sidering questions of expenses. The Court may, in its discretion, allow full or modified expenses or refuse to allow any expenses. The rule as regards expenses generally being as above stated, it seems to me clear that a party who desires to take advantage of the Act of Parliament by obtaining a judgment of expenses as between agent and client, is to make his motion for such a judgment at the time at which he must claim expenses generally. The Court is entitled to have everything before it as regards expenses at the proper time for dealing with expenses, viz., when judgment *in causa* is given.

As the case is at present before us, it relates to expenses in the Outer House for proof, &c. These expenses were disposed of by the Lord Ordinary without any motion being made to him to give any other order than an order for expenses in due course. What his judgment would have been on the general question of expenses had any motion on the statute been made in his Court we do not know. Further, no such question was raised in the Inner House when the case was brought there on reclaiming note.

In these circumstances my opinion is very decided that it is not competent to raise any such question now.

LORD KYLLACHY—In this case I am of opinion that, the question being *ex concessis* confined to the expenses of the proof and the other expenses incurred in the Outer House, the defenders' claim to have these expenses taxed as between agent and client is, according to our practice, excluded by their omission to make a motion to that effect before the Lord Ordinary, and, at all events, by their failure to reclaim against, or to intimate at the debate in the Inner House that they complained of, that part of the Lord Ordinary's interlocutor which allowed them only expenses on the usual scale. I would only add that I see no reason to doubt the soundness of the judgment of the First Division in the case of *Magistrates of Aberchirder*, 1906, 8 F. 571, or to differ from the construction of the statute which was there expressed.

LORD LOW—I am of the same opinion. This is an exceptionally clear case, because the question whether the defenders are entitled to the privilege given by the Public Authorities Protection Act 1893, section 1 (*b*), was not raised at any stage of the case until final judgment had been pronounced in the House of Lords, it having been apparently mooted for the first time before the Appeal Committee when, I understand, the order of the House of Lords was being adjusted.

Now, it is to be remembered that questions of considerable difficulty, and necessitating argument and consideration, may arise as to whether defenders claiming this privilege fall within the category of public authorities to which it was meant to apply. I think that it would be contrary to all principle to allow such a question to be raised for the first time after final judgment in the case, and when nothing remained to be done but taxation of accounts.

LORD STORMONTH DARLING concurred.

The Court refused the prayer of the petition in so far as it craved that the Auditor of Court should be directed to tax the defenders' account of expenses as between agent and client.

Counsel for Pursuers—Dickson, K.C.—Blackburn, K.C.—Bramwell. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Defenders—Clyde, K.C.—R. S. Brown. Agents—Millar, Robson, & M'Lean, W.S.

Friday, January 11.

SECOND DIVISION.

COLQUHOUN'S TRUSTEES *v.* COLQUHOUN.

Succession—Thellusson Act 1800 (39 *and* 40 *Geo. III, cap.* 98)*—Accumulations—Portions for Children—Section* 2.

A testator by his trust-disposition and settlement directed his trustees to accumulate the revenue of his estates for twenty years, and thereafter, with the capital and accumulations, to purchase land and settle it in fee-simple upon the representative of the family then in possession of the family estates, or failing such a representative, upon his own nearest heir whomsoever. By a subsequent codicil he directed his trustees, in certain events, which happened, instead of accumulating the revenue to pay it to A during all the years of her life, and by yet another codicil he directed them to retain out of the revenue, and to invest along with accruing income, £1000 annually for the behoof of B and C, A's daughters, equally between them, share and share alike, or in the event of one dying without leaving lawful issue, then the whole to the survivor, and, in the event of A's dying or marrying again, to continue to do so until there was accumulated a sum of £10,000, with a declaration that the same should be payable to B and C on their mother's death, provided they had attained the age of 21 or had married.

Held, in a special case, presented 21 years after the death of the testator, that the accumulation fell to be continued until the death or second marriage of A, it being a "provision for raising portions" for children of a person taking an interest under the will, and accordingly excepted by section 2 from the prohibition against accumulation imposed by the Thellusson Act.

