for 1906 did exist, and was used, and that it is finally traced to the pursuer's custody; and further, that the book was regularly kept and periodically discharged down to July 1906, as spoken to by the witnesses I have mentioned; and that the final instalment of the account, for August 1906, was also paid in December of that year, and marked as discharged by the pursuer in the missing pass-book. Assuming, then, the competency of the whole evidence, the defender has, in my opinion, sufficiently established that the money now sued for was in fact paid; and the pursuer's case must therefore fail.

If this be, as I believe, the truth and substance of the matter, it would be most regrettable that we should be debarred from giving the defender his just remedy by any rule of our law or practice; and I am glad to be able to hold that such is not the case. The pursuer's counsel argued that the existence and loss of the alleged pass-book could only be established by a separate process for the proving of its tenor; and that, even if strictness of procedure were so far relaxed as to dispense with the necessity of a separate action, the proof must fail owing to the absence of any written adminicles. I do not think there is any real substance in either point. The first is, as the Lord Ordinary points out, purely technical at the best, and I agree with him in thinking that a separate process is quite unnecessary in the circumstances of this case. The missing document is not of the quality, *e.g.*, of a title-deed, but of a much humbler kind, and is not substantively founded upon as the basis of an action, but pleaded by way of exception to prove the extinction of a debt. The other point also, in my judgment, fails. The circumstances of this case are very special, but I think they bring it well within the class of cases where the Court has from time to time dispensed with production of written adminicles, having regard especially to the fact that the missing pass-book is (as I hold) proved to have gone astray in the hands of the person who would be prejudiced by its production, and who takes up the position (which I consider to be disproved) that it never existed. In deciding this case in the defender's favour we shall not, I apprehend, do the slightest violence to the established rule that payment of sales upon credit (as the sales here in question were) may not be proved by parole evidence; for the basis of my opinion is that payment is here sufficiently established *scripto*. The legal requirement of "writ" is satisfied by proof of the existence of a regularly kept pass-book containing entries of monthly settlements. And then the pursuer cannot take any benefit from the difficulty as to proving the contents of the pass-book in detail, because the disappearance of the pass-book is the result of his own fault or negligence. We were referred to a considerable number of authorities—*inter alia*, Bell's Prin., sec. 883; *Seton*, 1766, 5 B. S. 924; *Maxwell*, 1742, M. 15,820; *Shaw*, 1876, 3 R. 813; *Lillie*, 1832, 11 S. 160; *Leckie*, 1884, 11 R. 1088. But I do not propose to comment upon them, because the question is, not so much as to the general principles of our law and practice, as whether this particular and peculiar case falls within them.

For the reasons I have stated, I am of opinion that the Lord Ordinary's interlocutor ought to be recalled, and that decree of absolvitor should be pronounced.

LORDS PEARSON and M'LAREN concurred.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for Pursuer and Respondent—D. Anderson—Armit. Agent—Arthur C. M'Laren, Solicitor.

Counsel for Defender and Reclaimer—Anderson, K.C.—A. M. Hamilton. Agents—Clark & Macdonald, S.S.C.

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*Friday, November* 13.

## FIRST DIVISION.

## MACKAY'S TRUSTEES *v.* MACKAY AND OTHERS.

*Succession — Accumulations — "Raising Portions" — Accumulations Act* 1800 (39 *and* 40 *Geo. III, c.* 98) (*Thellusson Act*), *secs.* 1 *and* 2.

A testator directed his trustees, after paying an annuity to his widow, to accumulate any surplus income for behoof of his children, and to divide among them, as they attained majority, the income derivable from the said accumulated surplus. On the death or second marriage of the widow the trustees were directed to set apart for each child an equal share of the capital estate and accumulations, if any.

In a Special Case presented after the lapse of twenty-one years from the testator's death (the widow being still alive), *held* (1) that the direction to accumulate the surplus income for behoof of the testator's children, and to pay to them the income derivable therefrom, was not a "provision for raising portions" within the meaning of section 2 of the Thellusson Act, and that the Act applied; and (2) that as there was no present gift of the fund directed to be accumulated, the surplus income fell into intestacy.

The Accumulations Act 1880 (39 and 40 Geo. III, cap. 98) (Thellusson Act) enacts, sec. 1—"No person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator,

. . . 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."

Section 2—"Provided always that nothing in this Act contained shall extend 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. . . ."

