

which he has sustained: Assess the said compensation at the sum of fifty-seven pounds ten shillings (£57, 10s.), and decern against the defender for payment of that sum in full of the conclusion of the action, with legal interest thereon from this date till payment."

Counsel for the Pursuer and Appellant—MacRobert, K.C. — Macgregor Mitchell. Agents—Ross Smith & Dykes, S.S.C.

Counsel for the Defender and Respondent—Wilson, K.C. — Mackinnon. Agents—Mackay & Hay, W.S.

Saturday, December 6.

SECOND DIVISION.

INNES'S TRUSTEES v. BOWEN AND OTHERS.

Succession — Accumulations — Thellusson Act (39 and 40 Geo. III, cap. 98), secs. 1 and 2—Accumulations Continued beyond Twenty-one Years in order to Effect Equitable Compensation for Legitim Taken by Liferentrix of Trust Estate.

By her trust-disposition and settlement a testatrix directed her trustees to pay the income of the residue of her estate to her daughter during her natural life, and after her death to hand over the residue to the daughter's child or children, and if she should die without leaving issue, then to divide the residue among certain persons named. The daughter having claimed and received payment of legitim the trustees accumulated the income of the estate, and at the expiry of twenty-one years from the truster's death the loss caused to the estate by the payment of legitim had not been made good. *Held (dis. Lord Salvesen)* that the accumulations of income subsequent to the expiry of twenty-one years from the truster's death were illegal under the Thellusson Act, and fell to be paid to the daughter as heir *ab intestato* of the truster.

The Thellusson Act (39 and 40 Geo. III, cap. 98) enacts—Section 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 or settler, devisor or testator; or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mère* 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 direct-

ing such accumulations would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated: And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulations had not been directed." Section 2—" . . . 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 . . . , but that all such provisions and directions shall and may be made and given as if this Act had not passed."

John James Lunham and another, the surviving trustees of Mrs Jane or Jeannie Drysdale or Innes, sometime of Dunbar House, Enniskillen, Ireland, and thereafter of North Mansionhouse Road, Edinburgh, *first parties*, Mrs Jeannie Cowie Drysdale Innes or Bowen, Bristol, wife of Chetwood Hamilton Bowen, Bangor, Ireland, and the only child of the testatrix, *second party*, and Captain Reginald Charles Bowen, Eastbourne, Sussex, and others, the contingent residuary legatees of the testatrix or their representatives, *third parties*, presented a Special Case for the opinion and judgment of the Court to determine the disposal of the income of the trust estate destined under the will of the testatrix in *liferent*, and left undisposed of in consequence of the second party having claimed legitim.

The Case stated, *inter alia*—"1. Mrs Jane or Jeannie Drysdale or Innes (hereinafter referred to as the testatrix), sometime of Dunbar House, Enniskillen, in the county of Fermanagh, Ireland, thereafter of No. 21 North Mansionhouse Road, Edinburgh, and latterly residing at 26 Castle Terrace there, widow of Edward Hally Innes of Dunbar House aforesaid, died at 26 Castle Terrace aforesaid on 23rd November 1893, predeceased by her husband Edward Hally Innes, and survived by her only child, her daughter, Mrs Jeannie Cowie Drysdale Innes or Bowen, the second party hereto. 2. The testatrix left a will, dated 18th September 1889, registered in the Books of Council and Session on 31st March 1894, and recorded in the Court books of the Commissariat, Edinburgh, on 26th April 1894. The first parties hereto are the sole surviving trustees acting thereunder. The second party is the wife of a domiciled Irishman, to whom she was married in 1885. She has been living apart from him for many years. By the Married Women's Property Act 1882, which is applicable to Ireland, it is provided that a married woman may sue in all respects as if she were unmarried, and her husband