By the Act 39 and 40 Geo. III (1800), cap. 98, commonly known as the Thellusson Act, it is enacted "that no person or persons shall

after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property to 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 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 . . . 2. Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed." [This enactment was extended to heritable property in Scotland by the Act 11 and 12 Vict. cap. 36, sec. 41.]

This was a special case in which the first parties were the trustees acting under the trust-disposition and settlement and codicils of William Colquhoun, Rossdhu House, Luss, Dumbartonshire; the second party was Mrs Anna Maria Colquhoun, widow of the late Colonel James Colquhoun, the testator's nephew; the third parties were Miss Violet Colquhoun and Miss Helen Colquhoun, daughters of Colonel James Colquhoun and Mrs Anna Maria Colquhoun; and the fourth party was Sir James Colquhoun of Luss, Baronet, the testator's heir-at-law.

The facts and circumstances bearing upon the present report are sufficiently set forth in the following narrative taken from the opinion of Lord Stormonth Darling:—"The main question raised by this special case is whether the accumulation of a certain fund for behoof of Miss Violet and Miss Helen Colquhoun, directed by the fourth codicil to the will of the late Mr William Colquhoun, who died on 22nd March 1884, is or is not struck at by the Thellusson Act as and from 22nd March 1905, that question again depending on whether the accumulation is to be regarded as a 'provision for raising portions for any child or children . . . of any person taking any interest under any such conveyance, settlement, or devise,' in which case it is enacted by section 2 of the Act that 'all such provisions and directions shall and may be made and given as if this Act had not passed.'

"By the fourth purpose of his principal trust-disposition and settlement, dated 7th March 1876, the testator directed his trustees to realise and invest the whole residue of his estate, heritable and moveable, and to hold the same for a period of twenty years, from and after his decease, and also to invest the rents, interest, dividends, and other income thereof from time to time as the same might accumulate, and at the expiry of the said period of twenty years to apply the said accumulated fund, both principal and interest, to the purchase of land in Dumbartonshire or elsewhere, and to settle the estate or estates so purchased upon the head or representative of the testator's family who should then be in possession of the family etstates; or if the said family estates at the expiry of the said period of twenty years should not be the property of the head or representative of the family, then to convey and make over the estates purchased, and any unexpended balance of the funds in their hands, to his own nearest heir whomsoever in fee-simple. By the second codicil to his will dated 25th November 1882 Mr Colquhoun altered these directions, and provided that in the event of his being survived by the wife of his nephew, Colonel James Colquhoun, and in case he (Colonel James) should die without having succeeded to the estate of Luss, and should leave her a widow (which events happened), then he directed his trustees (instead of allowing the rents, interest, dividends, and other income of the residue of his means and estate to accumulate, as provided by the 4th purpose of his trust-disposition and settlement) to pay and make over the said rents, interest, dividends, and other income to Mrs Anna Maria Colquhoun during all the days of her life.

"The fourth codicil, dated 12th February 1884, was in the following terms:—'I, William Colquhoun, before designed, hereby direct my said trustees and executors, out of the rents, interest, dividends, and other income directed by the foregoing codicil to be paid to the said Mrs Anna Maria Colquhoun, to retain and reserve £1000 annually for the benefit of Violet Colquhoun and Helen Colquhoun, her two daughters, and to invest the same, along with the annual interest or income accruing thereon, in my said trustees' and executors' own names, for behoof of the said Violet and Helen Colquhoun, equally between them, share and share alike, or in the event of one dying without leaving lawful issue, then the whole to the survivor, and in the event of the said Mrs Anna Maria Colquhoun dying or marrying again (in which latter event I hereby revoke and recall the provisions of the rents, interest, dividends, and other income left to her by the foregoing codicil), then I direct my trustees and executors nevertheless to continue to set aside annually £1000 until, with interest on said sums, there be accumulated a sum of £10,000 for behoof of the said Violet and Helen Colquhoun, equally between them, or the whole to the survivor in the event of the predecessor not leaving lawful issue as aforesaid: Declaring that said sums shall be payable to the said

Violet and Helen Colquhoun, on their mother's death, provided they have attained the age of twenty-one or have been married: And further declaring that said sums shall be alimentary, and shall not be affectable by the acts and deeds of the said Violet or Helen Colquhoun, nor assignable by them, nor attachable for their debts or the debts of any husband to whom they may be married.'

