bottle-washing but hotel keeping, and the washing of bottles, like the washing of plates and cups, &c., is carried on not as a main or separate business but merely incidentally to hotel keeping. For these reasons I think that we cannot hold that the cellars in question are a factory within the meaning of the Act of 1901, or that through that Act they are brought within the scope of the Workmen's Compensation Act 1897.

I therefore think that we should answer the second question as well as the first in the negative.

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

The Court answered both questions in the negative.

Counsel for the Appellant—Hamilton. Agents—Oliphant & Murray, W.S.

Counsel for the Respondents—Guthrie, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, July 14.

SECOND DIVISION.

CHALMERS' JUDICIAL FACTOR *v.* CHALMERS.

Succession—Testament—Legitim—Effect of Election to Claim Legitim—Forfeiture of Provision—Direction to Pay over Annual Proceeds to Father for Education and Support of Children.

In their mutual last will and settlement a husband and wife directed their trustees to apply the annual proceeds of one share of the residue of their estate in payment of the premiums on two policies of insurance, the surplus if any to be paid over to their son W. for the education and support of his children. The proceeds of the policies when payable were directed to be paid to the children of W. W. claimed and received his legitim.

Held (*diss.* Lord Moncreiff) that the bequest of the surplus income was a provision in favour of W., and not a trust in him for the benefit of his children, and that the bequest was therefore absolutely forfeited by W. claiming and accepting legitim.

Jack v. *Marshall*, January 21, 1879, 6 R. 543, 16 S.L.R. 326, *followed*.

Succession—Codicil Altering Will—Liferent or Fee—Testament—Construction.

In a trust settlement the trustees were directed in the fifth direction of the third clause to apply four shares of the residue of the trust-estate for the use of the testators' daughter J. in liferent till she attained 35 years of age or was married, and on her attaining said age without being married for payment of the principal to her, or in the event of her previous marriage for settlement of the principal on herself in liferent and her children in fee, whom failing the same to form part of the estate for division.

By a codicil the testator recalled the fifth direction of the third clause of the settlement, and "in lieu and in place of the provision or share of the estate thereby declared to be paid" to her daughter J., directed, appointed, and declared that only two and a half shares should be paid to her.

Held (*dub.* the Lord Justice-Clerk) that the codicil only changed the amount of the share which was to be applied for behoof of J. and did not convert the right of liferent given her by the settlement into a right of fee.

By mutual last will and settlement executed on 16th August 1872 William Chalmers and Jane Cruickshank or Chalmers, his wife, after providing, *inter alia*, for payment of an annuity of £20, provided in the third place that, subject to the burden of the said annuity, the testators' whole estate, under deduction of debts and charges, should be divided into twelve equal shares, and apportioned and applied, *inter alia*, as follows:—"(*First*) One share to be set aside and the annual proceeds applied in the first instance in payment of the premiums on two policies of assurance, each for £300, Nos. 2563 and 4184, held by us on the life of our son William Leslie Chalmers with the Northern Assurance Company, the surplus, if any, being paid over to the said William Leslie Chalmers for the education and support of his children, and on the emergence of the claims under said policies by the death of the said William Leslie Chalmers, the contents thereof, bonuses accrued thereon, . . . shall be paid over to and divided equally amongst the lawful children of the said William Leslie Chalmers on their respectively attaining the age of twenty-one years—the annual proceeds till said period being applied for their education and maintenance." "(*Fifth*) Four shares thereof to and for the use of our said daughter Jane Elizabeth Chalmers in liferent till she attain the age of thirty-five years or is married, and on her attaining said age without being married for payment of the principal to her, or in the event of her previous marriage, for settlement of said principal on herself in liferent, exclusive always of the *jus mariti* and right of administration of her husband, free from his or her debts or deeds, and on her children in such proportions as she may appoint, and failing such appointment equally among them share and share alike. . . . As also that failing the survivance of any of our grandchildren till the period of payment of the provisions in their favour, the same shall fall to and be divided equally among their brothers and sisters, and failing these the same shall revert to and form part of our estate for division." The testators further conferred upon the survivor of them power to nominate and appoint executors or trustees for the purposes of fulfilling the mutual settlement, and reserved and granted to themselves jointly, and to the survivor of them, full power at any time to alter or revoke

the said mutual settlement in whole or in part.

William Chalmers died on 27th October 1872.

