p. 192, but I read from p. 199 "an accumulation protected by this exception must be directed for the purpose of *raising*" (and that is put in italics) "a portion, not merely to add to its original amount." And a very old case is referred to in which Lord Langdale said—"As the accumulation which is directed does not appear to me to be a provision for raising portions, but a provision for making additions to the capital, for the purpose of making one gift of an aggregate fund, I think that this case is not within the proviso of the Act." Now, is this fund within the Thellusson Act? It provides that it shall not extend to "any provision for raising portions for any child or children of any granter, settler, or devisor, or any child or children of any person taking any interest under any such conveyance." What other meaning is there in that except to increase the amount of the portions of those children in liferent and grandchildren in fee? Is there any other good reason that occurs to one? If he directed the accumulation to be given—the whole of it—to one grandchild as that grandchild's portion, and which would in his estimation make the portion of that grandchild equal to what he had given to other grandchildren from some other source, would that not have been a case to which the Thellusson Act would admittedly not apply? But he says accumulate, or raise, or increase, the portion which I destine to each child and grandchild by the amount of that accumulation. Then the Act does not apply if he directs an accumulation for thirty years, say instead of only twenty-one, in order to make a provision, there being no other provision for the children, but if he directs the accumulation to be made for twenty-one, twenty-two, twenty-three, or twenty-five years, and for a shorter period in order to increase the provision then the statute does apply. I cannot see the reason or the sense of that, and I can find no authority upon which I could venture to say, that in my opinion that is according to the law of Scotland in interpreting this Act of Parliament. I thoroughly understand—at least I think so—the meaning of the provision that the restraint against postponing the enjoyment of the income from an estate shall not apply in the case of a direction made in order to pay off debts—the debts of the truster or any other person—for it applies to paying off any debts whatever, or a provision in favour of the children of the truster or of persons to whom the truster stood *in loco parentis*, or the children of such children. There is no restraint upon that from the very nature of it. It is a provision for children to whom the testator stands in the relation of parent. And this is not an accumulation *in memoriam*, to raise pillars or monuments, or to provide a large fund not connected with provisions to children. Now, there is no provision for anybody except the children or grandchildren of the testator, laying aside those sums which were to be paid to persons selected by his wife as a sort of generous gift from herself. There is no provision for anybody else. Now, in my humble opinion the Act does not apply, and I beg to state that I take the same view which the testator and the conveyancer who prepared the deed seems to have taken, namely, that the Thellusson Act did not apply to a provision of that kind. And the case seems the stronger that there really was a doubt in the testator's mind whether there would be any surplus at all; that would depend on the nature of the investment. There is very large power to invest the funds—to invest in shares in companies and so on; and if any of the investments failed there might very well be a loss one year that would lick up all the accumulations which had been made, and the language of this deed says simply this—there may be accumulation, there may be surplus or not; taking all the years that the trust exists, there may be accumulations or not—if there are no accumulations then no surplus; if there be a surplus one year with another, do not stop and make a period of division of it, but leave that to be divided when the period of division arrives, on the death of my wife." Even assuming that the Thellusson Act does apply, I think the fund must be disposed of as residue under the residue clause, but the postponement of the enjoyment put an end to; or (which is the view that I prefer), that the statute is not applicable at all, assuming the will of the deceased and its particular expression should be carried out, and any accumulation of surplus — very conceivably a large sum at the widow's death—should be divided in the same way as the residue of the estate.

I desire to add, that I think there is no case here of conversion and reconversion. The surplus cannot be interfered with by

the application of any such doctrine to the accumulated fund.

LORD MONCREIFF—(1) I am of opinion that the Thellusson Act applies. The direction for accumulation is not as I read it a provision for raising portions in the sense of the statute. This is sufficiently shown by the fact that no vested interest in the residue and accumulations is conferred upon any of the children or grandchildren of the truster by the residuary clause; because in the event of all of them dying before the period of division the residue goes over to other parties. The bequest is thus not a portion for any child or family of children or grandchildren carved out of the accumulations. It is a massing of the whole residue with its accumulations for the benefit of some person or persons whose identity cannot be ascertained till the death of the widow, and who may be other than the children or grandchildren of the truster — in short, such an accumulation of revenue as the Act was designed to prevent.

(2) The next question is, to whom do the accumulated rents and profits go? The Act directs that they "shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." It is settled that if the deed contains no present gift of the *corpus* from which the rents and interest directed to be accumulated are derived, the accumulations must be treated as intestate succession. In the present case none of the parties to whom the residue is destined in the first instance either in liferent or fee are given a vested interest; and therefore the accumulations must be dealt with as intestate succession.

(3) This being so, the accumulations in my opinion fall to be divided between the heir in heritage, the heir *in mobilibus*, and the widow of the truster.

Now, the provisions made for the truster's widow in the settlement are declared to be in full of her legal rights. But for the case of *Hamilton's Trustees* v. *Boyes*, 25 R. 899, and 36 S.L.R. (H.L.) 953, I should have been disposed to think that this formed a bar to the widow now claiming her legal rights of terce and *jus relictæ* out of the accumulations which are to be dealt with as intestate succession. But that decision, affirmed as it was in the House of Lords, must be held as conclusive to the contrary.

