hold that you must begin with a half-yearly payment on the 1st of March. The result would unquestionably be that if such a payment were enforced the North British Railway Company would be giving a half-yearly sum of upwards of £5000 for a period of possession when the Caledonian Company had this line entirely in its own hands and obtained the entire profit from it, and necessarily at a time when the North British Company were getting no advantage from it whatever. I might have been induced to adopt that construction if there were anything in the statute otherwise which indicated that there was a bonus or advantage of that kind to be given by the one company to the other; but as it appears to me that the preamble negatives that view, and section 6 indicates substantially the purposes for which the money is to be impressed by the North British Company into the hands of the Caledonian Company, I think that is not the sound view of the statute. I am accordingly of opinion that the language of the statute is open to construction, and that the reasonable and sound construction of its language is that to which the Lord Ordinary has given effect.

The Court adhered.

Counsel for Reclaimers (Pursuers)—Kinnear—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondents (Defenders)—Solicitor-General (Balfour, Q.C.)—Asher—J. P. B. Robertson. Agent—Adam Johnstone, Solicitor.

Tuesday, July 20.

SECOND DIVISION.

SPECIAL CASE—SMYTH'S TRUSTEES *v.* KINLOCH AND OTHERS.

Trust—39 *and* 40 *Geo. III. c.* 98 (*Thellusson Act*) —11 *and* 12 *Vict. c.* 36, *sec.* 41—*Accumulations beyond Twenty-one Years—Truster's Debts—Effect of Authority to Trustees to Incur Debt and Accumulate Funds to Pay it off—Person to whom Illegal Accumulations belong.*

A direction to testamentary trustees to accumulate savings from the rents and profits of a trust-estate, and therewith to buy land or to discharge debt incurred by them to pay for land bought under the directions of the testator, is a direction to accumulate within the prohibition of the Thellusson Act, in so far as beyond the term of twenty-one years from the death of the testator.

A truster who had made up his title to certain lands as heir of provision under a deed granted by his brother in favour of a certain series of heirs, directed his trustees on the occurrence of a certain event to make an entail of these lands in favour of certain substitutes named, whom all failing in favour of his "own nearest heirs and assignees whomsoever." In his trust-deed he directed an accumulation of the rents of these lands which was struck at by the Thellusson Act. *Held*, in a question arising before the period contemplated for making the entails, that the rents illegally directed to be accumulated fell to the heir under the old investiture, that investiture remaining unaltered *quoad* the illegal direction to accumulate.

John Smyth, Esq. of Balhary, died in the year 1819 without issue. He left a disposition whereby he conveyed his whole estate to the heirs of his own body, whom failing to his brother Robert Smyth and the heirs of his body, whom failing to his sisters and the heirs of their bodies successively. Robert expede a general service as heir of provision in general to him, and also a general service as his heir in general.

Robert Smyth died without issue on 6th October 1855. At that date his only surviving relatives were Sir George Kinloch of Kinloch, son of his sister Helen, who had married Mr Kinloch of Kinloch; Mrs Lingard Guthrie, daughter of a sister of Sir George Kinloch; Mrs Whitson, a sister of his own; Miss Cecilia Kinloch, a sister of Sir George Kinloch; and Miss Anne Oliphant Kinloch, another sister of Sir George. Of these there were alive at the date of this Special Case only the two first named and their children. Mrs Whitson died without issue in 1866, and her estate, which was destined to various charities, was managed by Mr C. W. W. Thomson, C.A., as judicial factor.

Robert Smyth left (1) a deed of settlement of his heritable estate, (2) a settlement of his moveables, and (3) a trust-disposition and settlement dated 16th October 1854, registered in the books of Council and Session 16th October 1855. By this last mentioned deed, under which alone the questions proposed to the Court in this Special Case arose, the truster, on the narrative of his succession to his brother John Smyth of Balhary, and of the title which he had made up to him, conveyed to trustees, whom the first parties to the Special Case represented, the estate of Balhary and others to which he succeeded as heir of his brother John Smyth. The settlement contained a detailed description of the Balhary estate, lying in the counties of Perth and Forfar, and also a special assignation of three heritable bonds for the cumulo sum of £13,250, and a general conveyance "of all and sundry other lands and heritages to which I have succeeded as heir of my said deceased brother." The deed by its second and third purposes provided for payment of certain annuities to the children of the truster's nephew Sir George Kinloch till they should be of full age, when the trustees were directed to pay to each of them the sum of £2000, being the sums of principal that the truster had become bound to pay them on their coming of age. The truster directed that his trustees should "apply £8000 of the sums contained in and due by the bonds and dispositions in security before conveyed for that purpose in the first instance, or if the sums due by the said bonds and dispositions in security shall have been paid up or otherwise disposed of before that time, in terms of the powers hereinafter contained, then my said trustees are hereby directed to sell lands in Glenisla belonging to me, or as much thereof as may be sufficient to produce the said sum of £8000, or what part of it may be required, for the purpose of paying the said provisions of capital sums to the children of said George Kinloch, or such part as may be required for that purpose; but if the sum required to pay off all the children of the said George Kinloch shall exceed £8000, then the remainder of the sums required