By codicil to the mutual settlement, executed on 11th June 1874, Mrs Jane Cruickshank or Chalmers, the survivor of the spouses, in virtue of the power conferred on her by the settlement, made, *inter alia*, the following alteration on the settlement:—"(Second) I recal the fifth direction under clause third of said settlement, and in lieu and in place of the provision or share of the estate thereby declared to be paid to my daughter Jane Elizabeth Chalmers, I direct, appoint, and declare that only two and a-half shares shall be paid to her . . . and in so far, but only in so far as necessary to give effect to these alterations and directions, I recal the said mutual settlement, and homologate and approve of the same otherwise." In this codicil Mrs Chalmers appointed trustees for carrying out the mutual settlement and codicil.

Mrs Jane Cruickshank or Chalmers died on 4th August 1879.

Miss Jane Elizabeth Chalmers, the testators' daughter, who was born in 1841, married Dr John Charles Hirschfeld on 9th September 1874. In 1880 Dr Hirschfeld was accidentally drowned along with a pupil son, the only child of the marriage.

William Leslie Chalmers, the testators' son, repudiated the mutual settlement and codicil, and claimed his share of the legitim fund, which was paid to him by the trustees, and in respect of which payment he granted to them a formal discharge, dated 18th July 1881, of all claims competent to him against the trust estate or under the mutual deed and codicil. After settlement of the said claim of legitim the trustees divided the trust-estate into twelve equal shares as directed by the mutual deed, and they set aside one share as directed in head first of clause third of the mutual deed. On the death of the annuitant on 13th July 1895 the capital sum retained by the trustees to provide therefor was divided in the same way. The income of the said share set aside was, so far as necessary, applied in keeping up the two policies of assurance over the life of William Leslie Chalmers, and the surplus income was annually accumulated in the hands of the trustees.

On the division of the trust estate the trustees, in terms of head fifth of clause third of the settlement and the second clause of the codicil, set aside two and a-half shares of the estate for the use and behoof of Mrs Jane Elizabeth Chalmers or Hirschfeld, and paid her the income of these shares.

In 1901 the trust lapsed by the death of the last surviving trustee, and on 25th January 1902 Alexander Duffus was appointed judicial factor on the trust estate.

In these circumstances questions arose relative, *inter alia*, to (1) the right to the accumulations of the surplus income of the share set apart for the upkeep of the policies of assurance, and (2) the right to the fee of the two and a-half shares set aside for behoof of Mrs Hirschfeld. For the settlement of these questions a special case was presented to the Court.

The first party to the case was the judicial factor, the second parties were William Leslie Chalmers and his children, the third party was Mrs Hirschfeld, and the fourth, fifth, sixth, and seventh parties were the persons other than the second and third parties having interests in the trust estate.

The whole parties were agreed that Mrs Hirschfeld, who was sixty-two years of age, should for the purposes of the case be held to be past the age of child-bearing.

The questions of law were, *inter alia*—"(1) Was the bequest of the surplus income of the share appointed to be set apart for the upkeep of the policies of insurance absolutely forfeited by the said William Leslie Chalmers claiming and accepting legitim? (5) Has the fee of the said two and one-half shares provided to the third party by the said mutual deed and codicil vested in her, and is she entitled to demand and receive payment of the same from the first party?"

The arguments of parties and the opinions of the Judges are given only in so far as they relate to the two questions dealt with in this report.

Argued for the second parties—*On Question* 1.—The bequest of the surplus income was a separate and independent bequest intended solely for the benefit of the children of William Leslie Chalmers, and the bequest was not affected by the fact that he had claimed and obtained payment of legitim. His children were therefore entitled to payment of the surplus income either direct or through their father. The children were the only persons interested, the income being for their maintenance, and the father only being entitled to receive it as trustee for them. Their rights could not therefore be prejudiced by their father's repudiation of the settlement. *On Question* 5.—They concurred in the argument of the fourth, fifth, sixth, and seventh parties.

Argued for the third party.—*On Question* 1.—They concurred in the argument of the fourth, fifth, sixth, and seventh parties. *On Question* 5.—In terms of the second clause of the codicil the bequest in Mrs Hirschfeld's favour of the two and a-half shares was absolute and unconditional, and vested in her as at the date of the death of the testatrix Mrs Chalmers. No doubt the provision in the mutual settlement gave Mrs Hirschfeld only a liferent, but the codicil recalled that provision *in toto* and conferred on her a fee.