need not be joined with her as plaintiff or defendant, or made a party to any action or other legal proceedings brought by or taken against her. 3. By her will the testatrix, after appointing trustees and executors, authorising payment of debts, funeral and testamentary expenses, and bequeathing certain legacies, directed the income of the residue of her estate to be paid to the second party during her natural life, and after her death the testatrix directed the residue to be handed over to such child or children of the second party as she might by her will direct, and failing such direction, then to all her children equally, or if she left only one, then to him or her absolutely. In the event of the second party dying without leaving any issue, then the testatrix directed the residue to be divided amongst the Indigent Gentlewomen's Fund, Edinburgh (described in error in her will as the Indigent and Aged Gentlewomen's Fund), the now deceased Isabella Drysdale, Mrs Janet Kirk, Mrs Arabella Louisa Howson, and Llewellyn Drysdale Innes Graham in equal shares. 4. The second party has one child, Captain Reginald Charles Bowen. He and the contingent residuary legatees, or their representatives, are the third parties hereto. 5. The trustees nominated by the testatrix accepted office and confirmed to estate amounting to £14,810, 18s. 10d. 6. The second party claimed legitim from the estate of the testatrix, and instituted an action in this Court against the trustees of the testatrix, to have it found and declared that the testatrix was at the date of her death domiciled in Scotland, and that she was entitled to such legitim. By interlocutor, dated 19th November 1895, the Court found and declared in terms of the declaratory conclusions of the summons, and by interlocutor, dated 11th March 1896, the Court found that the balance of legitim due by the trustees of the testatrix to the second party, exclusive of her reserved claim therein mentioned, with interest as at 3rd February 1896, amounted to £6381, 15s. 9d., with certain additional interest as mentioned in the interlocutor, and ordained the trustees to pay her the said sums on delivery by her of a discharge. The said sum of £6381, 15s. 9d. was thereafter paid to the second party, and by discharge granted by her, dated 12th and 13th March 1896, and registered in the Books of Council and Session on 5th July 1910, she acknowledged receipt of the said sum of £6381, 15s. 9d. and all interest due thereon. Thereafter a settlement took place of said reserved claim above mentioned, conform to agreement and discharge by and between the said trustees and the second party, dated 11th, 12th, 14th, and 15th July 1898, and registered in the Books of Council and Session on 16th July 1909. 7. The trustees of the testatrix, since settling the second party's legitim, have accumulated the income of the remaining trust estate, and have duly made up periodical accounts of charge and discharge, which have been audited by the Auditor of the Court of Session. From the account of charge and discharge, closing at 30th June 1914, the trust estate, exclusive of certain

Irish assets at that date, but including the said accumulations of income, amounted to £2408, 3s. 4d. The annual income of the trust estate is estimated at about £118 (including therein about £43, being the share falling to the trust of the testatrix of the net annual income received from the said Irish estates), but this income is subject to the legal expense of administration. The accumulated revenue which but for the second party claiming legitim would have fallen to be paid to her as liferentrix of the residue of the testatrix under the provisions of her will is estimated to have approximately amounted at 23rd November 1914 (being twenty-one years from the date of testatrix's death) to £1250 0 0
Deducting this sum from the amount of legitim paid to her as aforesaid 6381 15 9
the balance is £5131 15 9
The second party is over fifty years of age, and it is deemed improbable that the sum withdrawn for her legitim could be fully compensated by the income accruing during her life. 8. Questions have now arisen in regard to whether the first parties are entitled to continue accumulating the income from the trust estate of the testatrix subsequent to 23rd November 1914 in respect of the provisions of the Accumulations Act 1800, generally known as the Thellusson Act, and as to the rights of the second party therein in her capacity as heir-at-law and next-of-kin of the testatrix."

The *questions of law* were—"1. Are the first parties entitled to accumulate during the lifetime of the second party or until the sums withdrawn by her as legitim are replaced to the trust estate, the income of the trust accruing since 23rd November 1914? or 2. Do the provisions of the Thellusson Act render it illegal for the first parties to accumulate such income? 3. If question 1 is answered in the negative and question 2 in the affirmative, does the income which has accrued since 23rd November 1914, and may hereafter accrue during the lifetime of the second party, fall to be paid to her?"

Argued for the second party—The accumulations in the present case were the result of the directions of the testatrix and of the election of a beneficiary, and were struck at by the Accumulations Act 1800 (39 and 40 Geo. III, cap 98—Thellusson Act)—*Lees' Trustees v. Fingzies*, 1896, 34 S.L.R. 613 (O.H. Lord Kyllachy); *Lord v. Colvin*, 1860, 23 D. 111; *Logan's Trustees v. Logan*, 23 R. 848, per Lord McLaren at p. 852, 33 S.L.R. 638; *Hutchison v. Grant's Trustees*, 1913 S.C. 1211 (O.H. Lord Hunter), 51 S.L.R. 6. The accumulations in the present case were not accumulations for the payment of debt, but were accumulations to make up an amount out of which a debt had been paid. They were not therefore protected by the second section of the Thellusson Act (*cit. sup.*)—*Heathcote v. Trench*, [1904], 1 Ch. 826—even if that section applied to Scotland—Entail (Scotland) Act 1914 (4 and 5 Geo. V, cap. 43), section 9. The English cases founded on by the other parties were not in point, because there the accumulations took place

for the purpose of restoring dilapidation, but in the present case there was no dilapidation, because legitim was a debt due by the truster and did not require to be restored. Further, *esto* that this was a debt, it had been paid and income could not be accumulated to recoup it.