to pay said children shall not be paid out of the capital or stock of the trust-estate, but shall be made up by my trustees by a saving from the rents or income of the trust of not less than £200 yearly for each child who has to be paid off more than the £8000 will pay: Declaring that as each child comes of age he or she shall, in his or her order, be entitled to receive payment of his or her provision or capital sum out of the said sum of £8000, as far as the said sum will go: Declaring farther, that my said trustees shall, according to circumstances and in their discretion, decide when it may be necessary to set apart any savings for the above purpose." The fifth purpose of the deed directed the trustees "to lay out such part of the rents of my estates as may be required for executing such improvements as they may consider necessary on the estate, such as repairing or rebuilding farm-steadings when necessary or proper in whole or in part, in draining lands," &c., "at their discretion, in so far as the free rents can easily admit of." Thereafter, by the eighth purpose, after a recommendation to have a state of the trust-funds made up from time to time by a professional accountant, he directed "that if it shall appear from the accountant's report that there is any free annual residue out of the revenue of the trust funds arising from the funds or annual proceeds thereof, then in that event my said trustees shall have full power to pay over such part thereof as they may in their discretion consider proper, and as they have funds for, subject to the declaration after mentioned, to the said George Kinloch, Esq. of Kinloch, my nephew, annually during his life, to be applied by him for behoof of himself and family as he sees fit, but with this restriction, that my trustees may direct a part of the said annual residue to be paid to the child of the said George Kinloch who may be heir-apparent to the estate of Balhary at the time, under the terms of this trust-deed, for the proper aliment, education, and maintenance of said heir: Declaring always that during the lifetime of the said George Kinloch the sum to be paid to him annually out of the said free annual residue, including the allowance or payment to the child who may be heir-apparent to the said estates under these presents as aforesaid, shall not in any year exceed the sum of £1000 sterling; and which annual sum to said George Kinloch and said allowance to the heir-apparent shall be paid at such terms or periods as my said trustees may find convenient." The ninth, tenth, and eleventh purposes of the deed were in these terms—"*Ninth*, As there will be a surplus of the heritable debts conveyed by this trust-deed after paying such provisions to the children of the said George Kinloch as are hereby appointed to be paid out of them, I do hereby direct my said trustees, when opportunity offers, to apply such surplus in the purchase of other lands as near to the lands of Balhary as can conveniently be got; and as it would be desirable to sell off the most detached parts of my property, and to employ the price or prices in the purchase of other lands more conveniently situated for the estate of Balhary, I do hereby recommend to and give full power and authority to my said trustees to sell all or such parts of my lands and heritages lying in the parish of Glenisla and shire of Forfar as they may consider proper and necessary, and to apply the price or prices to be got for the same in the purchase of other lands nearer to or more convenient for the estate of Balhary and mansion-house thereof, either jointly with the balance of the money due to me on heritable securities hereby conveyed, or separately, with power to them also with the proceeds of said sales or part thereof, if they shall deem it advisable, to pay off debts that may be due by them as my trustees, it being my intention and wish that if a property comes into the market which my said trustees shall consider a desirable acquisition for the estate of Balhary and mansion-house thereof, that they shall purchase the same, which they are hereby authorised to do; and to facilitate that object I authorise my said trustees to borrow the whole or any part of the money necessary for that purpose on the security of my trust-estate, or such part thereof as they may consider proper to burden with such loan till they can conveniently collect any money that may be due to them under this trust, or accumulate savings, or sell land in Glenisla sufficient to pay off the price of any land that may be so purchased: But my trustees shall not denude of the trust till all sums so borrowed shall be fully paid off and the said lands and estates fully and effectually disburdened thereof, as well as of any sum or sums which may be borrowed by myself for any such purpose and remaining a charge upon the lands and others hereby conveyed at my death, if there shall be any. *Tenth*, In the event of the death of the said George Kinloch, my nephew, while his children are under age, or any of them, I appoint my said trustees to lay out such portion of the free rents of the trust-estate as they may consider proper on the education and maintenance of his child who may be heir-apparent to me under the terms of this trust-deed, and to accumulate the remainder till such child is of age, and after the heir is of age, if the trust shall be in that state that the trustees shall not consider it proper or expedient to denude of the trust, then and in that event my said trustees are authorised to continue the trust, and they may give the whole free income, or such part thereof as they may see proper, to the child entitled to succeed, until the time when they find that they can properly and expediently denude of the trust. *Eleventh*, After the death of the said George Kinloch, Esq. of Kinloch, and when the other purposes of the trust are all accomplished, and the annuities payable out of my estate are expired by the death of the respective annuitants, or at least reduced so as that the sum payable out of the estate to such annuitants as may be surviving shall not exceed £400 sterling in the total yearly amount, I authorise, appoint, and direct my said trustees or trustee to denude of the lands and estates hereby conveyed in trust (excepting always such parts as may be sold under the powers hereby conferred), and of such other lands as they may purchase and acquire under the powers herein contained, and that by executing a disposition and deed of entail thereof disponing and conveying the same to and in favour of George Washington Andrew Kinloch, second son of the said George Kinloch, Esq. of Kinloch, and the heirs whatsoever of his body (the eldest heir-female when more than one daughter always succeeding without division), whom failing to any other younger son or younger sons of the said George Kinloch that may yet be born, in the order of the priority

of their birth, and the heirs whatsoever of their bodies respectively." The deed then directed the entail, in case of the failure of the sons of Sir George, to be made in favour of his daughters in their order; and that the entail to be granted should contain all clauses necessary to a strict entail by the law of Scotland; and that it be so made as that the estates of Kinloch and Balhary be kept separate so long as there should be two descendants of the truster's sister Helen Kinloch in existence at the time.

Sir George Kinloch had eight children. There was thus a sum of £16,000 to be provided to them under the second purpose of the deed. The trustees made the annual outlay on improvements and repairs entirely out of revenue. The rental of the estate was thereby greatly increased. The trustees paid to Sir George Kinloch and his family an annual allowance, beginning with £530 the first year, and gradually increasing till in 1863 it rose to £1000, the maximum sum contemplated by the deed, which sum he thereafter regularly received. The trustees also put aside out of revenue from time to time £12,000 for provisions to Sir George's children under the second purpose, and the six elder children were paid their provisions therewith. During the first twenty-one years of the trust the trustees at various times purchased land which they thought desirable additions to Balhary, to the amount of £35,460. This land was paid for mainly from two sources—the sale of the heritable lands belonging to the trust-estate, and a loan of £21,500 (afterwards reduced to £15,500 by the sale of lands in Glenisla) over the lands of Balhary and part of the lands which they acquired. In October 1876, on the expiry of twenty-one years from the date of commencement of the trust, the estimated free rental of the trust-estate was £3000. The debt on the trust-estate was the sum of £15,500, borrowed as above mentioned over Balhary to pay the price of one of the properties acquired by the trustees, and the further sum of £4000, being the amount of provisions to Sir George's two younger children which were still unpaid—in all £19,500. Deducting from this a sum of £3648, 6s. which the trustees had in hand, the total debt due by the estate was £15,581, 14s. A question arose whether the free annual revenue accruing after 6th October 1876, being twenty-one years after the truster's death, did not fall under the operation of the Thellusson Act (39 and 40 Geo. III. c. 98), which enacts that "no person or persons shall after the passing of this Act" (28th July 1800), "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 any 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 assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed: (2) Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for the 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 Act was extended to Scotland by 11 and 12 Vict. c. 36, sec. 41 (Rutherfurd Act).

Assuming that the Thellusson Act applied to the trust, the question arose—Who was entitled to the accumulations of income? The accumulations were claimed by Sir George Kinloch as heir in heritage at Robert Smyth's death, under the destination of John Smyth quoted *supra*, or alternatively as heir-at-law of Robert Smyth as at 6th October 1876, when the twenty-one years expired. They were also claimed to the extent of one-half by Mrs Whitson's factor, she having been along with Sir George Kinloch one of the heirs-portioners of Robert Smyth at the date of his death on 6th October 1855. They were also claimed by George Washington Andrew Kinloch, the second son of Sir G. Kinloch, and as such heir-presumptive to Balhary, who claimed them on the ground that he was the person in whose favour the entail was to be made, the accumulations being directed for the sole purpose of purchasing additional lands to be entailed on him and his heirs. G. W. A. S. Kinloch, who had come of age on 30th November 1874, also demanded that the entail should be now made in his favour, he having attained majority and the accumulations being stopped, the trustees retaining in their hands a sufficient portion of the estate to pay off the two provisions to his brothers which were still unpaid, and to pay his father's and the other annuities. The trustees considered that they had no power to make the entail until the debt should be cleared off; the annuities should cease to be paid to Sir George Kinloch and the other annuitants; and the provisions to Sir George's two other children not yet paid should be paid. In these circumstances this Special Case was presented. The first parties were Robert Smyth's trustees, the second party was Sir George Kinloch, the third party was George Washington Andrew Kinloch, and the fourth party C. W. W. Thomson, C.A., judicial factor on Mrs Whitson's estate.

