to abuse if the legal rights of a workman were always enforced in the drastic manner that this workman took. There is great force in the view of the employer that if a workman gets his wages made up, taking into account both his earnings and the compensation that is given to him, to the full figure that he earned before the accident he can claim nothing more. But I feel the force of the special circumstances of this case, which are adverse to the employer, because the suspension relates to a single week in which the man happened to earn more than the difference between his former wage and the compensation which had been awarded to him by the Sheriff as for partial incapacity.

The workman, in answer 2, explains that in the immediately succeeding week he only earned 14s., and that this was all he could earn because of his physical state not permitting him to work more than three days in the week. That is not dealt with in the condescendence for the employer, but Mr Wilson frankly stated that having had the man's physical condition examined he did not find that he could proceed with an application for review on the ground that the amount of the proposed award was more than the workman required or was more than could competently be given him by the Sheriff—in short, there had been no change in the man's physical capacity between the date of the award and the date when this week's earnings were made. It is in these very special circumstances, and without committing myself in the least to some of the views of the Sheriff-Substitute as to when suspension may be competent, that I concur in the proposed judgment.

LORD GUTHRIE—I agree with your Lordship in the chair.

The Court recalled the interlocutor of the Sheriff, and reverted to and affirmed that of the Sheriff-Substitute except in so far as it sustained the fourth plea-in-law for the defender, and found it unnecessary to deal with the fourth plea-in-law.

Counsel for the Pursuers—Wilson, K.C. —R. Macgregor Mitchell. Agents—W. B. Rankin & Nimmo, W.S.

Counsel for the Defender—The Lord Advocate (Clyde, K.C.)—MacRobert. Agents —Dove, Lockhart, & Smart, S.S.C.

Saturday, June 2.

FIRST DIVISION.

WILSON'S TRUSTEES *v.* WILSON AND OTHERS.

Succession — Will — Accumulations — Thellusson Act (39 and 40 Geo. III, cap. 98), sec. 1—Jus relictæ—Disposal of Surplus Income when Accumulation has Become Illegal.

A testator directed his trustees — "(Lastly) And with regard to the residue of my means and estate I direct my said trustees should my said wife survive me to hold and retain the same and all accumulations thereof until her death, and on her death, or at my own death should she predecease me, my said trustees shall pay over the whole of said residue and all accumulations thereon to the trustees and managers of the Royal Infirmary of Glasgow to be used and applied by them for the purposes of the said infirmary." The testator's widow having survived him for more than twenty-one years, when further accumulation became under the Thellusson Act illegal, *held* in a special case that the surplus income after the lapse of twenty-one years from the testator's death fell to the testator's heirs *ab intestato* and that the testator's widow was not entitled to *jus relictæ* therefrom.

Logan's Trustees v. *Logan*, 1896, 23 R. 848, 33 S.L.R. 638, and *Campbell's Trustees* v. *Campbell*, 1891, 18 R. 992, 28 S.L.R. 771, in so far as they applied the law of resulting intestacy, *doubted per* Lord Skerrington.

The Thellusson Act (39 and 40 Geo. III, cap. 98), sec. 1, enacts—"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 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 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, dividend, or annual produce so directed to be accumulated; and in every case where any accumulations 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."

William Nicol and others, testamentary trustees of the deceased Lyon Wilson junior, *first parties*, Miss Jane Wilson and others, the heirs both in heritage and moveables of the said Lyon Wilson junior, *second parties*, the Glasgow Royal Infirmary, *third party*, and Mrs Elizabeth Anderson or Wilson, widow of the said Lyon Wilson junior, *fourth party*, brought a Special Case for the opinion and judgment

of the Court upon questions relating to the disposal of the income of the said Lyon Wilson junior's estate when under the Thellusson Act (39 and 40 Geo. III, cap. 98) accumulation of the said income as directed by his settlement ceased to be legal.

Lyon Wilson junior died on 30th December 1893 without issue and survived by the fourth party. He left a *trust-disposition and settlement* and three codicils, which conveyed "all and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description, and wheresoever situated, that shall belong to me at the time of my death, including therein the whole means and estate belonging to me under and in virtue of the trust-disposition and settlement of my father, the late Lyon Wilson, builder, Glasgow, dated fifteenth March Eighteen hundred and eighty, and codicil thereto dated seventh November Eighteen hundred and eighty-seven, and both recorded in the Books of Council and Session twenty-eighth July Eighteen hundred and eighty-eight, and also the fee of the estate stated to be life-rented by me therein and which belongs to me in fee inasmuch as the fee is not specially disposed of, and same falls to me as heir-at-law of my father, or otherwise in respect that the conveyance in my favour therein contained by the terms thereof implies a fee in my favour." The trust purposes included the payment of various legacies and an annuity to the fourth party of £100, increased by a codicil to £150. The residue clause is quoted *supra in rubric*.