Argued for the first and third parties—The Thellusson Act was not a universal prohibition against accumulations. It had never been applied to any case except where under the will itself there was an implied direction to accumulate. In the present case there was no such implied direction. The accumulations in the present case arose in consequence of the rule of law of equitable compensation and in defiance of the wishes of the testator. It was only accumulations that arose in consequence of the testator having settled his estates in a particular way that were struck at. To decide otherwise would be to make all equitable compensation after twenty-one years impossible—*Smyth's Trustees v. Kinloch*, 1880, 7 R. 1176, 17 S.L.R. 783; *Macfarlane's Trustees v. Oliver*, 1882, 9 R. 1138, 19 S.L.R. 850; *Rose's Trustees v. Rose and Others*, 1916 S.C. 827, 53 S.L.R. 630; *Mitchell's Trustee v. Fraser*, 1915 S.C. 350, 52 S.L.R. 293; *Lindsay's Trustees*, 1911 S.C. 584, 48 S.L.R. 470; *In re Mason*, [1891], 3 Ch. 467; *In re Gardiner*, [1901], 1 Ch. 697, *per* Buckley, J., at p. 700. Where accumulations took place for the purpose of preserving the capital of the estate, they were not struck at by the Thellusson Act because they were really of the nature of a sinking fund. The trustees in the present case were merely restoring dilapidation and not adding to the estate. The evil the Act was intended to remedy was stated in the preamble, and reference might be made thereto in order to construe the operative sections. Even if the Act applied, legitim was a debt *inter hæredes*, and therefore fell under section 2 of the Thellusson Act. This question was not affected by section 9 of the Entail (Scotland) Act 1914 (*cit. sup.*).

At advising—

LORD JUSTICE-CLERK—This Special Case raises a question as to the effect of the Thellusson Act.

The facts may be briefly stated—The testatrix was a widow when she made her will; it was executed in 1889. The testatrix died domiciled in Scotland in 1893. By her will she made certain provisions for her daughter (the second party), which the latter repudiated and claimed her legitim. The amount due as legitim has been paid to her. Thereupon the legal doctrine of equitable compensation came into operation under which the sums annually payable to the daughter fell to be accumulated for the benefit of those who had been prejudiced by the said second party's election until the amount abstracted as legitim had been fully compensated. The period during which the said doctrine will require to operate until full compensation has been made exceeds that allowed by the Thellusson Act. The question is whether these accumulations are subject to the provisions of the said Act.

That question has been decided in the affirmative in a case admittedly indistinguishable from the present by Lord Hunter, whose judgment was not reclaimed against but is now challenged as incorrect in law. I am of opinion that Lord Hunter rightly interpreted the Statute of 1800.

That statute in my opinion prohibits all accumulations extending over a period exceeding twenty-one years after the testator's death brought about by any will or trust deed subject to certain exceptions which do not apply in the present case. It is not necessary that the will or trust deed should expressly provide for or direct the accumulations; it is in my opinion sufficient that in the events which have happened, the executors or trustees, who have the duty to administer the estate, must in the discharge of their duty accumulate the interest or income beyond the period allowed by the statutes.

The truster could not interfere with the second party's right to claim legitim, the truster's absolute power of disposal by will or trust deed being limited to the dead's part, but she could within limits effectively prescribe results which would follow if a claim to legitim were insisted in. But when a claim to legitim had been enforced there came into operation, in respect of the terms of the trust deed, the doctrine of equitable compensation, whereby in respect of these terms accumulation of income had to take place. That accumulation was the direct result of the trust deed, and it was the result which I think the truster must be held to have known would inevitably follow if the second party's claim to legitim were made and pressed to payment. I think therefore that the accumulation was directed by the trust deed so as to be struck at by the Act.

This seems to me to be the result of a fair interpretation of the statute which prohibits any person from making a settlement of property so and in such a manner that an accumulation shall result as events turn out for a period in excess of the statutory limit.

I think this view has been judicially accepted as the correct one in *Lord v. Colwin*, 1860, 23 D. 111, and in *Maxwell's Trustees*, 5 R. 248, 15 S.L.R. 155. I also refer to *Matthews v. Keble*, L.R., 3 Ch. 691, where Lord Cranworth's dictum that "if a testator directs his property to go in such a course that upon certain contingencies there must be an accumulation beyond twenty-one years, he does direct that upon these contingencies the accumulation shall take place beyond that time," was accepted as sound and as bringing the Act into operation. I also refer to Jarman on Wills, (4th ed.) p. 313.