Argued for the fourth, fifth, sixth, and seventh parties.—*On Question* 1.—The bequest of the surplus income was a bequest personal to William Leslie Chalmers, and all right thereto was absolutely forfeited by his claiming and obtaining payment of legitim. It was a bequest not to his children but to himself, although it was coupled with the expression of a wish that he should use it in a particular way—*Jack*

v. *Marshall*, January 21, 1879, 6 R. 543, 16 S.L.R. 326; Jarman on Wills, i. 371; *Browne* v. *Paull* (1850), 1 Simons, N.S., 92. The accumulations of the income therefore fell to be added to the general estate. *On Question* 5.—The provisions of the mutual deed restricting the right of the third party to a liferent governed the bequest in her favour. The codicil only changed the amount of the bequest from four to two and a-half shares. No right of fee therefore vested in her.

At advising—

LORD TRAYNER — The first question relates to a provision in the settlement of the late William Chalmers, by which he directed his trustees to apply the annual proceeds of one share of his residue in payment of the premiums on two policies of insurance, the surplus, if any, to be paid over to his son William Leslie Chalmers "for the education and support of his children." William Leslie Chalmers claimed and got his legitim, and therefore forfeited his right to take any benefit under his father's settlement. The question is, whether the above provision was one in favour of William Leslie Chalmers or was a trust in him for the benefit of his children; in the one case it would be forfeited, in the other it would not, as the children's right would not be forfeited by their father's action. I think the provision was one in favour of William Leslie Chalmers. The question before us is, I think, ruled by the case of *Jack*. No doubt in that case there were specialities which do not appear here, but these do not make the case less a precedent. It was pointed out in that case that the children took a benefit only through their father; that he was the direct legatee, and that his right had been forfeited by his repudiation of the truster's settlement. That I think is the case here. The trustees were directed to pay the surplus income to William Leslie Chalmers, and although this was said to be "for the education and support of his children," this did not give the trustees any power to direct or control William Leslie Chalmers in the application of the money; it was given to William Leslie Chalmers (as the Lord President said in *Jack's* case) "to enable him to discharge his parental obligation." I am therefore for answering the first question in the affirmative.

The fifth and sixth questions relate to the interest of Mrs Hirschfield. With regard to them my opinion is that the recal (by the codicil) of the "fifth direction under clause third of the settlement" operated only as a change of the amount which Mrs Hirschfield was to take, and did not confer on her any benefit or higher right in the reduced amount other than had been given her originally. Her right therefore is one of liferent only. This negatives the fifth question.

LORD MONCREIFF—On the first question your Lordships are both of opinion that the bequest of surplus income of the share appointed to be set apart for the upkeep of the policies of insurance was absolutely forfeited by William Leslie Chalmers claiming and accepting legitim. I am unable to concur on that broad ground of judgment; but as your Lordships' opinion is conclusive I shall content myself with stating shortly the view which I take. A direction to pay the income of a share to A "for the education and support of his children" may, according to the context and circumstances either import a trust in A to apply the income so paid to the education and support of his children, or an absolute bequest to A accompanied by an indication of the purposes to which the testator desires the income to be applied. In the absence of indications in the deed that the testator intended the provision to be wholly or partly for the benefit of A, I should hold that a bequest in those terms imported a trust for A's children; and as in the present case there are no indications that William Leslie Chalmers was the true legatee, but on the contrary there are indications that the children were the persons favoured, I am prepared to hold that the bequest was not absolutely forfeited by William Leslie Chalmers claiming legitim.

I do not regard the case of *Jack* v. *Marshall*, 6 R. 543, as an authority against this view, for the simple reason that in the deed in that case a direct benefit was bestowed on the father. The income was to be paid to him Rob Jack, "for the maintainance of himself and the maintainance and education of his children," and therefore the interests of the children were not distinct and separable from those of the father. Besides, this provision was referred to in the deed as a "liferent provision" in favour of Rob Jack. I think it will be seen from the opinions of Lord Deas and Lord Shand that it is at least doubtful whether they would have concurred in the judgment but for the indication I have mentioned. But such a trust in a parent is of a peculiar character. So long as the father discharges his duty of educating and maintaining his children I do not think that the testamentary trustees would be entitled to interfere with his discretion or even perhaps to call him to account for any surplus that might remain over. The father might if he chose maintain and educate his children out of his own funds, in which case I fancy he could recoup himself out of the income directed to be paid to him. In the present case William Leslie Chalmers seems to have acted on the assumption that by claiming legitim he forfeited right to be paid the surplus income. He has accordingly since 1881 educated and maintained his children out of his own funds, and the surplus income we are told has been annually accumulated. The state of matters therefore is that the children have got all they were entitled to up to this point; but William Leslie Chalmers having advanced the money for the education and support of the children is, I apprehend, entitled to the accumulated income to recoup him for his outlays, not on the footing that he had an absolute personal right but as trustee for his children.