On June 9, 1908, William Reid, Viewfar, Leven, and others, trustees acting under the trust-disposition and settlement of the late David Mackay, Oak Lodge, Inveresk, (*first parties*); Mrs Isabell Watt or Mackay, the testator's widow (*second party*); Mrs Davina Margaret Mackay or Reid, wife of the said William Reid, and others, the daughters of the testator (*third parties*); and Archibald Douglas Reid and others, the children of the testator's daughters (*fourth parties*), brought a Special Case for the determination of certain questions as to their rights under the settlement.

The following narrative is taken from the opinion (*infra*) of the Lord President—"The question in this Special Case arises on the settlement of the late David Mackay, who left a trust-disposition and settlement in which he conveyed his property to trustees. The third purpose of the trust was that the trustees should pay to his widow a free annuity of £400; and then the fifth purpose provided that, in the event of there being any surplus income from his estate after satisfying the aforesaid annuity, his trustees should accumulate such surplus income 'and retain the same for behoof of my children, and they shall pay to and divide among them as they respectively attain majority equally, quarterly, half-yearly, or otherwise, the income derivable from the said accumulated surplus.' Then, by the seventh purpose, on the death of his wife, or her second marriage, and as his children should respectively attain majority, the trustees were directed to set apart for behoof of each child an equal share of the capital estate and accumulations, if any, corresponding to the number of children. These shares were to be settled on the daughters in liferent for their liferent use allenarly and their children in fee, and in the case of sons they were to get the fee. Now what has happened has been this. The testator's widow is still alive and has survived the period of twenty-one years from the testator's death. During all this time there has been, and there still is, a certain amount of surplus income on the original residue of the estate over and above what is necessary to meet the annuity of four hundred pounds. Up to the end of the twenty-one years, of course, no difficulty arose; the annuity of four hundred pounds was paid to the widow; the surplus income from year to year was accumulated; and the interest upon such accumulations was divided among the children as they respectively came to the age which allowed them to receive it. But now that the twenty-first year has passed, a question has arisen as to what is to happen in view of the provisions of the Thellusson Act."

The second and third parties maintained that the Thellusson Act (39 and 40 Geo. III, cap. 98) applied to the funds in question, and prohibited accumulations of surplus income subsequent to 15th September 1903—being twenty-one years from the date of the testator's death—and that the sums accumulated since that date, being otherwise undisposed of by the testator, fell into intestacy. The second party accordingly claimed that she, as the testator's widow, was entitled to one-third of the said accumulations as *jus relictæ*. The third parties maintained that they were entitled to the remaining two-thirds of the said accumulations as sole next-of-kin of the testator, or alternatively, that the whole surplus income subsequent to 15th September 1903 belonged to them as legatees of the liferent of the residue of the testator's estate. The fourth parties maintained that the Thellusson Act did not apply to the funds in question, in respect that the said accumulations were directed to be made for the purpose of raising *pro tanto* portions for the children of the testator who were alive at his death. Assuming that the said Act applied to the funds in question, the fourth parties maintained that they were the only persons to whom there was any gift of the fee, and that consequently the trustees were bound, in terms of the seventh purpose of the said trust-disposition and settlement, to hold and invest any balance of revenue accruing from the testator's estate subsequent to 15th September 1903 for their behoof, because but for the direction to accumulate they would have been entitled to the capital of the revenue so acquired, even though the third parties might be entitled for the future to the annual income of such accumulations after 15th September 1993.

The questions of law were—"1. Is the accumulation of the income of the deceased's estate subsequent to 15th September 1903 prohibited by the Thellusson Act? 2. In the event of the first question being answered in the affirmative, does the surplus income of said estate from and after 15th September 1903 fall to be treated as intestate succession of the deceased David Mackay? 3. In the event of the first and second questions being answered in the affirmative, is the second party entitled to one-third of the said accumulations in virtue of her *jus relictæ*, and are the third parties entitled to the remaining two-thirds of said accumulations as next-of-kin? 4. In the event of the first question being answered in the affirmative and the second in the negative, does the surplus income vest in and become payable to the third parties as legatees of the liferent of the residue of the deceased David Mackay's

estate? Or 5. Does the said surplus revenue fall to be invested for behoof of the fourth parties, as having, along with any other grandchildren who may come into existence subsequently, the right to the fee of the residue of the estate of the said David Mackay, and if so, are the third parties entitled to the liferent of such investment?"