The questions proposed to the Court were —"(1) Whether the Thellusson Act applies to the trust, and if so, from what date? (2) Assuming that the Thellusson Act is applicable, to whom does the surplus income from the date

at which the Act applies belong? (3) Are the trustees legally entitled now to execute the entail; and if not, at what period can they do so? (4) Are the trustees entitled to pay the two remaining provisions to Sir George Kinloch's children out of income accruing since 6th October 1876; and if not, are they entitled to borrow on the security of, or must they sell any part of, the trust-estates for that purpose? (5) Are the trustees entitled to borrow on the security of, or to sell, the lands of Wester Leitfie, or the lands in Glenisla, so as to replace the income accruing since the expiry of the twenty-one years, which was applied in the purchase of Wester Leitfie? (6) Are the trustees bound to sell land in Glenisla to pay off the debts of the trust, so as to entail the residue free of debt, or can they execute the entail subject to the debts?

Argued for Sir George Kinloch (second party)—There were two main questions in the case—(1) Did the Thellusson Act apply? and (2) If so, who was entitled to the accumulations? (1) The debt of £15,500 was trustees' debt, not the truster's. It was settled in *Lord* v. *Colvin*, December 7, 1860, 23 D. 111, that though the accumulation be not expressly directed, the Thellusson Act applies when accumulation would be the practical result of conveying out the settlement. To incur debt within the twenty-one years and pay it out of revenue after the twenty-one years is just to accumulate *per ambages*. It has the effect of keeping the annual produce from the person who but for the illegal direction would be entitled to it, and that is what the Act strikes at. The doctrine of *Lord* v. *Colvin* was again applied in *Mackenzie* v. *Mackenzie's Trustees*, June 29, 1877, 4 R. 962; and *Maxwell's Trustees* v. *Maxwell*, November 24, 1877, 5 R. 248; Lewin on Trusts, p. 85; *Bourne* v. *Buckton*, 2 Simon's Reps. (N.S.) 91. (2) As regarded this question, the case of *Maxwell's Trustees* was conclusive between Sir George and his eldest second son. The principle there is that he who has no present gift cannot take the accumulations. Now, the second son as heir-apparent to Balhary had no present gift. Not only had he no present interest, but the vesting of his right to the estate was dependent on his being the second son at Sir George's death; therefore the entail could not yet be made. The accumulations, on the doctrine of *Lord* v. *Colvin*, fall into intestacy, and the question is, who is heir *ab intestato?* The Act just blots out the direction to accumulate. The property therefore not effectually disposed of goes to Sir George as heir under the still standing investiture of John Smyth, because everything of which Robert Smyth had not altered the destination must be ruled by John Smyth's deed.—*Keith's Trustees* v. *Keith*, July 17, 1857, 19 D. 1040; *Talbot* v. *Jevers*, June 1, 1875, L.R., 20 Eq. 255; *Weatherall* v. *Thornburgh*, March 11, 1878, L.R., 8 Ch. Div. 261. As between Sir George and Mrs Whitson's factor, so far, but so far only, as the testator had altered the destination for an illegal purpose his deed was null. The rents belonged to the heir of John Smyth's investiture, which was unchanged.—*Keith's Trustees* v. *Keith, supra.*

Mrs Whitson's factor (fourth party) adopted the argument of Sir George Kinloch (second party) as to the applicability of the Thellusson Act. On the assumption that the Act applied, he claimed half the accumulations as representing Mrs Whitson, heir-portioner, along with Sir George, of Robert Smyth at the date of his death. Argued for him.—Robert Smyth's deed evacuated the standing destination of John Smyth, and the existing investiture was in his deed. His conveyance to trustees, with a direction, failing the persons named in his deed, to entail the estate on "his own nearest heirs and assignees whomsoever," showed plainly that he intended to cut off the old destination. Besides, the mere conveyance to trustees of subjects held under a destination is sufficient to cut off that destination. Thus, a conveyance of such subjects to trustees for a purpose to be afterwards named creates a resulting trust for the heir-at-law if no subsequent deed of directions is executed. In like manner, if Robert Smith had simply conveyed to himself and his heirs and assignees, that would have altered the destination, as in the case of *Molle* v. *Riddell*, December 13, 1811, F.C.; Stair, ii. 3, 43; Duff's Feudal Conveyancing, 331; *M'Leish's Trustees* v. *M'Leish*, May 25, 1841, 3 D. 914; *Boyle* v. *E. of Glasgow*, May 14, 1858, 20 D. 925; cases collected in Maclaren on Wills, ii. 90, as to resulting trust for heir-at-law.

Argued for third party (G. W. A. S. Kinloch)—The truster had authorised his trustees to borrow money over the estate for the purchase of land. The debt thus incurred was indirectly the truster's debt, and fell under the exception in the Thellusson Act in favour of accumulation for the payment of the debts of the settler or any other person.—*Barrington* v. *Liddell*, November 24, 1852, 2 De Gex, Macnaughton, & Gordon, 480 (opinion of Lord St Leonards, 496); *Varlo* v. *Faden*, July 27, 1859, 27 Beavan 255, affirmed December 17, 1859, 29 L.J., Ch. 230. The case of *Bourne* quoted for Sir George Kinloch had been overruled, the debt having been incurred within the twenty-one years in a due administration of the trust; the case of *Varlo* showed that money might be accumulated to meet it. Assuming the application of the Act, the accumulations must go to the third party, the institute in the entail which Mr Smyth had directed. He is the person entitled to the fee, and the result of the Act being simply to blot out the illegal direction to accumulate, the rents must go to him. —Lord Westbury in *Plean* v. *Gascoigne*, quoted in *Maxwell, supra.* The principle of *Mackenzie's* case was, that where there is a direction to entail, and also a direction to accumulate for more than twenty-one years, the rents illegally directed to be accumulated go to the institute in the entail. There was a vested interest in the third party, and he was institute of entail in the sense of the Rutherfurd Act. The entail might therefore now be made.

At advising—

Lord Ormidale—In considering the questions involved in this case it is important to keep in view that the late Robert Smyth, the granter of the trust-disposition and settlement in question, left the estates conveyed by that deed free and unencumbered with debt; that he died on 6th October 1855, when the trust came into operation; and that consequently twenty-one years from its commencement elapsed on 6th October 1876.

Before dealing specifically with the six questions submitted in the Special Case for the opinion

and judgment of the Court, it will be found convenient, I think, to ascertain first whether the Thellusson Act is applicable at all, or, in other words, whether by the trust-disposition and settlement of Robert Smyth an accumulation of the rents and profits of his estates is expressly or impliedly directed contrary to the prohibition of that Act? And secondly, if the Act does apply, and there has been an illegal accumulation, who is entitled to it?