A point upon which, if we had reached it, I should have wished more information and

argument is whether if the provision was to any extent forfeited, the forfeiture was not limited to securing equitable compensation, and whether after that had been done the second parties would not be entitled in the future to the surplus income for their support.

On the other question I agree with Lord Trayner.

LORD JUSTICE-CLERK — I concur with Lord Trayner. My only difficulty has been with regard to the fifth question. That depends on the word "paid," as used in the codicil, but looking to the way in which the same word is used in the principal deed, and in that part of the codicil which refers to the principal deed, I am unable to say that my doubt is strong enough to induce me to express a different opinion from that which Lord Trayner has given.

The LORD JUSTICE-CLERK added—"Lord Young (who was present at the hearing but absent at the advising) desires me to state that he concurs in the opinion of the majority of the Court."

The Court answered the first question of law in the affirmative and the fifth in the negative.

Counsel for the First and Third Parties—Salvesen, K.C. — Cullen. Agents — Alex. Morison & Co., W.S.

Counsel for the Second Parties — M'Clure. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Fourth, Fifth, Sixth, and Seventh Parties—Guthrie, K.C.—W. Thomson. Agent—George Byres Ross, S.S.C.

Wednesday, July 15.

FIRST DIVISION.

OBAN AND AULTMORE GLENLIVET DISTILLERIES, PETITIONERS.

Company — Ultra vires — Reduction of Capital—Alteration of Memorandum of Association—Cancellation of Arrears of Preference Dividend.

The memorandum of association of a company provided that the preference shares should be entitled to a fixed cumulative preferential dividend of 5 per cent. The articles of association provided that all or any of the rights and privileges attached to any class of shares might be modified at a general meeting of shareholders of that class. At a time when the dividend on the preference shares was two years in arrear a scheme for the reduction of the capital of the company, involving the cancellation of these two years' arrears, was duly approved at a meeting of the preference shareholders. In a petition for confirmation of the scheme for reduction of capital, the reporter, to whom the petition was remitted, suggested doubts as to the competency of the cancellation of the arrears of dividend on the preferred shares, in respect that it involved an alteration of the memorandum of association. The Court *granted* the prayer of the petition.

This was a petition by the Oban and Aultmore Glenlivet Distilleries, Limited, for confirmation of a scheme for the reduction of capital.

The company was incorporated in 1898. Article 5 of its memorandum of association provided, *inter alia*, as follows:—"The capital of the company is One hundred and sixty thousand pounds sterling, divided into eight thousand preferential shares of ten pounds each, which shall be entitled to receive out of profits a fixed cumulative preferential dividend of five per centum per annum (in the manner after stated), and eight thousand ordinary shares of ten pounds each. . . . The preference shares shall rank on the nett profits of the company (including any balance at the credit of profit and loss account brought forward from previous years, and any sum at the credit of reserve applicable for equalisation of dividend) for a dividend of five per centum per annum in preference to any dividend on the ordinary shares, and in the event of the nett profits in any year not being sufficient to pay such dividend in full for that period, the shortcoming shall be made good out of the nett profits of the subsequent year or years, such arrears of dividend being also paid in preference to any dividend on the ordinary shares." . . .

By article 46 of the articles of association it was provided—"All or any of the rights and privileges attached to any class of shares may be modified by an extraordinary resolution passed at a general meeting of the holders of shares of that class, and all the provisions hereinafter contained as to general meetings shall *mutatis mutandis* apply to every such meeting, but so that members holding or representing by proxy two-thirds of the nominal amount of the issued shares of the class shall be present at such meeting."

Article 101 provided in general terms for the payment of dividends.

Dividends on the preference shares were paid up to 30th April 1900, but the company's business proving unprofitable thereafter no further dividends were paid.

The directors of the company submitted a scheme for the reduction of the capital of the company, by which it was proposed, *inter alia*, to reduce the nominal value of the preference shares from £10 to £7, and to provide that after 5 per cent. had been paid on the ordinary and preference shares the remaining profits should be appropriated to the payment of a dividend *pari passu* on both classes of shares.

At an extraordinary general meeting of the company resolutions giving effect to these proposals were passed.

Prior to this meeting a meeting of the preference shareholders was held at which the quorum required by article 46 of the articles