The parties are agreed in stating that since the testator's death on 22nd March 1884 Mr Colquhoun's trustees have administered his trust-estate, which now amounts to £52,788, 18s. 5d. (exclusive of the fund for the Misses Colquhoun after mentioned), and each year, as on 22nd March, they set aside out of the income the sum of £1000, and invested that sum (along with the accrued interest on such sums formerly set apart) for behoof of the said Violet and Helen Colquhoun, and paid the remaining income of the trust estate to the said Mrs Anna Maria Colquhoun, all in accordance with the testator's directions. In the year 1893, when the sum so set apart amounted to £10,000, a special case was presented to the First Division of this Court by the parties to the present case; and the principal question submitted for opinion and judgment was whether the accumulation of the fund for behoof of the two young ladies ceased on the sum of £10,000 being accumulated. This question the First Division answered in the negative, and found it unnecessary to answer the remaining questions; but since the date of that judgment, and in accordance with it, the trustees have continued to set aside, out of the income of the trust (now amounting to about £1900), £1000 a year for behoof of Violet and Helen Colquhoun, and have paid the balance to their mother, just as before. The value of the accumulated fund for behoof of the young ladies, as at 22nd March 1905, was £26,740, 9s. 5d., yielding an income of about £950.

"There only remains one additional step in the history of this fund to be noted. In January 1894 the young ladies, then sixteen and seventeen years of age respectively, with consent of their curators, presented a petition to the First Division, craving the Court to authorise Mr Colquhoun's trustees to pay to their curators a sum sufficient for the petitioners' maintenance and education, having regard to their position and prospects in life, out of the free annual income directed to be accumulated for their behoof. On 15th March 1894 the First Division granted authority to the trustees to pay £200 a-year for each accordingly, and the report of this judgment is contained in 21 R. 671. In 1899 Miss Violet and Miss Helen Colquhoun again petitioned the First Division for an increase of the allowances, and their Lordships' interlocutor allowing £300 a-year for each of the petitioners, to be paid during the life of their mother, is printed. These allowances have been duly paid out of the income of the accumulated fund down to the present date. We were also told that both of the young ladies have attained majority, and that one has been recently married."

The contentions of parties, so far as material to the present report, were the following:—

The second and fourth parties maintained that by virtue of the provisions of the Thellusson Act the direction to retain £1000 a-year out of the income of the trust estate, and to accumulate the same in terms of the codicil of 12th February 1884, became null and void after 22nd March 1905.

The third parties, with the concurrence of the first parties, maintained that the accumulation directed by the codicil fell within the exception contained in section 2 of the Thellusson Act, and that the first parties were therefore bound to continue to set aside £1000 a-year during the life of the second party, so long as she did not enter into a second marriage, notwithstanding that twenty-one years had elapsed since the death of the testator, and to add to the accumulated fund the surplus income therefrom after payment of the allowances sanctioned by the Court.

The following questions were amongst others submitted to the Court:—"(1) Does the accumulation of the fund for behoof of the said Violet and Helen Colquhoun, directed by the codicil of 12th February 1884, cease after 22nd March 1905 by virtue of the provisions of the Thellusson Act? (2) Does the accumulation of said fund fall to be continued during the remainder of Mrs Colquhoun's life so long as she does not enter into a second marriage?"