As regards the heir in heritage two questions arise. The first is whether the heritable estate is to be held as having been converted into moveable estate in a question with the heir in heritage at the date when the Act came into operation. After the best consideration that I have been able to give to the authorities, I think that they establish this, that when a settlement partially fails either in consequence of a lapse or a failure on the part of the truster to dispose of the whole of his estate, or the operation of the Thellusson Act, the succession to the estate which is ultimately found not to have been disposed of must be dealt with having regard to the character of that estate as at the date of the truster's death; and that the character of the estate cannot be affected either by directions for sale given by the truster, or by the exercise of a power of sale by the trustees in the course of their administration of the trust. Applying this rule to the present case, it appears that the truster has failed to dispose of the rents and interest which will accrue during the period from the expiry of twenty-one years after his death to the time of the ultimate division of his estate. It appears that the heritable estate in question was sold just before the twenty-one years ran out; and but for the operation of the Act the proceeds would have reached the beneficiaries ultimately entitled to them as moveable property. But if we hold, as I think we must do, that the execution of a power of sale cannot affect the character of the right of a party having an interest in the heritable estate as intestate succession, the right of the heir in heritage to the rents directed to be accumulated is not affected by what has taken place in the course of the management of the trust. Therefore I think that the heir in heritage of the truster is entitled to the interest on the sum obtained for the heritable subjects which were sold just before the expiry of the twenty-one years. I believe that it is not necessary for us to consider whether the heir at the date of the truster's death or the heir at the termination of the twenty-one years is entitled to succeed, because the third party, J. W. Moon, in his own person, or in a representive capacity, occupies both positions.

(4) But then I am of opinion that the burden of annuities must fall on the proportion of the accumulations which represent the produce of heritage.

(5) We are also asked whether the third party, who is one of the next-of-kin as well as heir in heritage, is entitled to a share of the produce of the moveable estate without collation? I think not; I think he is bound to collate, notwithstanding what appears from the rubric to have been the decision in *Logan's Trustees* v. *Logan*, 23 R. 848. The point is not noticed at all in the opinions of the Judges. For myself I see no reason why part of a truster's estate which falls to be dealt with as intestate succession in consequence of the operation of the Thellusson Act, should be dealt with on a different footing from any other intestate estate.

On the whole matter, I think the questions should be answered in accordance with the views which I have expressed.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties in the special case, Answer the first question therein stated in the affirmative: In answer to the second question, find that the surplus income of the deceased's estates from and after 1st October 1897 falls to be treated in whole as intestate succession of the deceased William Moon: Find in answer to the third question that after deduc-

tion of the annual payments after mentioned the third party is entitled to two-thirds and that the second party is entitled to the remaining one-third of said surplus income derived from the deceased William Moon's heritable estate (except Edenfield) so far as not yet sold, and from the income of the proceeds of his heritable estate so far as sold, but that the third party is not entitled without collation to share in the surplus income so far as derived from the deceased's personal estate: Find in answer to the fourth question that after deduction as aforesaid the second party is entitled to one-third of the said surplus income, whether said income is derived from heritable estate or from the proceeds of heritable estate or from moveable estate, and that in the event of the third party collating, the third and fourth parties are entitled to the remainder of the said surplus income equally among them, share and share alike, and that if the third party does not collate, the fourth parties are entitled equally among them to two-thirds of said surplus income so far as derived from moveable estate: Find in answer to the eighth question that in the event of the third party exercising his right to claim two-thirds of the income derived from heritage or the proceeds thereof, the annual payments directed or empowered by the truster by his trust-disposition and settlement, amounting to £1300 per annum or thereby, fall to be deducted from the last-mentioned income: Find it unnecessary to answer any of the remaining questions: Find all the parties entitled to expenses out of the accumulations of surplus income since 1st October 1897, and remit," &c.

Counsel for the First and Fifth Parties—C. D. Murray. Agents—J. & D. Smith Clark, W.S.

Counsel for the Second Party—Balfour, Q.C.—Salvesen. Agent—George Bennet Clark, W.S.

Counsel for the Third Party—Sol.-Gen. Dickson, Q.C.—Cook. Agents—W. & J. Cook, W.S.

Counsel for the Fourth Parties—Johnston, Q.C.—Clyde. Agents—J. & D. Smith Clark, W.S.

Counsel for the Sixth Parties—Dundas, Q.C.—P. Balfour. Agents—Bell & Bannerman, W.S.

Tuesday, November 28.

SECOND DIVISION.

[Lord Pearson, Ordinary.

DAVIDSON'S TRUSTEES *v.* CALEDONIAN RAILWAY COMPANY.

(*Ante*, vol. xxxiii. p. 25).

Railway—Mines and Minerals—Reserved Minerals—Conveyance from Owner of Surface only—Right to Remove Minerals to Formation Level.

A railway company purchased the rights of a vassal in whose feu-contract the minerals were reserved by the superior. *Held* that the company was not entitled, as proprietor of the surface or otherwise, to excavate minerals down to the formation level of the railway without compensating the superior.

Railway—Compulsory Purchase—Omission to Take through Mistake or Inadvertency — Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. c.* 19), *sec.* 117.

The 117th section of the Lands Clauses Consolidation Act 1845 enacts that if at any time after the promoters of the undertaking shall have entered upon any lands which they were authorised to purchase, any person shall appear to be entitled to any estate, right, or interest in such lands which the promoters shall "through mistake or inadvertency" have failed or omitted duly to purchase or to pay compensation for, then whether the period allowed for the purchase of lands shall have expired or not, the promoters shall remain in the undisturbed possession of such lands, provided within six months after notice of such estate, right, or interest, in case the same shall not be disputed by the promoters, or in case the same shall be disputed, then within six months after the right thereto shall have been finally determined by law in favour of the person claiming such right, the promoters shall purchase or pay compensation for the same, and such purchase money or compensation shall be determined by arbitration in the manner provided by the Act.

Where a railway company had entered upon lands, an interest in which was afterwards claimed and determined in favour of the claimant, *held* that there was no onus on such claimant to take steps to have the compensation to which he was entitled determined by arbitration, and six months from the final decree having elapsed without action on the part of the company, that any right of the company to have the compensation determined by the statutory method was at an end, and the pursuers' claim was one for damages at common law.