In my opinion the cases dealing with such matters as payment of premiums on a policy of insurance or repairing property belonging to the trust are not in any way adverse to the views I have expressed. In the present case the very thing that is being done is to accumulate the produce of part of the estate, which is exactly what is prohibited. This is, in my opinion, just to accumulate the produce of those parts of

the estate which but for the doctrine of equitable compensation would have been payable to the truster's daughter so as to add to the fund which fell to be distributed in terms of the trust deed. I think, for the purposes of this case, what Bell says of legitim (Principles, sec. 1502)—“Legitim is generally stated as a share of the goods in communion belonging to the children on dissolution of the marriage”—may be accepted as accurate. But however that may be, the statute does not in my opinion permit accumulation for recoupment of what has been paid in name of legitim. Reference may be made to *In re Heathcote*, 1904, 1 Ch. 826.

I have dealt with the trust deed as that of a domiciled Scotswoman who must be held to have known the law of Scotland as to legitim and equitable compensation. But even if she had not that knowledge I would have reached the same result.

In my opinion the questions ought to be answered as follows—(1) In the negative; (2) In the affirmative; (3) In the affirmative.

LORD DUNDAS—The truster by her settlement directed her trustees to pay the income of the residue to her daughter, the second party, during her natural life, and after her death to hand over the residue to her child or children, and if she should die without leaving issue then the trustees were directed to divide the residue among persons named, who, along with the only son of the truster's daughter, are the third parties. The second party claimed and received payment of her legitim in lieu of the life-tenant provision above mentioned. There being no declaration that that provision was to be in full satisfaction of legitim, it was not completely surrendered or forfeited; but the rule of equitable compensation emerged, whereby the provision enured to the benefit of those prejudiced by the second party's election to claim her legal rights, until the sum removed from the capital of the estate for payment of legitim should be fully recouped, which being effected the second party might again claim as against the estate—*Macfarlane's Trustees*, (1882) 9 R. 1138, 19 S.L.R. 850. Contrast *Rose's Trustees*, 1916 S.C. 827, 53 S.L.R. 630. The trustees properly proceeded to accumulate the income of the estate and apply it yearly towards making good the loss incurred by payment of the second party's legitim. On the expiry of twenty-one years from the truster's death the loss had not been made good.

The question arises, whether these yearly accumulations must cease as from 23rd November 1914, as being struck at by the Thellusson Act. It is important to observe that there is no gift of the fee other than a direction to pay it after the daughter's death to her child or children, whom failing to the other beneficiaries named. On 23rd November 1914, therefore, I take it there had been no vesting—certainly no absolute vesting—of the fee in anyone—*Bryson v. Clark*, (1880) 8 R. 142, 18 S.L.R. 103. In these circumstances it seems to me that further accumulation of the in-

come is prohibited by the Thellusson Act.

That Act, on the preamble that it is expedient that all dispositions whereby the profits and produce of the estate are directed to be accumulated and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions thereinafter contained, enacts, *inter alia*, that no person shall, after the passing of the Act, by any deed settle or dispose of property so and in such manner that the profits or produce thereof shall be accumulated for any longer term than twenty-one years from the death of the granter. It is well settled that an implied direction to accumulate will involve the application of the above prohibition as well as an express one. Now I think we are bound to assume on the part of this truster (as of every other Scots truster) a knowledge of the general law of Scotland, and particularly of the right of a daughter to claim legitim and the legal results of such a claim in regard to the administration of the estate. The position is not substantially different from what it would have been if the truster had expressly added to her bequest of the life-tenant such words as these—“And if my daughter shall elect to claim her legal rights then the income of the residue shall be accumulated and applied towards the equitable compensation of those prejudiced by her said claim until the capital sum paid to her in name of legitim shall be made good to my estate.” Now in the circumstances which have arisen the estate was not, on the expiry of twenty-one years from the truster's death, fully compensated for the loss sustained by payment of the daughter's legitim. It seems to me that the direction which I have supposed to have been expressed in the settlement, and which in my judgment was impliedly involved therein, is precisely one of the nature struck at by the Act. If at the expiry of the twenty-one years it had been known—which in my judgment it was not—in whom the capital of the estate had vested, then the yearly payments of income might lawfully have been continued to be made to that person, not, however, as accumulations, but as payments due to him according to the rule of equitable compensation. But inasmuch as when the twenty-one years ran out it was still uncertain whether the truster's grandson would survive his mother, or whether the destination-over to third parties would take effect, further accumulation of income became, in my opinion, illegal in virtue of the Thellusson Act. The second party must therefore, in my judgment, prevail.