Argued for the first and third parties—The accumulation of income directed by the testator was lawful, falling as it did within the exception contained in section 2 of the Act. It was a provision for raising a "portion," whether that word was construed by the light of ordinary common sense and usage or that of the reported decisions. Thus what was here accumulated was not the whole but a portion of the whole—Lewin on Trusts, 11th edition, p. 97; *Moon's Trustees* v. *Moon*, November 28, 1899, 2 F. 201, 37 S.L.R. 140; *Edwards* v. *Tuck*, 1853, 3 De G. M. & G. 40; *Beech* v. *Lord St Vincent*, 3 De G. & Sm., p. 678; *Barrington* v. *Liddell*, 1852, 2 De G. M. & G. 480. It corresponded exactly with the definition of "portion" given by Buckley, J., in *in re Stephens*, [1904] 1 Ch. p. 322, at 327; see also *Middleton* v. *Losh*, 1852, 1 Sm. & Gif. 61. Further, it was a portion for the child and children "of any person taking any interest" under the will, for here the girls' mother had a most tangible interest under it, viz., a liferent of the residue. It was said, however, (1) that the interest of the persons for whom the portion was provided must be an already vested interest. For this there was no authority either in sense or law. The Act did not say so; the decisions did not say so. Thus in *Middleton* (*cit. sup.*) the fund was not vested in any way, and *Edwards* (*cit. sup.*), *Beech* (*cit. sup.*) and *Barrington* (*cit. sup.*) showed it was sufficient if the beneficiaries had a substantial interest of any kind under the will, and that the exception extended even to portions for children to come into existence after the date

of the will. But even if a vested interest were necessary, the girls had such an interest, subject only to defeasance in certain eventualities—*Newton* v. *Thomson*, January 27, 1849, 11 D. 452; *Maitland's Trustees* v. *M'Dermaid, &c.*, March 15, 1861, 23 D. 732; *Lindsay's Trustees, &c.*, May 22, 1885, 12 R. 964, 22 S.L.R. 638; *Gardner* v. *Hamblin*, February 28, 1900, 2 F. 679, 37 S.L.R. 486; *Fraser* v. *Fraser's Trustee*, November 23, 1883, 11 R. 196, 21 S.L.R. 137; *Wylie's Trustees* v. *Wylie and Others*, November 29, 1902, 43 S.L.R. 383. It was further objected (2) that the provision was not a "portion," because it was indefinite, but in *Beech & Middleton* and *in re Stephens, cit. supra*, the amounts were *ex facie* uncertain; and as to *Fremantle* v. *Banks*, 1799, 5 Ves. 79, relied on by their opponents for the Lord Chancellor's dictum, it was sufficient to point out that that case was not one under the Thellusson Act but one dealing with a very technical point of English law. It was objected further (3) that the provision was not a "portion" because it was excessive in amount and unreasonable. To this there were two answers—firstly, that as a matter of fact it was neither unreasonable nor excessive, and secondly, that the Act imposed no limit, and the cases only settled that it must be a portion and not the whole that was to be accumulated—see *Edwards, Moon's Trustees, &c., cit. sup.* There was nothing in any of them to suggest that the Court was otherwise concerned with the amount of the provisions.

Argued for the second and fourth parties—The provision did not fall within the exception of section 2, as it was not a provision for raising a "portion" for a child or children of a person taking an interest under the will, within the meaning of the section. To be a "portion" the right given must be (1) vested and not merely contingent, (2) definite in amount, (3) reasonable in amount. See *Eyre* v. *Marsden*, 1832, 2 Keen 564; *Edwards* v. *Tuck*, 1853, 3 De G. M. & G. 40; *Halford* v. *Stains*, 1849, 16 Sim 488, at 496; *Bourne* v. *Buckton*, 1851, 2 Sim N.S. 91; *Freemantle* (*cit. sup.*); *Burt* v. *Sturt*, 1853, 10 Hare 415; *In re Travis*, [1900] 2 Ch. 541; *Wharton* v. *Masterman*, [1875] A.C. 186; *Moon's Trustees* (*cit. sup.*). The present provisions complied with none of these conditions. As to (1) there was no vesting in the girls—*Robertson* v. *Richardson*, June 6, 1843, 5 D. 1117; *Mundell and Others*, January 24, 1862, 24 D. 327; *Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 37 S.L.R. 959; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346; *Forrest's Trustees* v. *Mitchell's Trustees*, March 17, 1904, 6 F. 616, 41 S.L.R. 421; *Laing's Trustees* v. *Sanson, &c.*, November 18, 1879, 7 R. 244, 17 S.L.R. 128; *Smith* v. *Wighton's Trustees*, January 9, 1874, 1 R. 358, 11 S.L.R. 177; *Young* v. *Robertson*, 1862, 4 Macq. 314. If such a provision as the present were to stand the whole object of the Act would stultified.