Argued for second and third parties—Accumulations of income subsequent to 15th September 1903 were struck at by the Act. The exception provided for in section 2—viz., provision for raising portions—was inapplicable. "Raising portions" meant "creating portions," not merely adding to their original amount—Hargrave on the Thellusson Act, 199; *Eyre* v. *Marsden*, 1838, 2 Keen 564. Moreover, "portion" meant a capital sum, not interest payable yearly—*Edwards* v. *Tuck*, 1853, 22 L.J. Ch. 523, *aff.* 1854, 23 L.J. Ch. 204, *per* Cranworth, L.C., at p. 206. Enhancing of residue by accumulation of surplus income was not raising a portion. There must be a direction to raise a specific sum, and that was absent here—*Moon's Trustees* v. *Moon*, November 28, 1899, 2 F. 201, at p. 206, 37 S.L.R. 140. It was impossible to say for whom the accumulations were being made, as the period of distribution was postponed till the death of the widow, and therefore this was not a provision for raising portions for children in the sense of the Act—*Moon's Trustees* (*cit. supra*), *per* Lord Moncreiff, 2 F. at p. 214. *Esto* that the Act applied, the surplus income was estate undisposed of, and fell into intestacy—*Lord* v. *Colvin*, December 7, 1860, 23 D. 111; *Maxwell's Trustees* v. *Maxwell*, November 24, 1877, 5 R. 248, *per* L.J.-C. Moncreiff at 250, 15 S.L.R. 155; *Moon's Trustees* (*cit. supra*).

Argued for fourth parties—This was a case of raising portions for children in the sense of section 2. It was immaterial that provision was made for children in the meantime. "Raising portions" did not necessarily exclude provision by way of accumulation of surplus income—*Colquhoun's Trustees* v. *Colquhoun*, January 11, 1907, 1907 S.C. 346, 44 S.L.R. 269, *in re Stephens*, [1904] 1 Ch. 322.

Lord President—[*After the narrative, supra*]—The twenty-one years having expired, of course it is clear that under the Thellusson Act any further accumulation is directly prohibited, unless the further accumulation can be brought within the exception of the second section, which provides that nothing in the Act shall extend to a provision for payment of debts or a provision for raising portions for any child or children of the granter, or any child or children of any person taking interest under the settlement. Therefore the question is whether this is a provision for raising a portion.

I think, from the cases that were quoted to us, there really could be no question in this case, but for one peculiarity which I will presently notice. It has already been decided in many cases that a provision is not a portion, simply because the benefit of it falls to a person who may be a child. As Lord Cranworth pointed out long ago, if you held that anything that was for the benefit of a child was a portion, that would really make almost nonsense of the Act altogether, because it would allow any amount of accumulation provided the objects of your eventual beneficence were your own family and not someone else. Then equally it is the case that where a child is, under the scheme of the settlement, to take a share of the residue, it does not make it a portion if you create by some purpose of accumulation a device by which the eventual share of the residue to be taken will be enhanced. Now that really is the case here but for one peculiarity, and it is this, that here there is a gift to the child of an intermediate income—that is to say, the child gets the interest upon that accumulation during the period in which its right to its eventual provision of a share of the residue has not yet emerged, because its mother is still alive. But I cannot think that makes any difference, because it is quite evident in reading the Act that the portion which by section 2 is preserved against the effect of the Act is a portion which must be paid to the child. Now here, if the argument was correct, the accumulation which is said to be saved by the second section would never be paid as a portion to the child, but it is only the interest on it that is paid to the child. I think that argument would be simply opening the door to a device to defeat the Act, because it would really come to this, that if you gave a direction to accumulate, and were content that that accumulation should, so to speak, not take place at compound interest, but only at simple interest—by the device of giving away the interest after the twenty-one years to some child or children—then by means of that device you would defeat the Act. Accordingly I think it is quite clear here that the Thellusson Act does apply to this direction to accumulate after twenty-one years.

If that is so, the question to whom the fund so set free goes is, I think, here of easy answer. The principle has long ago been settled, and has been very well expressed in a great many cases, and by none better than by the late Lord Moncreiff in *Maxwell's Trustees* (5 R. 250), where he said—"If the fund directed to be accumulated is not the subject of any present gift, then the right of the eventual beneficiary will not be accelerated or arise at the term of twenty-one years, but the heir-at-law *in mobilibus* will take it as intestate succession. But if there is a present gift of the fund itself, and the direction to accumulate be only a burden on the gift, then the burden will terminate at the expiration of twenty-one years, and the gift will become absolute in the person of the donee." Here as regards this money there is obviously no present gift, only a direction to accumulate, and therefore, following that authority, the result is that it will fall into intestate succession.