This result is, I think, in accordance with the decided cases. I agree in result with Lord Hunter's judgment in *Hutchison* (1913 S.C. 1211, 51 S.L.R. 6), where the facts were substantially identical with those here present. In *Logan's Trustees* ((1800) 23 R. 848, 33 S.L.R. 638) there was, as here, no vesting at the expiry of the twenty-one years. The Act was held to apply. The recent decision of this Division in *Mitchell's Trustees* (1915 S.C. 350, 52 S.L.R. 293) is not, I think, in any way discrepant. I gather

that the Court considered that the fee of the residue had vested in the testator's issue as a class, subject to the trustees' discretion in administering the benefit to those of the class whom they might think "most deserving." In *Lord v. Colvin* (1860) 23 D. 111 the Act was held to apply because the necessity for accumulating the income arose, in the opinion of the learned Judges, from the provisions of the settlement in the circumstances which had occurred, as I think it clearly did in the case before us. It was pointed out (*cf., e.g., per Lord Ivory, p. 127*) that a different situation would arise where, as in the case, *e.g.*, of a lunatic, it might be necessary as matter of prudent administration to accumulate beyond the period of twenty-one years the bulk of the income of an estate which actually belonged to him. So again in *Mitchell's Trustees* Lord Salvesen figured the case of an absentee not known to be dead, to whom, if alive, the estate belonged—1915 S.C., at p. 357. But no such situation is, as I have explained, here present, for the fee of the estate was not, when the twenty-one years expired, and is not yet, vested in anyone. It has been held in England (*cf., e.g., In re Gardiner*, [1901], 1 Ch. 697, and cases cited there) that a direction to apply rents for more than twenty-one years may be outside the purview of the Act if the purpose is merely to preserve the property or prevent it from being diminished. The doctrine, however, does not seem to me to be applicable here, for the object of the accumulations after twenty-one years would be to increase the dead's part of the estate of the testatrix, over which alone, of course, she had absolute legal power of testamentary disposal.

I may add that the case does not, in my judgment, fall within the exception in section 2 of the Thellusson Act. I agree with Lord Hunter (*Hutchison*, 1913 S.C., at p. 1215, 51 S.L.R. 6) that what was here done was not "in any proper sense payment of debt either of the truster or of anyone else."

For these reasons I am of opinion that we should answer the first question put to us in the negative, and the second in the affirmative. It was conceded that if these questions were so answered the answer to the third question must be in the affirmative.

LORD SALVESEN—The question raised in this case is of general importance. It has been the subject of decision in the Outer House in the case of *Hutchison* (1913 S.C. 1211, 51 S.L.R. 6), but the present case has been brought in order that that judgment may be submitted to review.

The will under which the question arises is one containing very simple provisions. The testatrix, after providing for payment of certain legacies, directed the income of the residue of her estate to be paid to her daughter during her natural life and after her death to certain residuary legatees. Admittedly no vesting has taken place in these residuary legatees, as they cannot be ascertained until the liferenter's death. Her

son, however, if he survives, will take as a contingent residuary legatee.

This will neither expressly nor by implication directed accumulation of income. On the contrary, if the daughter had accepted the provision made for her the whole of the income would have been paid over to her. She, however, preferred to claim her legal rights, and as the testatrix was at the date of her death domiciled in Scotland the trustees had no answer to the claim of legitim. This claim absorbed all but £1000 or so of the trust estate after legacies had been duly paid, and this sum, with the accumulated interest for twenty-one years, is the amount which the trustees now have in hand.

Under the principles established in *Macfarlane's* case (9 R. 1138, 19 S.L.R. 850) the estate fell to be compensated out of the income that would otherwise have been payable to the liferentrix, and as soon as full compensation had been made she would have been entitled to demand the income in virtue of the settlement itself. The fund just now amounts to £2408, and it is stated that the daughter, who is the second party, is now over fifty years of age, and that it is thought improbable the sum she withdrew for her legitim could be fully compensated by the income accruing during her life. Looking to the higher return for money which is now being obtained, it is, however, not impossible, for at 5 per cent. compound interest the £2408 ought to be doubled in fifteen years, and within a few years thereafter might well be brought up to the amount still required in order to make up the sum withdrawn from the estate in name of legitim. There is no apparent improbability that the second party may survive to the age of seventy or eighty, and it appears to me that the Court cannot proceed on any such ground. It so happens that the second party, who by claiming legitim has defeated to a large extent the rights of her son or residuary legatees who may ultimately succeed, is the sole heir in moveables of the testatrix, and therefore, according to the judgment which I understand your Lordships propose to pronounce, will take the income of the fund which she reduced by £6381 when she claimed her legal rights instead of taking the liferent provided under the will. It might, however, well have been otherwise, in which case it would have been her interest to maintain that the other heirs should not be allowed to draw a share of the income which if lawfully retained by the trustees would go to build up a fund the whole income of which would eventually come to her.