Lord Stormonth Darling—[*After the narrative of facts already quoted*]—Since the passing of the Thellusson Act in 1800, or rather since the expiration of the earliest period of twenty-one years after which the accumulation of the income of real or personal property was made unlawful by the 1st section of the Act, there have been many decisions of the law courts in England as to the scope and meaning of the 2nd section which created an exception to the Act, and particularly as to the scope and meaning of that part of it which still permits "any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise." And I think it may be fairly stated, as the general effect of these decisions, that whereas in the second quarter of the nineteenth century there was a tendency to draw the bands somewhat tightly round the exception established by the 2nd section, owing to a desire to give due effect to what was supposed to be the main purpose of the Act; this tendency was rather relaxed in the third quarter of the same century, and it came to be recognised as more in accordance with ordinary rules for the interpretation of statutes to take the statute as a whole, and to allow due weight to each one of its provisions. As samples of this change of view I may cite the case of *Beech* v. *Lord St Vincent* (1850), 3 De Gex & Smale 678, in which a testator had directed a provision of £2000 a-year out of the rents of an estate which he had devised to his son, this provision to be continued so long as his son had any children alive, and V.-C. Knight Bruce, holding that the direction answered the description of a "portion" within the meaning of section 2, refused to stop the accumulation when it had reached the sum of £42,000. Similarly, in *Barrington* v. *Liddell* (1852), 2 De Gex, M. & G. 480, where a testator had bequeathed a sum of £15,000 to be accumulated during the life of A until it reached the sum of £40,000 and then to be applied in satisfaction of portions of the younger children of A to that amount settled by a previous instrument, Lord St Leonards, brushing aside an argument that the parent of children for whom a "portion" was to be provided must himself take an interest in the very property which was directed to be accumulated, held that the case fell within the exception and that the accumulation might go on after the expiration of twenty-one years from the the testator's death. An equally significant case by way of contrast occurred in 1853 (*Edwards* v. *Tuck*, 23 L.J. Ch. 204), in which Lord Cranworth described *Barrington's* case as a "perfectly right decision" and distinguished it on the ground that the direction in *Edwards* was to accumulate all that the testator had and hand it over to some child or children in the aggregate when they attained twenty-one, which could never, his Lordship added, be said to be "raising portions" for the child or children; it was not raising portions, it was giving everything.

The same distinction accounts for the judgment of this Division in *Moon's Trus-*

tees (1899), 2 F. 201. There the direction was to "accumulate the balance of the revenue" after paying certain annuities, and on the death of the testator's widow to realise his whole estate and "dispose of the proceeds thereof as well as the accumulations of the same, if any," for behoof of his sons and daughters equally in liferent and their respective children in fee, with a destination-over. The case was held not to fall within the exception in section 2 because of the direction to accumulate surplus income for the purpose of increasing the residue. The *ratio decidendi* is stated by Lord Trayner in a sentence. "The increase of residue," said his Lordship, "could always be said to raise (in the sense of increasing) the portion of the children. But that is not the meaning of the Act. The Act prohibits accumulations being made more than twenty-one years after the testator's death in order to enhance or increase the aggregate estate, but allows such accumulations if out of them a provision is to be made or raised for the testator's children."