In regard to the first of these questions, it was settled, in the case of *Lord* v. *Colvin and Others*, Dec. 7, 1860, 23 D. 111, that in order to bring a case within the Thellusson Act it is not necessary that there should be an express direction to accumulate rents and profits for more than twenty-one years, it being enough that there is an implied direction to that effect, or that by the operation of the deed of settlement such is the result. It is true that in the present case no express direction to accumulate for more than twenty-one years the rents and profits of Mr Robert Smyth's estate is to be found in his trust-disposition and settlement; but whether such is not the operation and effect of that deed is the real question upon the solution of which depends the application or non-application of the Thellusson Act.

It is stated in the Special Case that at the death of Mr Robert Smyth in 1855 the gross revenue or income of his estate was £4501, 7s. 3d.; and it is also stated in the Special Case that during the first twenty-one years of the trust there was, after paying all outlays, a surplus income of £31,217, 15s. 6d. In this state of matters it would appear that any further accumulation must be struck at by the Thellusson Act. But then it is stated in the Special Case that at the end of twenty-one years the actual position of the trust-estate showed a debit balance against it of £15,851, 14s.; and that there were also, besides that debt, other unsatisfied burdens, consisting of provisions to children to the extent of £4000, and annuities exceeding £800 in amount.

Now, I am quite clear, and it did not appear to me to be disputed at the debate, that no accumulation of the trust-estate is permissible except for legitimate purposes—that is, purposes which can be shown to be not only authorised by the truster but also allowable under the Thellusson Act. I shall advert, therefore, to the burdens on the trust-estates said to have been unsatisfied on the lapse of the twenty-one years from the truster's death, in the order, 1st, of provisions to children, 2d, annuities remaining unpaid, and 3d, the alleged debt.

In regard to children's provisions, by which is meant the provisions of £2000 to each of the eight children of Sir George Kinloch, or in all £16,000, it has to be borne in mind that by the third purpose of the trust-deed they are directed to be paid out of certain specified funds—1st, out of the bonds and dispositions in security conveyed to the trustees; or 2d, if these bonds should be otherwise disposed of, out of the proceeds of the sale of lands in Glenisla; 3d, if necessary, and in certain events, out of savings from the rents and income of the trust-estates, it being declared that the trustees shall, "according to circumstances, and in their discretion, decide when it may be necessary to set apart any savings for the above purpose;" and 4th, it is declared "that in all the years when such sums shall be so set apart, the said sums shall in all cases be deducted before the trustees pay any part of the annual provision hereby granted to the said George Kinloch, Esq.," now Sir George Kinloch. Having regard to these directions of the truster, and keeping in view that no less a sum than £18,030 was paid to Sir George Kinloch during the twenty-one years immediately following the death of the truster, it is obvious that there must have been surplus income or revenue arising from the trust-estate more than sufficient for setting apart the fund requisite for paying the children's provisions. And it has also to be kept in view, that by the eighth purpose of the trust-deed it is provided that only on it appearing from the accountant's report, directed to be annually made on the trust-funds and estate, that there is a free annual revenue arising from rents or annual produce, the trustees "shall have power to pay over such part thereof as they may in their discretion consider proper, and as they may have funds for, subject to the declaration after mentioned,"—that is, the declaration that the payment should never exceed £1000 "to the said George Kinloch, Esq. of Kinloch, my nephew, annually during his life, to be applied by him for behoof of himself and his family as he sees fit." If, then, it is to be held that no payment ought or could legitimately have been made to Sir George Kinloch till after a fund sufficient to satisfy the provisions to his children had been first saved and set apart out of the annual revenue of the trust-estates, and if this had been duly attended to, it is indisputable that no part of the children's provisions would have remained unpaid or unprovided for on the lapse of the twenty-one years, and if so, any accumulation thereafter would be struck at by the statute.

In regard, again, to the alleged annuities remaining unpaid at the date when the Special Case was prepared, it appears from the Special Case that these amounted to only £362, but what their amount was at the end of the twenty-one years is nowhere stated. I think it may be fairly assumed that they did not amount to the otherwise free revenue or income of the trust-estate. It is only, however, in so far as there has been free income or revenue of the trust-estate during the twenty-one years after paying or satisfying the annuities that the accumulation prohibited by the statute can be held to have taken place.

The question as to the debt on the trust-estate at the end of the twenty-one years is more important, and in my opinion attended with more difficulty than that relating to the children's provisions and the annuities. As the alleged debt has arisen in consequence of purchases of lands by the trustees, it is necessary to see how far these purchases were within their powers. On this point the statement of the Special Case is important. According to that statement it is only the surplus of the heritable lands composing part of the trust-estate and the price of lands sold by them in the parish of Isla, or sums borrowed on lands in that parish, that the trustees are authorised to apply in payment of the purchase of other lands. I cannot make out from the Special Case whether these conditions of the trustees' right to purchase lands and borrow money have been complied with or not. But further, and at anyrate, it appears to me that the statement in the Special Case is not suffi-

ciently clear, and that it is necessary to examine the trust-deed itself, which is referred to as part of the Special Case, in order to see how the matter exactly stands. Now, on examining the ninth purpose of the trust-deed it will be found that power is only given to the trustees to purchase lands with the surplus of the heritable debts conveyed by the trust-deed, and out of the price of detached lands and lands in Glenisla which are authorised to be sold; and then it is added—"It being my intention and wish that if a property comes into the market which my trustees shall consider a desirable acquisition for the estate of Balhary and mansion-house thereof, that they shall purchase the same, which they are hereby authorised to do; and to facilitate that object I authorise my said trustees to borrow the whole or any part of the money necessary for that purpose on the security of my trust-estate, or such part thereof as they may consider proper to burden with such loan, till they can conveniently collect any money that may be due to them under this trust, or accumulate savings or sell land in Glenisla sufficient to pay off the price of any land that may be so purchased." Bearing in mind these passages in the trust-deed, and that nothing is said in the Special Case to the effect that the money the trustees have borrowed for the purpose of buying lands, which constitutes the debt on the trust-estate, might not have been paid off in one or some of the ways referred to, I think I am entitled to assume that the debt ought and might quite well have been paid off before the end of the twenty-one years, and therefore that there was no necessity for accumulating after that date the rents and revenue of the trust-estate in order to pay off debt. This, I think, becomes quite clear when it is observed from the statement in the Special Case that the last purchase of lands by the trustees, and the borrowing of money for that purpose to the extent of £15,500, was made by them at Martinmas 1873—that is, about three years before the expiry of the twenty-one years. It cannot therefore in this state of matters be taken from the trustees that they could not have sold lands in Glenisla in order to pay off the debt before the end of the twenty-one years. But they did not do so, and so far as appears made no attempt to do so. On the contrary, it is stated in the Special Case that they subsequently bought other lands (the lands of Wester Leitfie) and borrowed more money.

