LORD SANDS was not present.

The Court answered the first question of law in the affirmative and the second question in the negative.

Counsel for the Appellant—Gentles, K.C. —Macdonald. Agents—Cornillon, Craig, & Thomas, W.S.

Counsel for the Respondents—Lord Advocate (Hon. William Watson, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Friday, December 15, 1922.

FIRST DIVISION.

WATSON'S TRUSTEES *v.* BROWN AND OTHERS.

Succession—Accumulations—Implied Direction to Accumulate—Applicability of Thellusson Act (39 *and* 40 *Geo. III, cap.* 98).

A testator directed his trustees, *inter alia*, to set apart and hold a sum of £120,000 for behoof of the elder of his sons in liferent, for his liferent alimentary use allenarly, and the son's children in fee, the fee being payable to the children upon their respectively attaining the age of twenty-five years, with a destination-over in the event of their failing to attain that age. Provisions subject to the same conditions were made for the younger son and the testator's daughters and their children. With regard to the residue of his estate the testator directed his trustees to hold certain further sums for his daughters and their children subject to the same conditions as those applicable to the original bequests and under the declaration that "the increased provisions out of residue shall not be payable until my trustees shall have accumulated sufficient funds to meet the whole of the same." The remainder of the residue was bequeathed to his two sons equally, the issue of either son in the event of his predeceasing the time of payment to be entitled on their respectively attaining the age of twenty-five years to their parent's share, with a destination-over in the event of failure of issue. Power was given to the trustees to apply during the minority of the beneficiaries the whole or such portion as they should think proper of the annual income towards the maintenance, education, and upbringing of the prospective fiars. The testator's estate at the date of his death consisted mainly of unexhausted minerals and was not then sufficient to pay the original and the residuary legacies. As funds became available the trustees set aside sums in accordance with the testator's directions. The elder son, who died shortly after the testator, enjoyed during his lifetime the liferent of the £120,000, but received no part of the share of the residue destined to him. After his death the trustees accumulated such part of the income of the £120,000 as they did not use for the benefit of his children, and having set aside sums to account of his share of residue accumulated the income thereof. The elder son's children did not attain twenty-five years of age until more than twenty-one years after the testator's death. *Held* that there was an implied direction to accumulate, and that accordingly the restrictions of the Thellusson Act applied to the income accruing from the sum of £120,000 and from the elder son's share of residue after the expiry of twenty-one years from the testator's death.

Mitchell's Trustees v. *Fraser*, 1915 S.C. 350, 52 S.L.R. 293, *distinguished.*

Succession—Will—Construction—Accumulations Struck at by Thellusson Act—Whether Falling into Residue or into Intestacy—No Beneficiary with Vested Right.

By the residuary clause of his settlement a testator directed his trustees with regard to the residue of his estate, including therein all accumulations of revenue so far as not required for the purpose of the trust, to pay and convey it at a postponed term of payment equally between his two sons, the issue of either son predeceasing the term of payment to take their respective parent's share on attaining twenty-five years of age. The elder son predeceased the term of payment without having acquired a vested right in his share of residue, and none of his children attained the age of twenty-five until more than twenty-one years after the testator's death. *Held* (1) that, looking to the terms of the residuary clause, accumulations prohibited by the Thellusson Act fell into residue, but (2) that so much as did not fall to be paid away under a vested and payable residuary gift did not fall to be added to residue but fell into intestacy.

Succession—Accumulations Struck at by Thellusson Act—Income Arising from Accumulated Rents of Heritage and Falling into Intestacy through Operation of Act—Whether to be Taken by Heirs in Mobilibus or Heir in Heritage.

The income of a share of residue derived from rents of heritage accumulated by testamentary trustees for a period of twenty-one years after the testator's death, fell at the end of that period into intestacy owing to the combined operation of the Thellusson Act, and the non-existence of anyone having a vested and present right to residue. *Held* that the income fell to be paid to the heirs *in mobilibus* of the testator and not to the heir-at-law.