The Thellusson Act does not expressly declare all accumulations for more than twenty-one years to be illegal. It has been repeatedly held in England that accumulations of income which are directed for the purpose of maintaining the capital of the estate intact do not fall within the Thellusson Act. Cases have occurred in Scotland, such as *Mitchell's Trustees* (1915 S.C. 350, 52 S.L.R. 293), which illustrate the same view. In that case it was held that certain accumulations of income beyond twenty-one years were due not to the direction, express

or implied, of the testator, but to the extraneous circumstance that no occasion for payments out of income had in the opinion of the trustees as yet arisen. Similar cases may be figured, as, for instance, where the trustees are directed to pay the income of a large fund to a lunatic whose maintenance can only absorb a very small proportion, and where accumulations of income beyond twenty-one years require to be made because there is no occasion for spending the whole income on the liferenter. I cannot imagine that in such a case the Thellusson Act should apply on the footing that the testator was bound to contemplate the possible lunacy of the object of his bounty, and so to have impliedly directed that in such an event the income beyond what was necessary for the lunatic's maintenance should be accumulated for a period that might exceed twenty-one years. There appears to me to be no better reason for the view, which commends itself to your Lordships, that the testatrix in this case ought to have contemplated that her daughter would not accept the liferent of her whole estate, which she had bequeathed to her, more especially as the fee was destined to her own children in the first instance. On the contrary, I think it is plain that had she contemplated such a possibility she would have made other and different directions in her will. It may be noted, although this does not probably affect the legal question, that the will itself was drawn by Irish solicitors at a time when the testatrix was domiciled in Ireland, where such a claim as legitim is unknown.

I understand that your Lordships base your decision on the opinions delivered in the case of *Lord v. Colvin* (23 D. 111), where the broad general proposition is laid down that where accumulations are directed expressly or by implication by the terms of the deed, and also where accumulation is the necessary consequence of the directions given, the Thellusson Act applies. As I pointed out in the case of *Mitchell's Trustees*, this statement of the law, which I quoted from Lord Anderson's judgment, may have to be enlarged in view of the decision in the case of *Logan's Trustees* ((1890) 23 R. 848, 33 S.L.R. 638), for a direction to accumulate until the death of the last of certain persons who in fact survive more than twenty-one years must be held to be an implied direction to accumulate in that event for a period in excess of the statutory limit, and is therefore bad. In all these cases, however, the accumulations resulted from the scheme of the will itself. The testator may not have contemplated that the annuitants would survive so long, but he had this possibility before his mind at the time when he made his will, and it cannot be supposed that he would have made any other directions though he had had fully in view the probability of an accumulation taking place during a period in excess of twenty-one years.

In the present case I cannot find any direction, express or implied, in the settlement itself, nor do I think that the testatrix must be held to have had in contempla-

tion the possibility of her daughter claiming her legal rights according to the law of Scotland. I cannot accept the view that the testatrix was dealing only with the dead's part. She disposed her whole estate to trustees, and she did so on the footing that if her settlement was carried out as she must be held to have intended there would be no accumulations of income at all. To use Lord Guthrie's language in the case of *Mitchell's Trustees*, "the testator neither ordered accumulations nor did he contemplate accumulations. If accumulations have arisen, or do hereafter arise, this will not be in consequence of the provisions of his will, but will be the result either of the trustees' failure to give a reasonably liberal interpretation to the provisions of the testator's will or to the accidental absence from time to time of any suitable beneficiaries." In that case it might just as reasonably have been held as here that the testator was bound to contemplate the possibility of there being no suitable beneficiaries for a period in excess of twenty-one years, and therefore had impliedly directed accumulations to which the Thellusson Act applied. The case was figured in argument that if the testatrix here had provided that in the event of her daughter claiming legitim she had directed the remainder of the estate to be accumulated until the amount withdrawn by way of legitim had been restored, there would have been a clear case for the application of the Thellusson Act. In my opinion that does not follow, for the purpose of the accumulations would have been to restore the capital to its original amount, and that purpose is, I take it, not struck at by the Thellusson Act. One might figure the case of express provision being made in the event of dilapidations of a landed estate that no income should in that event be distributed, but that the whole income should be accumulated until the dilapidations had been made good. According to the English authorities such accumulations of interest, though exceeding twenty-one years, would not fall under the Act.