The Special Case set forth—"4. The testator left no estate except his interest as the only son and heir-in-law of his late father Lyon Wilson senior, builder, Glasgow, in (1) a portion of his father's residuary estate which had fallen into intestacy, and (2) the accumulated annual income thereof since that intestacy emerged. 5. The testator's father, who died in 1888, left a trust-disposition and settlement under which the residue was held for behoof of his whole children equally in liferent for their liferent use allenarly and for behoof of their respective issue in fee. 6. On the testator's death in 1893 a question arose as to who was entitled to the fee of the share of his father's estate liferented by the testator, and on a Special Case presented to the Court in 1894 it was decided that the said share on the death of the liferenter without issue fell into intestacy and belonged to the heirs *ab intestato* of Lyon Wilson senior as at the date of the latter's death—*Wilson's Trustees*, 1894, 22 R. 62, 32 S.L.R. 54. Miss Margaret Craig Wilson, a sister of the testator, subsequently died without issue on 27th March 1911, and the share of Lyon Wilson senior's estate liferented by her also fell into intestacy, and belongs to the heirs *ab intestato* of Lyon Wilson senior as at the date of his death. 7. The widow of the testator elected on his death to take the annuity provided by the settlement in lieu of her legal rights, and she has accordingly received payment of the same regularly from the income of the estate. 8. The estate left by Lyon Wilson senior consisted of a large amount of heritage, viz., tenements of different values situated in Glasgow, and a house at Mambeg, Gareloch, with a relatively small amount of moveable estate. After payment of his widow's *jus relictæ* the moveable estate held by the trustees for the deceased Lyon Wilson senior's children in terms of his settlement amounted to £1341, 5s. 11d. On the respective deaths of Lyon Wilson junior and Margaret Craig Wilson the shares of the moveable estate liferented by them were, in terms of the judgment in the Special Case, transferred to the heirs *in mobilibus* of Lyon Wilson senior. The shares of heritage liferented by the testator and Margaret Craig Wilson are still in the hands of the trustees of Lyon Wilson senior, in whose name the titles to the properties stand, and these trustees have, since the respective deaths of Lyon Wilson junior and Margaret Craig Wilson, paid the revenue thereof to the first parties. The income from these shares of heritage amounts to about £400 per annum. The trustees of said Lyon Wilson senior have power to sell. 9. The said income has been all along more than sufficient to pay the annuity to the testator's widow, and the balance after providing for said annuity has been accumulating in the hands of the first parties. The testator's estate now consists as aforesaid of his interest in his father's estate and cash amounting to about £2750 invested in Glasgow Corporation mortgages, said sum of £2750 being the said accumulated balances. 10. The testator was the only son of the said Lyon Wilson senior, who also left four daughters, viz., Miss Jane Wilson and Mrs Christina Mackie Wilson or M'Andrew (two of the second parties), the said Miss Margaret Craig Wilson, who survived the testator but is now deceased, and Mrs Mary Barclay Wilson or Neill, who died on 12th December 1893 (thus predeceasing the testator), leaving an only child Mrs Margaret Craig Wilson Neill or Hunter, the third of the second parties. The second parties, the said Miss Jane Wilson, Mrs Christina Mackie Wilson or M'Andrew, and Mrs Margaret Craig Wilson Neill or Hunter, are thus the heirs *ab intestato* of the testator, both in heritage and moveables."

The second parties *claimed* (1) the whole of the said surplus income; alternatively (2) the whole surplus income from year to year from the rents of the heritable properties and one-half of the income of the Corporation bonds. They contended that the whole of the said surplus income fell to them as intestate heritable estate of the testator, being undisposed of in his said trust-disposition and settlement, and that the claim of the third parties did not emerge until the death of the annuitant. Further, that the character of said estate was determined as at the date of the testator's death, and that the accumulations now invested in moveables being the proceeds of heritable estate were heritable as regards succession, and that the future income of the same fell to them along with the surplus income from the heritable properties to the exclusion of the claim of the fourth party. Alternatively that should the fourth party's claim in con-

nection with same be declared to be legal they were entitled to have their alternative claim upheld.