If, therefore, I am right in holding that the debt on the trust-estate might and ought to have been cleared off before the end of the twenty-one years, and that the existence of any debt subsequent to that time must be held to have been unauthorised, it is unnecessary to consider what is the true meaning of the exception by way of proviso in the second section of the statute, to the effect that "it shall not extend to any provision for payment of debts of any grantor, settler, or devisor, or other person or persons;" for assuredly that provision in no view that can be taken of it can be held to apply to debts or liabilities which he did not in any way authorise, but which were incurred *ultra vires* of his trustees. And, again, even if according to any reasonable construction of his trust-deed the granter in the present instance could be held to have empowered his trustees to purchase lands by borrowed money, to be paid off by accumulation of the rents or revenue of the trust-estate, after the lapse of twenty-one years, I should entertain very little doubt that such accumulation would be struck at by the statute. Were it otherwise, the enactments of the statute might be very easily evaded, and that accumulation might go on for an indefinite length of time. Just suppose that in the present instance the trustees had shortly before the expiry of the twenty-one years, in virtue of powers given them to that effect, purchased lands to the extent of £200,000, or some other very large sum, with borrowed money, to be repaid out of the accumulation of subsequent rents and revenue of the trust-estates—for it might be a very long period of time after the lapse of twenty-one years from its commencement—I cannot doubt that such an accumulation would be an evasion of the statute, and consequently illegal. And if so, in the extreme case suggested the illegality must be the same, although more limited in its operation, where the purchase-money or price paid and sum borrowed are small.

The question how the trust accounts and affairs can be readjusted, and the interests of parties affected by the past management put right, is one with which the Court is not at present called on to deal. I have no doubt, however, that the necessary remedies are open to the parties, and probably there will be no great difficulty in effecting a suitable arrangement.

The only other general question which at the outset I proposed to consider is, To whom, assuming the application of the Thellusson Act, does the income illegally accumulated belong?

According to the terms of that Act, the illegal accumulations are to "go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." But who are "such person or persons" in the present instance? No less than three different parties claim to be entitled to the illegal accumulation, and the question is which of them is to be preferred?

In determining this question it is of importance to keep in view that it was settled in the case of *Lord* v. *Colvin and Others*, to which reference has been already made, and has been ruled in other cases, both English and Scotch, that illegal accumulations, such as those now in question, fall to the heir *ab intestato*, and that the person holding that character must be looked for as at the date of the death of the testator, for it was then he died intestate *quoad* the illegal accumulations. And it is also of importance that in the present instance there is no room for holding that the illegal accumulations fall to George Washington Kinloch or any other party, as being immediately entitled to the trust-estates themselves, on the principle illustrated by the cases of *Mackenzie* v. *Mackenzie's Trustees*, June 29, 1877, 4 R. 967, and *Maxwell's Trustees* v. *Maxwell*, Nov. 24, 1877, 5 R. 248; for neither George Washington Kinloch nor any other person is or can be held to be in that position, seeing that the trust-estates themselves do not go to or become vested in anyone till the death of Sir George Kinloch—an event which has not yet occurred. This, I think, on the terms of the eleventh purpose of the trust-deed, too clear for dispute. The person or persons entitled to the illegal accumulations is therefore he who would have been entitled to them as

intestate succession on the death of the truster on 6th October 1855. In this view it appears to me that the illegal accumulations must be held to belong to Sir George Kinloch, who, as I understand the statements in the case, is entitled to them on the assumption that the truster died *quoad* them intestate.

The result is, that in my opinion the specific questions submitted in the Special Case fall to be answered as follow:—

1st, That the Thellusson Act applies, and has applied from the end of twenty-one years after the death of the truster—that is, from 6th October 1876.

2d, That the surplus income from the said date at which the Act applies belongs to Sir George Kinloch.

3d, That the trustees are not entitled to execute the entail till the death of Sir George Kinloch.

4th, That the trustees are entitled to pay the two remaining provisions to Sir George Kinloch's children out of the income arising since October 1876; and that to the extent mentioned in the trust-deed they are also entitled, if necessary, to borrow on the security of the trust-estates for that purpose.

5th, That this question must be answered in the affirmative.

6th, That this question must be answered in the affirmative.

Lord Gifford—This is an important and difficult case. It involves various questions as to the true interpretation and the legal effect of the provisions contained in the Statute 39 and 40 Geo. III. cap. 98, known as the Thellusson Act, as extended to heritage in Scotland by 11 and 12 Vict. cap. 36. Such questions under the Thellusson Act are frequently attended with much nicety.

The first question put is, Whether the trust-disposition and settlement by Robert Smyth of Balhary of 16th October 1854, conveying the estates of Balhary, directs or involves an accumulation of rents and profits; and whether such accumulation is struck at or rendered illegal by the Thellusson Act; and if so, from what date are such accumulations struck at or rendered illegal?

I am of opinion that the provisions of Mr Smyth's trust-deed do imply or involve an accumulation of the rents and profits which is struck at or rendered illegal by the Thellusson Act; and I am of opinion that the date after which all accumulation must cease is 6th October 1876, being the elapse of twenty-one years complete from 6th October 1855, when Robert Smyth of Balhary, the truster, died.

It is quite fixed by the cases that the Act applies although the deed contains no express direction in words to accumulate. It is enough if what is directed to be done implies accumulation. If the trustees cannot fulfil the trust in the terms appointed without accumulating rents and profits for more than twenty-one years, the statute applies, and all such accumulations after the lapse of twenty-one years must be applied, not in terms of the will, but in terms of the statute. It is of no consequence that the word accumulation is not used by the truster, or that he nowhere says that rents and profits are to be retained for more than twenty-one years and applied in any particular way. If the effect of the deed is to postpone the beneficial right to the estate for more than twenty-one years without disposing of the accruing rents after that period, this will create an implied accumulation, which is in its nature within the scope of the Thellusson Act; and although at one time a different view was adopted, the latest decisions have returned to the original opinion that implied accumulations are quite as illegal under the statute as those which are expressly directed.

In the present case the ultimate purpose of the trust is that the trustees shall execute an entail of the lands and estate of Balhary (including other lands which the trustees are empowered to purchase) in favour of George Washington Andrew Kinloch, the second son of the present Sir George Kinloch of Kinloch, and certain other heirs-substitute mentioned in the deed. This entail, however, is not to be executed until after the death of Sir George Kinloch, and until after certain annuities are reduced by death to £400 per annum, and after certain debts are paid, and until these events happen the trustees are to possess the lands and to draw their rents. Some of these events have not yet happened. Sir George Kinloch is still alive, and certain debts affecting the lands are not yet paid off. The twenty-one years from the truster's death elapsed four years ago, and the result is that the trustees are still in receipt of the annual income of the trust-estate. Out of that income they are directed to make various payments; but these payments do not exhaust the income, so that for the last four years there has been surplus income accumulating in the hands of the trustees, and this accumulation will continue for an indefinite period yet to come; and the question is, Does the Thellusson Act make this accumulation illegal since 6th October 1876? I think it does, in so far as these accumulations would ultimately under the trust-deed inure to the benefit of some one who has not right to them at present. For example, if the rents accruing after the elapse of the twenty-one years are applied, without giving present enjoyment to anyone, in enlarging the estate to be ultimately entailed, or in buying additional land, or in paying the price of such additional land whensoever purchased after the death of the truster, or in improving the entailed estate or any part thereof, then and in all these cases I think that revenue accruing after 6th October 1876, and so applied, falls under the Thellusson Act, and must be disposed of in terms of the statute.

