been pronounced, he must be certiorated when to appear, and accordingly in the most recent Act, namely, the Act of 1908, there are expressly given forms for use in cases where there is an adjournment—Summary Procedure (Scotland) Act 1908 (8 Edw. VII, c. 65, Schedule E). [*His Lordship read the forms.*]

Accordingly the Act provides for an official adjournment and an official intimation, which is binding upon the accused and makes him liable to apprehension if he does not appear, and in that case it orders the accused to be imprisoned until security be found for his appearance.

I know of nothing to prevent that rule being applied. It seems an essential rule, and it has always been looked upon as an essential rule, and if it is not altered by Act of Parliament it is because the Legislature thought it ought to be maintained.

In this case it so happened that the procurator-fiscal had two charges against a man for the same day, and after the trial in one had taken place the Sheriff said that he convicted the prisoner, and it is alleged that the conviction was written out and signed at the time. That is disputed, and necessarily one would need to know what the fact was, but I shall assume that the conviction was duly recorded. Thereupon the diet of another case was called before the same Judge, and although that diet was a diet against the same person, I do not think that makes any difference. In my opinion the proceedings in the first case fell in respect that no means were taken to keep them in life by adjourning them either to a later period of the same day or to a new day. It is quite true that the first case was both tried and finally disposed of on the same day, but that does not seem to me to make any practical difference, because a case must be kept going either by its being proceeded with or by its being formally adjourned. That was not done, and I am of opinion that the omission is fatal to the proceedings in the first case.

LORD LOW—I confess that in the corn case I have found the question whether the conviction was altogether nullified because the Sheriff-Substitute allowed the case to stand over from an earlier to a later hour on the same day, to consider his sentence, without a written interlocutor adjourning the case, to be not without difficulty. No doubt it is very well settled that if a criminal prosecution is adjourned from one day to a later day there must be a written interlocutor adjourning the case and fixing a date and time at which the adjourned diet is to take place, and one can very well see the reason of that rule; but I have some difficulty in thinking that in the circumstances which we have here the reason for the rule applies at all. My impression was that it was rather too technical a point; but as your Lordships, who have had long experience in these matters, are very clearly of opinion that the rule is established that all adjournments, however short, must be by interlocutor. I do not dissent from the judgment proposed. It establishes a salutary rule, and one which there is no difficulty in keeping.

LORD ARDWALL—I agree with the decision proposed. With regard to the corn case, so far as I know the practice is universal both in the Sheriff Court and in the High Court of Justiciary that all adjournments of a diet must be minuted. Otherwise the diet would fall, being brought to an end, another diet being called in the same Court and before the same Judge, and it does not matter whether the diet so called is against the same person or another person altogether.

The Court passed the bill of suspension and suspended the conviction and sentence complained of *simpliciter*.

Counsel for the Complainer—Sandeman, K.C. — J. Jameson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent — Morison, K.C., A.-D. — Lyon Mackenzie, A.-D. Agent — W. S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Friday, January 21, 1910.

SECOND DIVISION.

DAVIDSON'S TRUSTEES *v.* OGILVIE.

Succession—Liferent and Fee—Free Annual Income—Literary Works—Royalties and Profits from Sale of Books.

A testator directed his trustees to hold the residue of his estate for the liferent use of his niece, and to pay to her the "free annual income" thereof. He was the author of a number of books, some published during his life and some after his death. In both cases books were published on each of the following terms of remuneration—(1) a single payment, (2) a royalty on sales, and (3) a share of profits.

Held that royalties and profits derived from the sale of books published before the testator's death fell to the liferentrix as "free annual income," but that all sums received by the trustees in respect of works published after the testator's death fell to be treated as part of the capital of the estate.

Robert Russell Simpson and another, testamentary trustees of the late Rev. Andrew Bruce Davidson, LL.D., *first parties*, and Mrs Davidson or Ogilvy, Dr Davidson's niece and the liferentrix of the residue of his estate, *second party*, presented a Special Case dealing with the proceeds derived from his literary works.

The testator died on 26th January 1902, leaving a trust-disposition whereby he disponed and conveyed his whole estate

to trustees, and directed them, *inter alia*, to hold the residue and to give to his "niece Mrs Helen Bruce Davidson or Ogilvie . . . the liferent use and enjoyment thereof, and to pay to her the free annual income of the estate at two terms in the year by equal instalments during all the days of her life . . . with full power to my trustees to sell and dispose of all or any part or portion of the trust estate and effects."