The loss of the estate in the present case has not arisen from any unexpected debt which the estate had to meet, for a claimant to legitim is only a creditor *inter hæredes*. It is a loss of part of the *corpus* of the estate itself through operation of law. It is therefore, in my opinion, within the exception indicated in the case of *Lord v. Colvin*, and within the rule of the English decisions. The effect of a judgment in the opposite sense is in every case to limit the operation of equitable compensation to a period not exceeding twenty-one years. Such a limitation has never been hinted at in any of the cases on that subject. On the contrary, they all state that the accumulations of income must go on until the full amount by which the estate has been depleted owing to the claim of legitim has been restored. In one sense the second party is a debtor to the estate until she has made such restoration, at all events to the effect of not being able to claim a provision that would otherwise be due until

complete compensation has been made. Assuming the second party's son to survive her and to become entitled to the residue of the estate, he will find that in virtue of your Lordships' judgment he will be entitled to no more than £2400, whereas, on the assumption that the Act does not apply, if his mother lived long enough he would receive the capital of the estate which was destined to him by the will, which would amount to something like three times that amount. For these reasons I am unable to concur in the proposed judgment.

LORD GUTHRIE—If question 2 is answered in the affirmative it is admitted that the answer to question 1 must be in the negative and the answer to question 3 in the affirmative. I am of opinion, with your Lordship and Lord Dundas, that the second party is entitled to have question 2 answered in the affirmative.

Even if payment of legitim could be considered payment of a debt in the sense of the exception in the statute, which I think it cannot, legitim has been paid and the exception cannot apply.

The main question in the case seems settled by authority; and I do not think that the success of the second party will involve the extension of the operation of the Thellusson Act beyond what has been settled in previous cases.

On the terms of the deed it is essential to notice that the fee of the residue, the liferent of which was bequeathed to the second party, is not vested. This fact deprives the decision in the case of *Mitchell's Trustees* (1915 S.C. 350, 52 S.L.R. 293) of all application. Equally, cases such as those figured in argument of minors and trustees and disappeared persons in whom a right has vested have no application.

On the application of the Thellusson Act it is admitted that an express direction to accumulate is not necessary; it will be sufficient, it is admitted, if the terms of the deed, apart from circumstances accidentally emerging, necessitate accumulation. But it is said that in this case the terms of the deed did not necessitate accumulation; accumulation has resulted from the accidental circumstance that the second party, in the absence of an antenuptial marriage-contract between her parents excluding a claim for legitim claimed her legitim, and that the trustees must accumulate under the operation of the doctrine of equitable compensation. This argument seems to me to have been put forward and negatived in the case of *Lord v. Colvin*, 23 D. 111. In that case the executors of the testator pleaded "that the Thellusson Act does not apply, as the deed contains no direction, either express or implied, necessarily leading to the accumulations in question; and the Act does not prohibit accumulations arising, not from the terms of the deed, but from accidental circumstances which have emerged and the application of the ordinary rules of law to them." In *Lord v. Colvin* the accidental circumstance was the failure of the persons to whom the

testator had left the intermediate income of his estates. Notwithstanding, the Court held that the Act applied. Mr Fleming founded on passages in the opinions of the Judges where accumulation is said to have followed from the necessary operation of the terms of the deed. But these opinions must be read in reference to the terms of the deed which, had the expectation of the testator as to the survivance of certain of his beneficiaries been realised, would not have led to accumulation. I do not doubt that this view was before all the Judges. In some of the opinions it is clearly expressed. For instance, the Lord President (at p. 124) says—"It is an accumulation resulting from the provisions of this deed in the circumstances which have occurred."

The only further distinction which has been suggested in answer to this view depends on the assumption that while minority, lunacy, disappearance, as ordinary incidents in human life, must be held to have been in the contemplation of every testator, such a possibility as a claim for legitim and the resulting effect of the doctrine of equitable compensation is in a different position, because, first, it is not reasonable to suppose that either the legal right or the legal rule would be known to any ordinary testator like the deceased, and because, second, even if known, it is not reasonable to suppose that an ordinary testator would ever contemplate the right and rule coming into operation in connection with his or her will. I find no warrant for this distinction in the decided cases, and I see none in principle or in good sense. It is not necessary to invoke the rule that every testator must be presumed to know the law and to have had it in view in making settlement. When the circumstances render such a clause applicable there is no commoner provision than a forfeiture of conventional provisions if legal rights are claimed, and it seems impossible satisfactorily to distinguish the law as to equitable compensation from other rules of law, such as the rule in the case of disappeared persons that, apart from the provisions of the Presumption of Life Acts, estate cannot be divided till one hundred years after the birth of the disappeared person.

I also agree with your Lordships that the rule applied in the cases of *In re Mason* ((1891) 3 Ch. 467) and *In re Gardiner* ((1901) 1 Ch. 697) does not apply to this case. The estate to be looked at in the construction and application of a statute like the Thellusson Act, whatever might be the view in the case of a will, is the estate of which the deceased had a legal right to dispose. Legitim has been paid out of estate which the law disposes of for a deceased in the event of anybody being in a position and being ready to make the appropriate claim. There is therefore no room for the argument that the sums in question have been accumulated to repair dilapidation of the testator's legal estate.