I do not think it necessary to refer to any of the other reported cases which were cited to us, because the circumstances of the case before us seem to me peculiarly strong for holding the second section of the Act to apply. The testator does not call the provision of £1000 a-year which he makes for each of the young ladies a "portion," but it is so nevertheless, whether you read it in its scriptural or in its ordinary sense, as "a sum of money secured to a child out of property either coming from or settled upon its parents." (*Stephens*, [1904] 1 Ch. 322, Buckley, J., at p. 327.) Here it was laid by the testator as a burden on income which would otherwise have gone to the surviving parent of the children, and it was to be retained and reserved and invested along with the annual interest or income accruing thereon, *i.e.*, it was to be accumulated till their mother's death. Their mother was to receive the balance of the income, therefore she was a person taking an interest under the will. The amount to be annually set apart was specific. The only thing not precisely ascertained is the sum-total of the accumulations, because these depend upon the life of Mrs Colquhoun; but nobody contends that in any view these can be said to be unreasonable in amount looking to the young ladies' condition in life. And in point of fact, as shown by the proceedings before the First Division, if these are not to be regarded as "portions," the young ladies have no other. Lastly, this case is not complicated, as *Edwards'* case and *Moon's* case were, by provisions for increasing the aggregate residue. It is only the income of the residue that is given to Mrs Colquhoun after the £1000 a-year has been taken out of it, and there is no accumulation of principal with income.

I am therefore for answering the first question in the negative and the second question in the affirmative. The remaining questions are superseded, but it is, of course, understood that the judgment of the First Division of 8th July 1899 holds good unless and until there is a change of circumstances.

LORD LOW—The main question in this case is whether the accumulation of income directed by the testator for behoof of Miss Violet and Miss Helen Colquhoun falls within the excepted cases specified in the second section of the Thellusson Act. The particular exception which is said to apply is thus expressed in the Act—"Any provision for raising portions for . . . any child or children of any person taking any interest under any such conveyance, settlement or devise." It is clear that the Misses Colquhoun fall within the description in the latter part of that clause, because their mother Mrs Colquhoun takes an interest under the settlement. The question therefore is, whether the direction to accumulate is a "provision for raising portions" for these ladies?"

I think that what is meant by "portions" for children is such provisions for children as might be made by a father or by a person *in loco parentis*. If the method of raising the money required for such provisions is accumulation of income, then the prohibition of accumulation beyond a certain time does not apply.

Now, there can be no doubt that the testator's object was to make a provision for the Misses Colquhoun, who were his nieces, and to whom he put himself in the codicil *in loco parentis*.

It was argued, however, that the accumulation in question does not fall within the exception in the statute, because (1) the right given to the Misses Colquhoun in the accumulated fund was contingent; (2) the amount was, or at all events might be, excessive, and beyond what could be regarded as a reasonable provision; and (3) the amount was indefinite.

In regard to the first point, I do not think that the right conferred is subject to any other or further contingency than one would expect to find in regard to provisions made by a father for his daughters. The testator directs his trustees to deduct £1000 annually from the income of the trust fund, which in a previous codicil he had directed them to pay to Mrs Colquhoun, and to invest the same in their own names "for behoof of the said Violet and Helen Colquhoun, equally between them, share and share alike, or in the event of one dying without leaving lawful issue, then the whole to the survivor.

That clause I think plainly refers to the death of one of the ladies prior to the period of payment of the accumulated fund, namely, the death of Mrs Colquhoun. The effect of the clause therefore seems to me to be this—that if one of the ladies dies before the period of payment without leaving issue, the survivor takes an indefeasible right to the whole fund, while if the predeceaser leaves lawful issue, such issue take upon her death an indefeasible right to one-half of the fund. These conditions appear to me to be quite appropriate to provisions or "portions" for children, and I am therefore of opinion that there is no

contingency attached to the provisions in question which prevents them falling within the exception in the statute.

Upon the second point, the fourth parties (by whom the objections with which I am now dealing were urged) relied upon certain English authorities, and in particular the case of *Edwards* v. *Tuck* (1853, 22 L.J. Ch. 523, and 23 L.J. Ch. 204).

In that case the question arose whether a gift of residue to accumulate fell within the exception in the Thellusson Act. The circumstances, if I have gathered them rightly from the long and involved instruments recited in the report were of this nature—A testator had given certain parts of his estate to his granddaughter Miss Edwards in liferent and to her children in fee, and he also directed his trustees to accumulate the income of the whole residue of his estate, and to transfer the *corpus* and the accumulations to Miss Edwards' children when they attained the age of twenty-one. When the question of the legality of the accumulations was raised Miss Edwards was fifty-five years of age and was unmarried.