The testator was the author of a number of published works on the Hebrew language and theology, and among his repositories on his death were found the manuscripts of certain further theological works. Some of the books and articles published were paid for by a single payment. For others a royalty only was received, the publishers taking the whole risk, and for others again Doctor Davidson received a large proportion of the profits, he taking the risk of publication. After the testator's death his trustees arranged for the publication of five manuscripts found in his repositories. In one case the trustees received a sum down in respect of a fixed number of sales with a royalty on additional sales. In two cases they received a royalty only. In a fourth case the publication was a joint-undertaking with the publishers, the trustees receiving two-thirds of profits and bearing two-thirds of loss, while in the fifth case £200 was received for an absolute sale of an unfinished manuscript.

The *questions of law* were—"(1) Do royalties derived from sales subsequent to the testator's death of works published by him fall to be treated (*a*) as capital or (*b*) as income? (2) Do profits derived from sales subsequent to the testator's death of works published by him fall to be treated (*a*) as capital or (*b*) as income? (3) Does a sum paid to the trustees as the price of the testator's work on publication of the work by the trustees fall to be treated (*a*) as capital or (*b*) as income? (4) Do royalties derived from the sale of the testator's works published by the trustees fall to be treated (*a*) as capital or (*b*) as income? (5) Do profits derived from the sale of the testator's works published by the trustees fall to be treated (*a*) as capital or (*b*) as income? (6) Does a sum paid to the trustees on publication by them of a book by the testator to cover a fixed number of copies sold fall to be treated (*a*) as capital or (*b*) as income?" [Questions (3) and (6) were not argued, these payments admittedly falling to capital.]

Argued for the first parties—Royalties and profits derived from the sale of the testator's works, whether published during his life or after his death, fell to be treated as capital. They were not income, because they were not derived from a capital subject, itself left untouched. They were simply a form of price for the copyright, paid by instalments, and no value would remain when the copyright expired. They should therefore be regarded as capital, as had been an annuity—*Crawley* v. *Crawley*, 1835, 7 Simon 427—and a share of profits in a partnership—*Freer's Trustees* v. *Freer*, January 28, 1897, 24 R. 437, 34 S.L.R. 323; *Dykes' Trustees* v. *Dykes*, November 20, 1903, 6 F. 133, 41 S.L.R. 84. Casualty cases were different, for there a capital subject existed and was left intact—*Gibson* v. *Caddall's Trustees*, July 11, 1895, 22 R. 889, 32 S.L.R. 668; *Ross' Trustees* v. *Nicol*, November 22, 1902, 5 F. 146, 40 S.L.R. 112; *M'Dougal's Factor* v. *Watson*, 1909 S.C. 215, 46 S.L.R. 172. In any event royalties and profits from works published after the testator's death were clearly capital on the analogy of mineral royalties, which were treated as income only when the mines had been opened during the testator's lifetime, and as capital if opened after his death—*Campbell* v. *Wardlaw, &c.*, July 6, 1883, 10 R. (H.L.) 65, 20 S.L.R. 748; *Ranken's Trustees* v. *Ranken*, 1908 S.C. 3, 45 S.L.R. 10; *Naismith's Trustees* v. *Naismith*, 1909 S.C. 1380, 46 S.L.R. 844.

Argued for the second party—Royalties and profits of this nature were to be regarded as income. (1) In the case of books published before the testator's death it was presumed that where the testator was enjoying an annual return from a subject during his life, he intended that the liferenter should enjoy the same return—*Campbell* v. *Wardlaw, &c.*, and *Ranken's Trustees* v. *Ranken, cit. supra; Ferguson* v. *Ferguson's Trustees*, February 23, 1877, 4 R. 532, 14 S.L.R. 377; *Strain's Trustees* v. *Strain*, July 19, 1893, 20 R. 1025, 30 S.L.R. 906; *Mein's Trustees* v. *Mein*, June 21, 1901, 3 F. 994, 38 S.L.R. 715; *Dick's Trustees* v. *Robertson*, June 28, 1901, 3 F. 1021, 38 S.L.R. 744; M'Laren on Wills and Succession, i, 616. (2) As regards books published by the trustees, the analogy of mines opened after a testator's death was inapplicable. In mines the actual subject wasted; here the subject, the book, continued to exist, although it might be valueless on the expiry of the copyright. The payments were rent for the use of the subject, not price in instalments. The trustees might have let the MSS. lie and produce nothing, or they might have sold them for a capital sum, but when they did not do so, but used them as a profit-bearing asset, the profits should go to the liferenter.