The practical question which arises in the execution of Mr Smyth's will is really, whether the surplus rents and profits of the estate accruing after 6th October 1876 can be applied in paying for additional land to be ultimately entailed, or in paying the debts which the trustees have incurred in purchasing such additional land, or in any other way, so that in the meantime no person will be entitled to the rents accruing and accumulating after 6th October 1876, but the beneficial enjoyment thereof, in whatever form, shall be postponed till some future and indefinite period? The preamble of the statute is—"Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained,"—that is, to the restrictions of the statute. The "direction" to accumulate may be

either express or implied, and the test is the postponement of beneficial enjoyment. I think the words of the statute, as well as its meaning and import, directly apply to the present deed in the circumstances which have emerged. The rents which have accrued since October 1876, and which are still accruing, are being accumulated and retained by the trustees for the purpose of enhancing and increasing the ultimate value of an estate to be entailed at some future period, either by adding to the lands to be entailed, or by improving their condition or value, or by paying off debts and burdens with which they are affected; and the beneficial enjoyment of these rents is undoubtedly postponed for an indefinite and it may be for a long period. I think the Act undoubtedly applies. It was ingeniously argued that as the trustees were empowered to borrow money for the purpose of buying additional land, and as they actually did so, and borrowed in 1868 and 1873 in all £21,500 which they expended on various lands to be added to the entailed estate, they are entitled to apply the surplus rents of the original estate accruing after 6th October 1876 in the payment of these debts, and that until these debts are liquidated and discharged there is no accumulation under the statute; and reference is made to the provision in the statute contained in section 2, which enacts—"That nothing in this Act contained shall extend to any provision for payment of debts of any granter, settler, or devisor, or other person or persons." It was urged that debts incurred by the authority of the truster are in the same position as debts incurred by the truster himself, and that if it was lawful to pay the truster's debts out of rents accruing after the elapse of twenty-one years, it must be equally lawful to pay from the same source debts which were incurred by the trustees but with the truster's authority.

The argument is ingenious, but I think unsound. The debts which are saved by the statute, and payment of which may be provided for, are, I think, debts in existence and owing at the death of the truster, whether these debts be owing by the truster himself or by any other person or persons. The provision of the statute cannot possibly apply to debts which are not in existence and are not incurred at the date of the truster's death, for the words of the statute do not include future debts contracted, it may be, many years after the trust has come into operation, whether in terms of the truster's will or not. To give the statute this interpretation would be to defeat its object altogether. Nothing would be easier for a truster, who wished to accumulate his estate for 100 or for 1000 years, than to direct his trustees always to take care to borrow money upon his estate from time to time to a greater extent than the accruing rents, and to apply the accruing rents from time to time in paying off the sums which from time to time they might borrow, the produce of the loans being applied in increasing the capital or adding to the accumulated estate itself. This would simply be evading the statute, and would be easy in every case. All that the trustees would have to do would be to take care not to pay, or not to pay fully, for the additional lands which from time to time and in a course of centuries they might purchase, and then the rents which they could not legally accumulate and keep directly they would accumulate indirectly by applying them in paying off a constantly re-created debt. I cannot give such an interpretation to the statute, and I am compelled to hold that the debts which the second section allows to be paid from rent must be debt in existence at the death of the truster, and subsisting at the date when the trust comes into operation. Now, the debts which Mr Smyth's trustees borrowed in 1868 over Coupar Grange and Burnhead, and in 1873 over Balhary, were never debts of the truster at all, but were simply part of the price of additional lands of Coupar Grange and Burnhead and Bardmony Bank which the trustees purchased in 1868 and 1873, but for which they could not at the time pay in full. I think it was no more lawful to pay these debts out of rents accumulated after 1876 than it would have been lawful first to accumulate after 1876, and then with the accumulations to buy the lands in order to add them to the entailed estate. It is really no matter when the lands are purchased; they must not be paid for by rents illegally accumulated after 6th October 1876, for that would be to postpone the beneficial enjoyment of these rents, and in substance to accumulate, that they or their produce may be enjoyed by some future beneficiary.

Where the testator has directed rents accruing after 6th October 1876 to be actually paid away to somebody, of course this is lawful, for this is the very reverse of accumulation and inconsistent therewith—for example, the payment of £1000 a-year to Sir George Kinloch during his life may legally be made out of the rents accruing after 1876, and this however long Sir George may live. In like manner, although I am anticipating the fourth question put in the case, I think the trustees, out of the rents accruing subsequent to October 1876, may apply £200 a-year in payment of the provisions to Sir George's two youngest children whose provisions have not been already paid. In so far as not legally disposed of, however—that is, in so far as directly or indirectly destined to increase the value of the estate to be ultimately entailed—I think such addition of rents accruing after 6th October 1876 is illegal under the Thellusson Act.

Second. The next question is—Assuming that the Thellusson Act is applicable, to whom does the surplus income from 6th October now belong? This also is a question of difficulty. The words of the Act are—"And in every case where any accumulation shall be directed" (and this word must be read as if it were "provided" or caused directly or indirectly) "otherwise than as aforesaid, such directions 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."

In interpreting this clause I think the result of the decisions is to hold the deed as containing, and to read it as if it had contained, an express clause providing that all accumulation of rents and profits shall cease on the expiry of twenty-one years, without saying more and without containing any provision as to the person or persons to whom the rents accruing after the twenty-one years shall go. Now, suppose Mr Smyth's deed

had contained such a clause, all the other clauses and words of the deed remaining as at present, who in such a case would take the surplus rents accruing after 1876?

In the present case there are three, or rather four, competitors for these surplus rents—(1) Sir George Kinloch, as one of the testator's heirs-at-law, or one of the two heirs-portioners at the testator's death, and as his sole heir-at-law as at 6th October 1876, when the twenty-one years expired; (2) The said Sir George Kinloch, as the heir under the destination of John Smyth's disposition and settlement dated 16th September 1819—John Smyth being the party from whom and under whose deed the whole property came to Robert Smyth, the testator; (3) The judicial factor on the estate of Mrs Whitson, who was sister of the testator and heir-portioner of him along with Sir George Kinloch at the time of the testator's death in 1855; and (4) Mr George Washington Andrew Smith Kinloch, Sir George's second son, as the first heir of entail called, in whose favour the entail is to be made.

I am of opinion that the surplus rents now in question, and the accumulation of which is prohibited by the Thellusson Act, belong to Sir George Kinloch, and will belong to him from 6th October 1876 until the deed of entail falls to be executed in terms of Mr Smyth's trust-deed, and that under the original destination of John Smyth's deed of 16th September 1819, which, so far as these rents are directed to be accumulated, is still in force.