The third parties claimed that the whole of said surplus income should be paid to them on the ground that they had a vested right to the residue *a morte testatoris*, which was equivalent to a present gift of the whole residue to them, and also in respect that there was in the trust-disposition and settlement a specific bequest of accumulations to them.

The fourth party, as widow of the deceased, contended that she was entitled as *jus relictæ* to one-half of the gross income of the personal estate; that the said surplus income was moveable estate and that its character was to be determined, not as at the testator's death, but as at the expiry of the twenty-one years thereafter, and so far as invested in moveable estate was moveable property.

The *questions of law* were—"(1) Are the third parties entitled to payment of the whole of the surplus income? (2) In the event of the foregoing question being answered in the negative, are the second parties as the heirs of the deceased both in heritage and moveables entitled to (*a*) the whole of the surplus income both from the heritable properties and from the Corporation bonds; or (*b*) the whole surplus income from the heritable properties and one-half of the income from the Corporation bonds? Or (3) Is the fourth party entitled to payment as *jus relictæ* of one half of the surplus income during the remainder of her life of the whole estate as at the close of the lawful period of accumulation, or alternatively is she entitled to payment during the remainder of her life of one-half of the free income of the personal estate without deduction of said annuity as at said period?"

Argued for the second parties—A lapsed residuary bequest usually fell into intestacy—Lewin, Trusts, 12th ed., p. 99. When there was a present gift of residue that rule suffered an exception, but here there was no present gift of the residue, and consequently *Smith* v. *Glasgow Royal Infirmary*, 1909 S.C. 1231, *per* Lord Dunedin, at p. 1236, 46 S.L.R. 860, applied. Indeed the present case was stronger, for the testator himself had differentiated between residue and accumulations. *Weatherall* v. *Thornburgh*, 1878, 8 Ch.D. 261, was in point. That case was not overruled by *Wharton* v. *Masterman*, [1895] A.C. 186, as was shown by *Frost* v. *Greatorex*, [1900] 2 Ch. 541. *Wharton's* case (*cit.*) was distinguished, for there the ratio of the decision was that the legatee could put an end to accumulations which were for his own benefit. Here the accumulations were to secure benefits for others than the residuary legatee. The bequest of accumulations only applied to such accumulations as the law allowed; when the accumulations ceased to be lawful the settlement fell to be read as if there had never been any direction to accumulate, and there was no room for an argument as to implied intention. *Maxwell's Trustees* v. *Maxwell*, 1877, 5 R. 248, 15 S.L.R. 155, was an illustration of the contrary case. Further, the rents of the heritage went to the heir—*Campbell's Trustees* v. *Campbell*, 1891, 18 R. 992, 28 S.L.R. 771; *Logan's Trustees* v. *Logan*, 1896, 23 R. 848, 33 S.L.R. 638. And in the present case it did not matter whether they went to the heir as at the testator's death or at some other time. Consequently the fourth party's claim could not be sustained; having abandoned her claim to the capital she could not claim the fruits thereof, and she had no claim to *jus relictæ*, for the estate in question was not moveable as at the date of the testator's death.

Argued for the third parties—"Residue" here meant everything not otherwise disposed of. There was a present gift to a third party with postponed enjoyment; it was not the case of a gift of a fund to be ascertained at a later date which was not a present gift. A present gift meant that there was an existing object of gift—*Weatherall's* case (*cit.*); *Wharton's* case (*cit.*). *Smith's* case (*cit.*) was distinguished, for in that case the testator directed his trustees to realise his estate after the death of all the annuitants, and then only was the residue ascertained; here the residue was "struck" as at the testator's death.

Argued for the fourth party—The fourth party adopted the argument for the second parties on the first point, and cited in addition *Green* v. *Gascoyne*, 1865, 34 L.J., Ch. 268. The fourth party was entitled as *jus relictæ* to one-half the gross income of the personal estate—*Lord* v. *Colvin*, 1860, 23 D. 111, 1865, 3 Macph. 1083; *Campbell's Trustees* v. *Campbell* (*cit.*); *Logan's Trustees* v. *Logan* (*cit.*); *Moon's Trustees* v. *Moon*, 1899, 2 F. 201, 37 S.L.R. 140; *Mackay's Trustees* v. *Mackay*, 1909 S.C. 139, 46 S.L.R. 147.