LORD JUSTICE-CLERK—It appears to me that a very marked distinction must be drawn in this case between the proceeds of manuscripts and books with which the testator himself had dealt before his death and those dealt with by the trustees after his death. I think the testator's intention is manifest. Of the books which he himself published he took the income for himself, and when he left the liferent of his estate to anybody, I think he must be held to have intended that that from which he was deriving income should be a source of income to the liferenter, whoever he might be. Therefore I have no doubt whatever that any questions relating to works which the testator had published before his death must be answered by holding that the proceeds from those works formed part of the income of the estate.

But I think it is a totally different case when you come to those works which were dealt with after the death of the testator. Whatever he left after his death and had not dealt with during his lifetime —whether complete manuscripts or incomplete manuscripts—were necessarily of the nature of estate left behind by him, which it was the duty of the trustees to realise to the best of their ability. They might do that in various ways. To a certain extent they were in the hands of publishers as to how it could be accomplished, because everybody who has had anything to do with the publishing of books knows perfectly well that different terms may be given by publishers as regards different books. Even in the case of a book that might turn out well publishers may not be willing to take the risk of paying a price for it. Accordingly sometimes an arrangement is made for royalties, and sometimes an arrangement is made for a sum down and for royalties. It was the duty of these trustees to do their best for the realisation of the works. I assume that they have done their best. Their conduct has not been impugned in any way. Everybody is agreed that nothing has been done that ought not to have been done. I am clearly of opinion that the works which passed into the hands of the trustees as part of the testator's estate, and which he had not dealt with except by leaving it to them, form part of the capital of the estate. I would move your Lordships that we should answer the questions accordingly.

LORD ARDWALL—I agree with what your Lordship has said. This is a novel and interesting case. It appears that at his death Dr Davidson left, as might have been expected, a number of literary works. With regard to some of these he had already disposed of the copyright by having come to an arrangement under which in some cases he had got a sum down and in other cases he was to be entitled to royalties or profits from the sale of the books as time went on. In some cases he was remunerated partly in one way and partly in the other. With regard to the literary works published before the testator's death he had been during his lifetime in receipt of the proceeds, so far as they consisted of royalties or profits, by way of income—income available for himself, to spend year by year as he pleased.

In these circumstances he directs his trustees to give his niece the liferent use and enjoyment of the residue of his estate, and to pay to her the free annual income at two terms in the year. I cannot doubt that as a matter of intention we must hold that the free annual income of the estate means the free annual income of the estate as it existed at his death, of which those profits or royalties formed a part. It seems that there is no case exactly on all fours with the present, but I think we derive assistance from and find a very valuable analogy in the cases which have been decided regarding minerals, and in which a distinction has been taken between minerals the proceeds of which formed income before the testator's death, and minerals which had not begun to be worked at the death of the testator. These decisions must be held to proceed on the principle of intention; and likewise in this case I hold we must have regard to the intention of the testator in deciding the question as to the proceeds of royalties on works published by himself before his death. Accordingly, with regard to such royalties and profits I hold that they still form income, and should be paid to the liferentrix.

But with regard to the other works which have been published by the trustees since his death, I think these are in a totally different position. It was the trustees' duty, as has been pointed out by your Lordship, to dispose of the manuscripts carrying with them copyright to the best advantage after the testator's death. At the testator's death they represented part of the capital of the estate. I do not think it can be held that these unpublished manuscripts and the copyright which they bore with them were anything else than capital. Now, what was the trustees' duty with regard to that capital? I find that under the trust deed the trustees have power to sell or dispose of all or any part or portion of the trust estate and effects. I think these literary remains form part and portion of the truster's estate and effects; and the question which the trustees had to decide was how they could best be disposed of. In this matter the trustees were to a certain extent tied by the usages of the publishing trade. Under these usages books are sometimes disposed of in return for a sum paid down, and sometimes, instead of taking payment all at once, by taking payment of the price in instalments in the shape of royalties. The trustees were practically tied up to taking one course or another. But whatever course they did take, whether they were paid by a sum down or by instalments, or partly by a sum paid down and partly by instalments, the proceeds were a surrogatum for the assets left by the testator at the time of his death in the form of literary property. I think that they must be treated, accordingly, as capital and as nothing else—the proceeds being invested as they accrue, and the interest of that capital so invested being paid to the liferentrix. To hold anything else would have this result, that the trustees would have it in their power to alter the respective interests of the liferentrix and the fiars in what was truly part of the capital of the estate at the time of the death of the testator. I think that is a conclusion which we cannot accept. Although this is a novel case I have really no hesitation in deciding it in the way your Lordship has suggested, and the questions will fall to be answered accordingly.