The Lord Chancellor (Cranworth) held that the case did not fall within the exception to the Act in regard to portions for children. His Lordship said—"A gift of residue to accumulate is not within the meaning of the clause; if it were, the whole Act would fall to the ground at once, for almost all accumulations are directed for the benefit of children, and it is clear that the Legislature meant to restrain excessive accumulations for the benefit of children."

The circumstances of that case were entirely different from those with which we are dealing. The possible children of Miss Edwards were first given the fee of the means and estate, the liferent of which was conferred upon her; then they were given the residue, whatever it might be; and in addition the trustees were directed to accumulate the income of the residue on the chance that Miss Edwards might marry and have children, and if that event happened the accumulation was to be continued until the children attained majority. It is not surprising that such a direction should have been held not to be a provision for raising portions for children within the meaning of the Act. That was all that was decided, and I cannot read Lord Cranworth's dictum as meaning that when there is a *bona fide* provision for raising portions for children by accumulating income it is the duty of the Court to consider whether the portions are reasonable or excessive in amount, and according as the one view or the other is taken to hold the accumulation lawful or unlawful. There is nothing said in the Act about the amount of the portions, the enactment simply being that if provision is made for raising portions for children by accumulating income the limitation in the statute shall not apply. A case might possibly occur in which the accumulation directed was so extravagant as to lead the Court to the conclusion that the object of the grantor was not truly to raise what he regarded as suitable provisions for children but to evade the Act. It is plain, however, that nothing of that sort can be suggested here.

I am therefore of opinion that the argument that this case does not fall within the exception, because in the event of Mrs Colquhoun surviving to extreme old age the daughters' portions will be very large in amount, is not well founded.

There remains the question whether the provision cannot be regarded as a "portion" within the meaning of the Act, because it is not a definite sum. The argument was chiefly founded upon what was said by Lord Chancellor Loughborough in the case of *Freemantle* (5 Vesey 79). That case was not one under the Thellusson Act, but related to what seems to have been a somewhat technical question of English law, namely, whether a gift of residue could be considered as a gift of a "portion." The Lord Chancellor said that it could not, because "the idea of a portion is, *ex vi termini*, a definite sum."

I do not feel competent to form an opinion whether, looking to the connection in which that dictum was pronounced, it has any bearing upon the present question, but it is sufficient to say that in my judgment the amount provided in this case by the testator for his nieces is sufficiently definite to enable the Court to give effect to his directions.

It is true that the period during which accumulation is directed to be made, and consequently the amount to be accumulated, are uncertain, because it cannot be foreseen when Mrs Colquhoun's death will occur. But the event itself is certain, and therefore the direction is to accumulate for a definite period, namely, until an event which must happen actually occurs. I am unable to find any principle which would justify the view that that circumstance deprives the provision of the protection of section 2 of the Act, it being otherwise a proper provision for raising portions for children. The only two cases cited in which a similar question was raised were decided in accordance with that view—*Beech*, 3 De G. & Smale, 678, and *in re Stephens*, [1904] 1 Ch. 322.

I am therefore of opinion that the first question in the case falls to be answered in the negative and the second in the affirmative, and that being so the other questions are superseded.

LORD JUSTICE-CLERK—I concur.

The Court pronounced this interlocutor—

"Answer the first question of law therein stated in the negative, and the second question of law therein stated in the affirmative: Find that this supersedes the necessity of answering the other questions therein stated."

Counsel for the First and Third Parties—Guthrie, K.C.—Cochran Patrick. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Second Party—Pitman. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Fourth Party—Blackburn, K.C.—J. Macq. Trotter. Agents—J. S. & J. W. Fraser, Tytler, W.S.

Thursday, January 10.

FIRST DIVISION.

[EXCHEQUER CAUSE.]

[Lord Johnston, Ordinary.

H. M. ADVOCATE *v.* BROWN'S TRUSTEES.

Domicile — Abandonment — Acquisition — Ceylon.

Circumstances in which *held* that a Scotsman abandoned his domicile of origin in Scotland, and acquired, *animo et facto*, a domicile in Ceylon.