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

Counsel for the First and Third Parties—
—Wilton, K.C.—D. P. Fleming, Agent—
James Gibson, S.S.C.

Counsel for the Second Party—Macphail,
K.C.—J. G. Thom. Agents—Melville &
Lindesay, W.S.

Wednesday, December 10.

SECOND DIVISION.

(BEFORE SEVEN JUDGES.)

[Sheriff Court at Edinburgh.]

SMITH v. BARCLAY AND ANOTHER.

Landlord and Tenant—Emergency Legislation—Removing—Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 (5 and 6 Geo. V, cap. 97), sec. 1 (3)—“Satisfactory Ground” for Ejection Order.

The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, section 1 (3), enacts—“No order for the recovery of possession of a dwelling-house to which this Act applies, or for the ejection of a tenant therefrom, shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this Act and performs the other conditions of the tenancy, except on the ground that the tenant has committed waste, or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighbouring occupiers, or that the premises are reasonably required by the landlord for the occupation of himself or some other person in his employ or in the employ of some tenant from him, or on some other ground which may be deemed satisfactory by the court making such order. . . .”

The tenant of a dwelling-house to which the Act applied gave notice to the landlord on 26th February 1919 that she intended to vacate the house at the following Whitsunday term and recommended a new tenant. The landlord let the house to the new tenant as from the Whitsunday term. The old tenant refused to vacate the house, but the new tenant held the landlord to his contract with her, whereupon the landlord brought an action of ejection against the old tenant. The Court granted decree of ejection, *holding* that if the Act applied the circumstances of the case constituted a “satisfactory ground” within the meaning of the sub-section for making the order.

Opinion reserved per the Lord President, Lord Dundas, Lord Guthrie, Lord Mackenzie, and Lord Cullen as to whether the Act applied.

Opinion per Lord Mackenzie that it was not competent for a tenant to contract himself out of the Act *ab ante*, and contract that he was to have none of the benefits of the Act, but it was competent for him to prevent tacit relocation.

Opinion per Lord Guthrie that in a

case to which the Act applied, and in which the discretion of the Court to grant ejection did not apply, contracting out could not be sustained.

The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 (5 and 6 Geo. V, cap. 97), section 1 (3), is *quoted supra in rubric*, . . .”

Sydney Scope Shedden Smith, Moness, St Ninian’s Road, Corstorphine, *pursuer*, brought an action in the Sheriff Court at Edinburgh against Mrs Margaret Barclay and her husband George Barclay, 34 Comely Bank Avenue, Edinburgh, *defenders*, in which the pursuer craved a warrant of summary ejection against the defenders.

The following narrative of the *facts* is taken from the note of the Sheriff-Substitute, *infra*:—“The house in question belongs to the pursuer, who let it to the defender Mrs Barclay on a yearly lease from Whitsunday 1916 to Whitsunday 1917, subsequently renewed each year. The rent is £19, 19s. The said defender admittedly intimated in writing on 26th February 1919 that the let was to be terminated and the house vacated at the term of Whitsunday 1919. The pursuer accepted this intimation, and in consequence thereof considered himself free to let the house to another tenant, and did let the house to another tenant with entry at the said term. But defender now refuses to leave the house, and pleads that she is entitled to continue in occupation. She explains that a lease of other premises which her husband, the defender George Barclay, entered into has fallen through, and that they have failed to find accommodation elsewhere.”

The pursuer *pleaded*—“1. It being reasonable and necessary in the circumstances condescended on that the pursuer should obtain immediate possession of the house, decree should be pronounced as craved, with expenses. 2. The defences being irrelevant, ought to be repelled. 3. The defenders having given notice to terminate the said lease, and the pursuer having accepted and acted thereon, the defenders are barred *personali exceptione* from founding on the said Act.”

The defenders *pleaded*—“1. The action is incompetent as laid. 2. The pursuer’s averments are irrelevant and insufficient to support the conclusions of the summons. 3. The said house not being required by pursuer for his own occupation or for an employee, or on any ground which can be deemed satisfactory in the circumstances stated, decree of absolvitor should be granted with expenses. 4. It being reasonable in the circumstances that the defenders should be allowed to retain possession of the subjects the defenders should be assolizied.”

On 1st August 1919 the Sheriff-Substitute (ORR) pronounced an interlocutor in which he repelled the first and second pleas-in-law for the defenders, sustained the pursuer’s second and third pleas-in-law, and granted warrant as craved.

Note.—[*After the narrative quoted supra*]—“Pursuer does not say he warned out the defender; his case is founded on the fact that defender voluntarily and uncondi-