LORD DUNDAS—I am of the same opinion and have nothing to add.

LORD LOW was absent.

The Court answered the first alternative of the first and second questions of law in the negative, and the second alternative of the said first and second questions in the affirmative, the first alternative of the third, fourth, fifth, and sixth questions of law in the affirmative, and the second alternative of the said third, fourth, fifth, and sixth questions in the negative.

Counsel for the First Parties—Graham Stewart, K.C.—R. C. Henderson. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Second Party—Constable, K.C.—Cowan. Agent—R. C. Gray, S.S.C.

Wednesday, January 26.

SECOND DIVISION.

(SINGLE BILLS.)

DOW (DOW'S TUTOR), PETITIONER.

Process — Minor and Pupil — Nobile Officium — Petition by Tutor-Nominate for Authority to Sell—Presentation in Inner House — Competency — Court of Session Act 1857 (20 *and* 21 *Vict. cap.* 56), *sec.* 4 (5)—*Pupils Protection Act* 1849 (12 *and* 13 *Vict. cap.* 51)—*Guardianship of Infants Act* 1886 (49 *and* 50 *Vict. cap.* 27), *sec.* 12.

The Guardianship of Infants Act 1886 enacts that tutors-nominate shall be subject to the provisions of the Pupils Protection Act 1849. The Court of Session Act 1857 enacts that all petitions under the Pupils Protection Act 1849 shall be presented to the Junior Lord Ordinary.

Held that a petition by a tutor-nominate for authority to sell must be presented to the Junior Lord Ordinary, and not to the Inner House.

The Court of Session Act 1857 (20 and 21 Vict. cap. 56), section 4, enacts—"All summary petitions and applications to the Lords of Council and Session, which are not incident to actions or causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz. . . . (5) All petitions, applications, and reports, under the Act of the twelfth and thirteenth Victoria, chapter 51, entituled an Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity in Scotland."

The Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), section 12, enacts—"In Scotland tutors, being administrators-in-law, tutors-nominate, and guardians appointed or acting in terms of this Act, who shall by virtue of their office administer the estate of any pupil, shall be deemed to be tutors within the meaning of an Act passed in the twelfth and thirteenth years of the reign of Her Majesty, intituled an Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity in Scotland, and shall be subject to the provisions thereof. . . ."

On 23rd October 1909 John Graham Dow, tutor-nominate to Walter Dow, acting under the general disposition and settlement of the deceased Walter Dow junior (father of the above-mentioned Walter Dow), presented a petition to the Second Division of the Court of Session for authority to sell certain heritable subjects belonging to the ward.

On 19th November 1909 the Court remitted to Mr Charles Young, W.S., to inquire into the regularity of the proceedings, and to report.

The reporter reported on the procedure as follows—"The reporter has doubt as to the competency of the procedure followed in this petition. It has been presented to your Lordships presumably under the *nobile officium* of the Court, but it would appear that the proper course would have been to go to the Junior Lord Ordinary on a report by the Accountant of Court, in terms of the Pupils Protection Act of 1849, the Court of Session Act 1857, and the Guardianship of Infants Act of 1886. In this connection the reporter would refer your Lordships to the case of *Souter*, 1890, 18 R. 86, 28 S.L.R. 89, where the Judges of your Lordships' Division, after consultation with the Judges of the First Division, dismissed a petition for the removal of a *curator bonis* and appointment of a new *curator bonis* as incompetent in the Inner House. . . . In view of the Court of Session Act and the above case it appears to the reporter that the present petition should have been presented to the Junior Lord Ordinary.

"The reporter would, however, ask your Lordships to consider, along with the case of *Souter*, the case of *Logan*, 1897, 25 R. 51."

In the Single Bills counsel for the petitioner founded on the case of *Logan*, November 9, 1897, 25 R. 51, 35 S.L.R. 51, and two unreported cases, and argued that the competency of presenting such petitions in the Inner House was supported by the practice in regard to them.

LORD ARDWALL—This case involves a small point of procedure, but one which it is well should be settled. We are told that in the case of *Logan* a similar petition was dealt with by the First Division. But in that case the question of competency was not raised, and it is therefore not an authority on the point now before us. It is also said that the practice is to present such petitions as this to the Inner House. I can only say that any ideas regarding practice which may be entertained in the profession or among the Clerks of Court cannot prevail against the