Observations by Lord M'Laren upon (1) the value of authorities in questions of domicile, (2) the comparative amount of evidence required to establish the *animus manendi* in colonies in temperate and in tropical regions.

In this action the Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, sued Marcus John Brown and others, the testamentary trustees of the deceased Robert Lewis Maitland Brown, merchant, Colombo, in the island of Ceylon, and sometime residing in Musselburgh, for the sum of £200 alleged to be due by them under the Legacy Duty Acts.

Whether or not legacy duty was payable depended solely upon the question whether or not the deceased Robert Lewis Maitland Brown was at the time of his death a domiciled Scotsman.

A proof was taken before the Lord Ordinary in Exchequer Causes (JOHNSTON), the result of which is sufficiently set forth in the opinion of Lord M'Laren, *infra*.

On 26th July 1906 the Lord Ordinary issued the following interlocutor:—"Finds that the domicile of the deceased R. Lewis M. Brown at the date of his death was in Ceylon, and therefore assoilzies the defenders from the conclusions of the action, and decerns."

Opinion.—[*After dealing, inter alia, with the circumstances which had rendered a proof necessary*]—"Accordingly, to bring the matter to a conclusive judgment, the Inland Revenue were obliged to raise the present action for recovery of duties, which the executors have defended, in order to establish that the domicile of Mr R. Lewis M. Brown was truly in Ceylon. On a proof I think that they have succeeded, for the proof led carries them a great way further than anything contained in the affidavits above referred to.

"I do not think that I should serve any good purpose by going into the details of the proof. I think it sufficient to say that I find it proved that the late Mr Lewis Brown originally went to Ceylon, like many other Scotsmen, merely to push his fortunes, and with no idea of abandoning his domicile of origin and acquiring any new one; and that he engaged in mercantile pursuits, in which he was keenly interested to the date of his death. So many Scotsmen have gone to Ceylon that it is common knowledge that the planting industry is the basis of Ceylon trade and Ceylon prosperity, and that it is the exception for anyone to be engaged in business in Ceylon without becoming interested in planting and other local industries, which involve the acquisition of interest in real estate. Formerly these undertakings were more of the nature of joint adventures, but these have largely given place to the small limited company. The fact of the late Mr Brown being thus interested, through such adventures, in real estate in Ceylon does not weigh much with me. Nor do I think that it is conclusive that he made the bungalow of his plantation, which was exceptionally near to Colombo, his preferable residence for many years before his death. In this he was probably merely a pioneer in suburban residence, and early utilised the railway as a means of connecting his business with his country house. Were the facts of his business engagements, his financial ventures and interests, and his actual residence and mode of life in Ceylon, all that I had to go upon, I should not have found anything conclusively to distinguish him, at the comparatively early age of 53, from the preponderating majority of Ceylon merchants, and even planters, who notoriously do not go to Ceylon to settle, but only to trade or cultivate, and when possible to return. It must be remembered that Ceylon is a tropical climate. But though none of these matters, singly or together, are conclusive, they are all material to the consideration. What has chiefly determined me in holding a Ceylon domicile established, is, not so much the facts of the late Mr Brown's life, as his personal attitude to them, as disclosed in the evidence of his friends and acquaintances, both in Ceylon and at home. I am satisfied that Mr Brown had before his death abandoned his Scottish domicile of origin, and acquired a domicile of choice in Ceylon, which, though he died in this country, dying, as he did, with a return ticket for his passage back to Ceylon in his possession, he retained until his death. The most satisfactory piece of evidence is his own letter of 18th November 1898 from Falmouth to his friend Mr M'Martin. I refer to the whole letter, but particularly to the passage in which, after describing his difficulties in relation to one of his businesses, he says—'However, I hope the way will be smooth now, and though I propose returning to Ceylon, I don't intend to go in for the active life of the past.' While this betokens an intention to draw out of more active business, a course which his health demanded, it indicates an intention, contrary to the course pursued by almost all Ceylon business men in similar circumstances, to continue his residence in Ceylon.

"I shall find that the domicile of the deceased R. Lewis M. Brown at the date of