Mr Smyth's trust-deed of 1854 directs that any residue of funds which may remain in the hands of the trustees after executing the whole purposes of the trust shall be employed in purchasing lands to be included in the entail thereby directed, unless such residue shall not exceed £1500, in which case such residue not exceeding £1500 shall be paid to the institute of entail for his own use. Under this residuary clause the accumulated rents would fall if the accumulation was legal; but as the accumulation is illegal under the statute, as I hold it is upon the grounds already explained, then the illegal accumulations are not carried by the residuary clause, which indeed involves a repetition or reiteration of the direction or implied direction to accumulate illegally. There is therefore no residuary clause in the deed under which the illegal accumulations could be taken by any beneficiary named in the deed. The result of this is that *quoad* these illegal accumulations Robert Smyth, the testator, must be held to have died intestate; and if he had been fee-simple proprietor, with no other subsisting destination, the accumulations struck at by the Thellusson Act would, I think, belong to his heir-at-law; for I am of opinion that these illegal accumulations, being exclusively the produce of heritable estate and having a *tractum futuri temporis*, are heritable in their nature, and if the estates had been held in fee-simple and without any subsisting destination, then if not disposed of by Robert Smyth's deed they will descend to his heir-at-law.

But in the present case there was, I think, a subsisting destination which has never been evacuated, and which must now receive effect in consequence of Robert Smyth's failure legally and validly to dispose of these illegal accumulations.

The whole estates which Robert Smyth conveyed by the trust-deed in question, of 16th October 1854, were acquired by him from his brother John Smyth. Robert's deed is confined to what he had acquired from his brother John. It embraces nothing else, and it proceeds expressly on the narrative of John Smyth's settlement, under which, and under which alone, Robert Smyth had made up titles. Now, John Smyth's disposition, which is dated 16th September 1819, conveyed his whole heritable estates, and particularly the lands and subjects therein mentioned (being precisely the same estates, neither more nor less, as those contained in Robert Smyth's subsequent deed of 1854), to and in favour of himself John Smyth, "and the heirs whatsoever of my body, whom failing to Robert Smyth, W.S., my brother, and the heirs whatsoever of his body, whom failing to Cecilia Smyth, my eldest sister, and the heirs whatsoever of her body, whom failing to Margaret Smyth and the heirs whatsoever of her body, whom failing to Helen Smyth, spouse of George Kinloch of Kinloch, and the heirs whatsoever of her body," whom failing as therein mentioned. Under this deed Robert Smyth made up titles as heir of provision, and then he conveyed his brother's whole estate to which he had so succeeded to the first parties in the present case, as trustees for executing an entail in terms of the trust-deed of 1854. Now, no doubt Robert Smyth's trust-deed of 1854 operated, so far as it went, as an evacuation of the whole destinations contained in John Smyth's deed of 1819; and if Robert's deed of 1854 had effectually conveyed all his estate which he received from John there would have been no more room for the old destination. But then Robert has failed to convey at all the illegal accumulations struck at by the Thellusson Act, and the result is that *quoad* them the old destination in John Smyth's deed still subsists, and must still receive effect *quoad* everything that is not effectually conveyed by Robert's deed of 1854. Who, then, is the heir under the old destination. The answer is, the present Sir George Kinloch, the eldest son of Helen Smyth, who married Mr George Kinloch of Kinloch. All the previous branches of the destination have failed, and as heir of the body of Mrs Helen Smyth or Kinloch, I think the second party Sir George Kinloch is entitled to the whole illegal accumulations struck at by the Thellusson Act not effectually disposed of by Robert Smyth, and as to which I think the old destination subsists.

There is another view which would lead to the same result. The accumulations accruing after 6th October 1876 are, as has already been explained, heritable in their nature. They are exclusively the produce of the heritable estate conveyed by Robert Smyth's trust-deed of 1854, and they have a tract of future time accruing annually or half-yearly from 6th October 1876 till, at all events, the death of Sir George Kinloch, which may not happen for a number of years. Now, even supposing that the old destination in John Smyth's deed were inapplicable, the only other alternative would be that they should belong to Robert Smyth's own heirs-at-law in heritage. But Sir George Kinloch was on 6th October 1876, and is now, the nearest heir-at-law of Robert Smyth, the testator, and as such he alone could take undisposed-of heritage of Robert Smyth. No doubt at Robert Smyth's death in 1855, and

down to Mrs Whitson's death in 1866, Sir George was only one of two heirs-portioners of Robert Smyth, Mrs Whitson being the other heiress-portioner; but the illegal accumulations now in dispute did not begin to come into existence till October 1876, whereas Mrs Whitson, who was heiress-portioner along with Sir George Kinloch, died in 1866, ten years before the subject now in dispute had any existence. Its existence was at best then only a possible contingency, and it is difficult to see how Mrs Whitson could take by anticipation an estate which did not exist till ten years after her death and which might never have existed at all. However this may be, I think the true ground of judgment is that which I have mentioned first, namely, that the destination in John Smyth's deed was never evacuated *quoad* the accumulations struck at by the Thellusson Act.

The third question is, Are the trustees legally entitled now to execute the entail, and if not, when can they do so? I think the answer to this question is that the entail must be executed immediately after the death of Sir George Kinloch, but not till then. The declaration of the trust-deed is that after the death of the said George Kinloch, and when the other purposes of the trust-deed are all accomplished, and when the annuities payable out of the estate have expired or are reduced so as not to exceed £400 per annum, then the trustees are to denude by executing the deed of entail. I think the death of Sir George Kinloch is the only event forming a condition-precedent to the execution of the entail. No doubt debts and sums borrowed by the trustees must be paid off, but I think the trustees are bound to do this by selling the lands in Glenisla, or even part of the additional lands which they have purchased. I think they cannot disappoint the rights of the heirs of entail merely because they have purchased land to such an extent that they have not yet means to pay off the whole debt thereby created. If they have purchased too much land their only remedy seems to be to re-sell part of it.

The fourth question, I think, falls to be answered in the affirmative. The express terms of the statute allow provisions to children to be paid from rents accruing after the lapse of twenty-one years, and this was virtually conceded at the bar. The payments will be of course restricted to the sums specified in the trust-deed, being £200 a-year to each child.

The fifth question will be answered in the affirmative. Of course the trustees must pay the income the accumulation of which has been found illegal to the party now found entitled thereto, and it must be paid out of the general funds in the hands of the trustees.

The last question relates to the payment of debts before executing the entail. I think the trustees are bound to do this, and the sale of the lands in Glenisla is the proper course to take for this purpose.

Lord Young—I am of opinion that a direction to testamentary trustees to accumulate savings from the rents, issues, profits, or produce of the trust-estate, and therewith buy land or discharge debt incurred by them to pay for land bought under the directions of the will, is a direction to accumulate within the prohibition of the Thellusson Act, in so far as beyond "the term of twenty-one years from the death of" the testator. It is clear that the rents are thereby accumulated and the beneficial enjoyment thereof postponed as effectually as if they were deposited in bank or invested in the funds. That this is so with respect to accumulations, the produce of which is ordered to be invested in the purchase of land, seems almost too clear to be questioned; and the statute would indeed be worthless if a direction to borrow the price of the land in the first instance would suffice to evade it. For if so, it is plain enough that any possible investment of accumulations—and there must always be some—might be preceded by borrowing money wherewith to make the investment in the first instance, so that the accumulations should in form be directed for the payment of debt. The debt referred to in sec. 2 of the Act is existing debt, and not future debt directed or allowed to be incurred by the very instrument which directs the accumulation to pay it.