LORD M'LAREN—I agree with your Lordship on all points.

LORD KINNEAR—So do I.

LORD PEARSON—I also agree.

The Court answered the first three questions of law in the affirmative, found it unnecessary to answer the other questions of law, and decerned.

Counsel for the First and Fourth Parties—D. Anderson. Agents — Steedman, Ramage, & Co., W.S.

Counsel for the Second and Third Parties —Macgregor. Agents—Ketchen & Stevens, S.S.C.

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*Tuesday, November 24.*

FIRST DIVISION.

[Lord Johnston, Ordinary.

## HUNTER'S EXECUTRIX *v.* GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED.

*Insurance—Accident—Conditions of Policy—Claim to be Made "within Twelve Months of Registration of Holder's Name"—No Regular Register—Date of Registration Held to be Date when Insurer Informed that Registration had been Made.*

A coupon insurance policy provided, *inter alia*, that a claim must be made within twelve months of the registration of the holder's name. A applied for registration on 25th December 1905. On 4th January 1906 he received a letter from the company, dated 3rd January 1906, enclosing an official acknowledgment, dated 29th December 1905, of the registration of his name. It was impossible to say exactly what was the actual date of A's registration, as the company kept no regular register. In practice, however, the applications were, on receipt, registered by being stamped, dated, and filed, after which acknowledgments were issued to the couponholders intimating that they had been duly registered. A was injured in a railway accident on 28th December 1906, and died the following day. Notice of claim was given on 2nd January 1907.

*Held* that as the company kept no regular register, and could not say exactly when A's name had been registered, the date of registration must be held to be the date when they informed him that his name had been registered, and that accordingly the claim was timeously made.

On 21st February 1907 Mrs Janet Armstrong Robertson or Hunter, Wilton Hill, Hawick, widow and executrix of Adam Turnbull, commercial traveller, Hawick, brought an action against the General Accident Fire and Life Assurance Corporation, Limited, for payment of £1000, the sum contained in a coupon insurance policy of which he was the holder.

The following narrative is taken from the opinion of the Lord President—"This is an action raised by Mrs Hunter, the widow and executrix of the late Adam Turnbull Hunter, commercial traveller in Hawick, against the General Accident Fire and Life Assurance Corporation, Limited, in which the pursuer seeks to recover the sum of £1000 in respect of an accident insurance policy which she alleges was held by the deceased. The deceased was injured in the Elliot Junction railway accident on 28th December, and died on 29th December 1906.

"Now the policy held by the deceased had its origin in the following circumstances. The deceased had been a purchaser of a Letts' Diary, and in Letts' Diary there was a coupon. The coupon, after setting forth the name of the company, its offices, and so on, reads as follows:—'One thousand pounds will be paid under the following conditions by the above Corporation to the heirs, executors, or administrators of any person killed solely and directly by bodily injuries received in an accident to'—and then comes various forms of travelling, including, of course, railway travelling; 'or who shall have been fatally injured thereby should death result within three calendar months after such accident.' There are other stipulations as to smaller sums being paid under other conditions of transit, and still smaller sums if the injury was not death, but the loss of both arms and legs, or an arm and leg, by separation above the wrist or ankle. But the whole of these stipulations are conditioned by this proviso:—'Provided that at the time of such accident the person so killed or injured was the owner of the publication in which this insurance coupon is inserted, that such person had duly caused his or her name to be registered at the head office of the Corporation in Perth, and had paid the fee for registration and cost of acknowledgment, and that notice of claim is sent to the registered office of the Corporation at Perth within fourteen days of the occurrence of the accident, and that such claim be made within twelve months of the registration of the holder's name.' Attached to the coupon there is a form of application for registration, which can be torn off, printed in these terms:—'To the General Accident Assurance Corporation, Limited, General Buildings, Perth, N.B.—In accordance with the terms of the insurance coupon to which this is attached, I request you to register my name as below—for which purpose, and also to cover cost of acknowledgment, I enclose remittance value 6d.' Then there are blanks for full name, full address, profession or occupation, and date.

"Now it is admitted that the deceased Mr Hunter was the proprietor of a Letts' Diary, as such had the coupon, detached from that coupon the form of application for registration, filled it up by inserting his name and address and the date, 25th