LORD PRESIDENT—In this case the testator gives the following directions in regard to the disposal of the residue of his estate—"I direct my said trustees should my said wife survive me to hold and retain the same and all accumulations thereof until her death, and on her death or at my own death should she predecease me my said trustees shall pay over the whole of said residue and all accumulations thereon to the trustees and managers of the Royal Infirmary of Glasgow, to be used and applied by them for the purposes of said infirmary." The widow survives, but inasmuch as the testator died on the 30th December 1893, on the 30th December 1914 the surplus income could no longer be accumulated. The accumulation was struck at, it was agreed, by the Thellusson Act.

The question we have to decide is, To whom is that surplus income now payable? I answer, in the terms of the Act, to "such person or persons as would have been entitled thereto if such accumulation had not been directed." On a consideration of the terms of this will I have come to the conclusion that the second parties, who are the heirs in heritage and moveables of the deceased, are entitled to have that surplus income. The will in this case offers us no guidance. As Lord Rutherfurd Clark, in the case of *Campbell's Trustees*, 18 R. 992, at p. 1007, says—"I do not think that the

truster had in his view the possibility of the direction to accumulate ceasing to be effectual. It is certain that he has made no provision for the occurrence of that event. In my opinion I am not entitled to conjecture what his views would have been if he had been aware of the operation of the Thellusson Act."

In the clause which I have just read there are three points to be noted—(*first*) there is no present gift of the residue—the bequest takes effect on the death of the widow, who still survives; (*second*) there is no disposal of the surplus income payable between the 30th December 1914—the expiry of the twenty-one years—and the death of the widow; (*third*) the accumulations bequeathed are accumulations under the will and not accumulations after the will has ceased to operate. To use the words of Lord Kinnear in the case of *Smith* v. *Glasgow Royal Infirmary*, 1909 S.C. 1231, at p. 1237—"There is no gift of the income to any person whatever except" the widow "and no gift of the residue to anybody until the death of" the widow. "The right of the Infirmary to take the residue remaining in the hands of the trustees at the death of the widow is not accelerated according to the rule settled by the decisions by the operation of the Thellusson Act; it remains exactly what it was before. And that being so, as I can find no gift of the income arising between the date when the twenty-one years came to an end and the death of the widow, that income being undisposed of falls into intestacy." These words seem to me to be directly applicable to the present case. In short, so far as regards the bequest of residue I am of opinion that the case is covered by *Smith* v. *Glasgow Royal Infirmary*.

With regard to the accumulations of income, it appears to me that the words of Lord Trayner in *Moon's Trustees*, 2 F. 201, are in terms applicable to the present case, for here, as there, the testator disposed of that part of his estate which consisted of accumulations lawfully made, but he has not disposed of that part of it which arises from accumulations of income prohibited by law.

Accordingly I am of opinion that the second parties are entitled to have the surplus income here. The claim for the widow was not very seriously pressed. In my opinion it is not tenable.

I therefore propose to your Lordships that we should answer the first question put to us in the negative, the second question, branch (*a*), in the affirmative, and the third question in the negative.

LORD MACKENZIE—I am of the same opinion. After what was said by the Lord President and Lord Kinnear in the case of *Smith*, 1909 S.C. 1231, I find it impossible to answer the questions in any other way than your Lordship proposes.

As regards the claim of the widow, a claim of *jus relictæ* must be on estate which is in existence at the date of the death of the testator, and therefore the claim made by her in this case seems to me untenable.

LORD SKERRINGTON—I concur with your Lordships.

It has been said that the question whether income set free by the operation of the Thellusson Act belongs to the legatee of the *corpus* which produces the income or falls into intestacy depends upon whether such legatee has or has not an absolute vested right to his legacy. That, however, is an incomplete statement of the law. Absolute vesting is indeed a condition of success on the part of the legatee, but something more is required. A legatee, whether special or general or residuary, whose legacy falls to be paid or delivered at a postponed date is not necessarily and in all circumstances entitled to receive the intermediate income even although his right to the *corpus* is absolutely vested in him. It is always a question of intention depending upon the express or implied directions of the testator whether such a legatee is entitled to claim the fruits accruing prior to the date fixed for payment or delivery of the legacy. It follows that where a direction to accumulate income has become null and void by the operation of the Thellusson Act, the legatee of the *corpus* cannot successfully claim the income set free by the statute unless he can show that he has a gift of that income which remains valid notwithstanding that the direction to accumulate has become void and ineffectual. In some cases a residuary legatee may have no difficulty in demonstrating that the mere bequest of the "residue" vests him not merely in the *corpus* but also in the whole free income therefrom accruing prior to the date fixed by the testator for the distribution of the residue. In other cases, of which the present seems to me to be a typical example, the gift of the intermediate income and the direction to accumulate are inseparable from each other. In the last purpose of his will the testator distinguished between the "residue" of his estate on the one hand and "all accumulations thereof until her" (his widow's) "death" on the other hand. By "residue" he clearly meant the *corpus* of the residue as at his death, and excluding the free income subsequently accruing therefrom. It follows that the direction to his trustees to pay over to the residuary legatee on the death of the widow "the whole of said residue and all accumulations thereon" included merely the "residue" in the narrow sense which I have explained *plus* the free income therefrom so far as the trustees might lawfully accumulate it, but necessarily excluding free income which the trustees could not lawfully retain in their hands but were bound to distribute as it accrued.