The trust now in question does not expressly direct any accumulation beyond twenty-one years from the truster's death, and I should not have thought that it necessarily implied such a direction. On the contrary, I should have collected from the 9th purpose of the trust that the truster contemplated no such extensive purchases of land as the trustees have made, but only such as might be paid for with "the balance" of the heritable bonds (about £5000), the price of lands in Glenisla which it might be thought prudent to sell, and accumulated savings of income, which there is nothing to suggest he meant to extend beyond twenty-one years. The trustees thought otherwise, apparently with the concurrence of Sir George Kinloch, with whom they no doubt communicated, he and his family being in truth the beneficiaries and alone interested in the matter. At the end of the twenty-one years, being then £15,000 in debt for money borrowed to pay for land bought, they proceeded to buy more land, relying on future accumulations of income to pay for it, as well as to discharge the debt already incurred; and in answer to a question put by myself, the Dean of Faculty, as counsel for Sir George Kinloch, stated that he did not impeach their conduct, but admitted that they had acted rightly and according to their trust. I cannot say that I think the trustees have acted according to the trust. On the contrary, I think they were not entitled to buy land or incur debt by borrowing money or otherwise, without seeing their way to pay for the land and discharge the debt with such parts of the *corpus* of the estate as they were permitted to sell for that purpose, together with such savings of income as they might accumulate within twenty-one years of the truster's death. If the trust-deed directed or permitted accumulations beyond that term, it violated to that extent the Thellusson Act, and if not, the trustees exceeded their powers. How the error is to be corrected to the effect of putting the trust on a proper footing is a question which I have not materials to enable me to answer, nor do I think the parties before us are, now at least, in a position to consult the Court upon it. The institute of entail and the heirs in immediate succession cannot be known till the death of Sir George Kinloch, and it is for the trustees to see to it that they put themselves in as good a position as they can to satisfy their just claims when

the time comes, and to that end to take such legal advice as is open to them. It may turn out, for aught I know, that Sir George Kinloch is personally barred from objecting to the purchases made and debt incurred, and under implied contract to surrender his right *ab intestato* (if he have such right) to the income after twenty-one years, and allow it to be applied in payment of the purchases and debt incurred at his request. Our opinion, to the effect that accumulations beyond the twenty-one years if allowed by the trust-deed are contrary to the Thellusson Act, and that Sir George Kinloch is entitled to the income beyond that term—if that shall be our opinion—clears the case very partially, and leaves the trustees to extricate the estate from the position in which they have placed it, and prepare as they best may to encounter the questions which may arise on Sir George's death.

Sir George received £1000 a-year from the trust during the first twenty-one years, except only in the years prior to 1863, when the allowance made to him was smaller. The trustees might have accumulated all this money to pay for the land they bought. I do not say it would have been judicious to do so, but I do say it was unwarrantable both to buy the land and give Sir George the only money available to pay for it. They may or may not have a remedy against him through the medium of his claims as heir *ab intestato*, according to the facts and the law applicable to them. We only decide that the trustees cannot by virtue of the trust-deed apply the income beyond the twenty-one years to pay for the land they bought, or discharge the debt which they incurred to pay for it, and that nevertheless they must discharge the debt somehow before the entail is executed, unless all parties interested shall otherwise agree.

To the first question I answer that the Thellusson Act applies to the trust from the expiry of the term of twenty-one years from the death of the truster.

To the second question I answer that the surplus income belongs to Sir George Kinloch as the truster's heir *ab intestato*.

To the third question I answer that the entail cannot now or until the death of Sir George Kinloch be executed.

To the fourth question I answer that the provisions to Sir George Kinloch's children are, in my opinion, portions within the meaning of section 2 of the Thellusson Act, but that I have no such knowledge of the trust affairs or the past management of the trustees as to enable me to give any further answer.

The fifth question I answer in the affirmative.

To the sixth question I answer that the trustees are at liberty to sell land in Glenisla to pay off the debts of the trust. The trust directs the debts to be paid before the entail is executed. Whether when the time comes this condition may be dispensed with by the whole parties interested is at present a speculative question.

The Lord Justice-Clerk was absent, but Lord Ormidale intimated that his Lordship had read and concurred in the opinion delivered by him.

The Court answered the questions put to them in terms of the opinions of Lords Ormidale and Gifford.

Counsel for Robert Smyth's Trustees—Rutherfurd—Keir. Agents—Skene, Edwards, & Bilton W.S.

Counsel for Sir George Kinloch — Dean of Faculty (Fraser, Q.C.)—Mackintosh. Agent—C. J. Napier, W.S.

Counsel for G. W. A. S. Kinloch—Kinnear—Pearson. Agents—Hamilton, Kinnear, & Beatson.

Counsel for Mrs Whitson's Judicial Factor—Asher — Lorimer. Agents — Scott-Moncrieff & Trail, W.S.

Tuesday, July 20.

FIRST DIVISION.

[Lord Craighill, Ordinary.

RAMSAY *v.* RAMSAY AND ANOTHER.

Divorce — Adultery — Evidence — Co-Defender — Corroboration where Defender admits Adultery.

In an action of divorce on the ground of the wife's adultery, which was defended by the co-defender only, the evidence of the wife, who had confessed to her husband, was the only direct evidence of adultery. Circumstances which, being considered proved, were held to amount in law to a corroboration of the wife's story as in a question with the co-defender, no collusion between husband and wife being averred or suggested.

Divorce—Adultery—Confession of Wife to Husband.

Question—Whether evidence by a husband of his wife's confession of acts of adultery, made to him outwith the presence of the co-defender, is competent evidence against the co-defender?

This was an action of divorce by William Ramsay, labourer, Leith, against his wife and John Weir, porter, Leith. The following were the pursuer's averments:—"(1) The pursuer is a labourer, and resides at No. 1 Wilkie Place, Leith. On or about the 3d day of July 1877 he was married to the defender Ann Armit or Ramsay by the Rev. Robert Auchterlonie at Portobello, and the pursuer and the said defender thereafter lived together as husband and wife at Leith. No children have been born of the marriage. An extract from the register of marriages is herewith produced. (2) In or about the month of August 1878 an intimacy sprang up between the said defender Ann Armit or Ramsay and the other defender John Weir, who is a porter, residing in Argyle Street, Leith, and is a married man. Between said month of August 1878 and 19th September 1879 they were often seen in company together, unknown to the pursuer, and were on terms of improper intimacy. (3) On or about 19th September 1879 the pursuer and the defender Weir were engaged as musicians at a ball in Junction Street Hall, Leith. About eleven o'clock on that night, the pursuer having missed the defender Weir from the ball-room, and his suspicions being aroused, went to his house, which was then at No. 6 Johnstone Street, Leith. He found the door bolted from the inside. He then went to the window of the kitchen and dashed in a pane