I am accordingly of opinion that the surplus income does not belong to the residuary legatee but that it falls into intestacy. Further, assuming it to be the law, as was decided in the case of *Logan's Trustees* v. *Logan*, 23 R. 848, that surplus income arising from rents lawfully accumulated by and in the hands of trustees is moveable estate and falls to the heir *in mobilibus* as at the testator's death, it does not in the

least follow that the widow can claim *jus relictæ* out of a fund which had no existence at the date of the testator's death. No precedent was cited for any such demand and it must accordingly be repelled. I find it difficult, however, to understand upon what principle, in a case of resulting intestacy, an heir *in mobilibus* was thought entitled in *Logan's* case to point out that certain rents of heritable estate had been lawfully accumulated in pursuance of testamentary directions, and to found upon this fact a claim to money the right to which formed no part of the moveable *hæreditas jacens* but was an indirect though undisposed of fruit of the heritable estate. The Court, however, was a very strong one, and the judgment upon the point in question was unanimous. Accordingly I should not have ventured to express my doubts but for the fact that I am not alone in thinking that the case of *Logan's Trustees* and the case which it followed, *Campbell's Trustees* v. *Campbell*, 18 R. 992, ought to be reconsidered in so far as they applied the law of resulting intestacy differently in the case of the income from heritable and in the case of the income from moveable property. The other point might be reconsidered at the same time.

LORD JOHNSTON was absent.

The Court answered the first question in the negative, the first branch of the second question in the affirmative, and the third question in the negative.

Counsel for the First Parties—Maclaren. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Second Parties—Blackburn, K.C.—A. M. Mackay. Agents—Simpson & Marwick, W.S.

Counsel for the Third Parties—Moncrieff, K.C.—R. C. Henderson. Agents—Webster, Will, & Co., W.S.

Counsel for the Fourth Party—Wilson, K.C.—Lippe. Agents—Maxwell, Gill, & Pringle, W.S.

Wednesday, June 6.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

WOODBURN *v.* ANDREW MOTHERWELL, LIMITED.

Contract—Sale—Transfer of Property and Risk—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 17, 18, *and* 35—*Hay Sold and Destroyed by Fire after being Baled by the Buyer for his Own Purposes.*

Ricks of hay containing an estimated quantity were sold at a price per ton. Under the contract the buyer was to send his machinery and bale the hay at the seller's farm (the buyer was under contract to the War Office to supply hay to them baled in a particular way); the seller was to cart the baled hay to a railway siding, where it was to be weighed, and from the weight of the hay so ascertained the total purchase price was to be ascertained. The buyer arranged with the railway company for the carriage of the hay. A considerable number of bales of the hay were destroyed by fire while still in the seller's stackyard. *Held*, in an action by the seller for the value of the hay, that the property in the hay had been transferred to the buyer prior to the fire, because prior to the fire the buyer had, within the meaning of the Sale of Goods Act 1893, section 35, by baling done an act in relation to the hay inconsistent with the ownership of the seller.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts—Section 17—"(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." Section 18—"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—Rule 1—Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. Rule 2—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof. Rule 3—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done and the buyer has notice thereof. . . ." Section 35—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. . . ."

Andrew Woodburn, farmer, Galston, *pursuer*, brought an action in the Sheriff Court at Kilmarnock against Andrew Motherwell, Limited, grain dealers, Glasgow, *defenders*, for payment of £94, 1s., being the value of hay purchased by the defenders from the pursuer.

The *facts* of the case appear from the following findings of the Sheriff-Substitute (J. A. T. ROBERTSON)—"Finds in fact (1) that on 31st March or 1st April 1915 the pursuer sold and the defenders purchased two specific ricks of threshed hay, estimated to contain 8-10 tons, at £3 per ton, and four specific ricks of green-cut hay, estimated to contain 30-35 tons, at £3, 15s. per ton; (2)