Logan's Trustees v. *Logan*, 23 R. 848, 33 S.L.R. 638, *followed.*

Succession—Collation inter hæredes—Accumulations Falling into Intestacy through Operation of Thellusson Act—Whether Representative of Heir in Heritage a morte Claiming to Share therein was Bound to Collate.

The heir in heritage *a morte* of a testator having taken under the settlement rights in the heritable succession, *held* that his testamentary representative was not entitled without collating the heritage to which the heir had succeeded, to a share of moveable estate which owing to the operation of the Thellusson Act fell to be divided among the testator's heirs *in mobilibus*, of whom her author was one.

The Thellusson Act, section 1, provides that no one shall thereafter settle any real or personal property by will or otherwise in such manner that the rents, profits, or produce thereof shall be "wholly or partially accumulated for any longer term than the life... of any such... settler... or the term of twenty-one years from the death of any such . . . settler, and in every case where any accumulation shall be directed otherwise than as aforesaid such direction shall be null and void, and the rents, . . . profits, and produce of such property so directed to be accumulated shall . . . go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Thomas William Watson of Neilsland and others, testamentary trustees of the late Sir John Watson, first baronet of Earnock and Neilsland, Lanarkshire, acting under his trust-disposition and settlement dated 5th January 1897 and codicils relative thereto, *first parties;* Mrs Agnes Emily Watson Williamson or Brown, wife of Horace Tabberer Brown, Maidenhead, and others, being the five surviving daughters and the children of two deceased daughters of the late Sir John Watson, *second parties;* Dame Edith Jane Nott or Watson, widow of the deceased Sir John Watson, second baronet of Earnock, *third party;* the said Thomas William Watson, *fourth party;* Sir Derrick William Inglefield Watson, fourth baronet of Earnock and his curators, *fifth parties;* Mrs Doreen Agnes Edith Watson or Dorman-Smith, wife of Reginald Hugh Dorman-Smith of Earnock, and the trustees acting under an antenuptial marriage contract between her and the said Reginald Hugh Dorman-Smith, *sixth parties*, presented a Special Case for the opinion and judgment of the Court with regard to questions which had arisen as to the effect of the Thellusson Act upon the rights of certain of the beneficiaries under the will of Sir John Watson, first baronet of Earnock.

Sir John Watson died on 26th September 1898 leaving the said trust-disposition and settlement and relative codicils, under which he disponed and made over his whole means and estate, heritable and moveable, to trustees for the purposes therein set forth. By the twenty-first purpose he directed his trustees "to set apart, hold, and apply, pay, and convey the following sums, viz.—For behoof of my son John and his children as after mentioned the sum of £70,000" [provisions of less amount were then made for his other children] . . . . "which respective sums my trustees shall hold and apply for behoof of my said sons and daughters respectively in liferent for their liferent alimentary uses allenarly . . ., and to and for behoof of their respective children *per stirpes* in fee, payable and divisible the said fee in such proportions, at such time or times, and under such conditions and restrictions as my said sons and daughters may respectively appoint by any writing under their respective hands, which failing, then to and among such children equally *per stirpes*, and that upon their respectively attaining the age of twenty-five years." [Destinations-over in the event of the failure of any of the children of his sons and daughters were then set forth.] By the twenty-fourth purpose he provided—"And with regard to the residue of my means and estate, including therein all accumulations of profits, mineral rents, or lordships and other revenue in so far as not required for the purpose of the trust, I direct my trustees, after payment of the foregoing legacies and after the necessary sums have been set aside to meet the foregoing annuities, legacies, and other provisions, to hold, pay, and convey the same in manner following: In the first place they shall set apart, hold, and apply, pay, and convey the following sums to and for behoof of my daughters in liferent and their respective children *per stirpes* in fee, viz. . . ., subject always said sums to the same liferent and also to the same destinations, declarations, and conditions in all respects as are hereinbefore contained with regard to the original legacies provided to my said daughters respectively in liferent and their respective children in fee: Declaring that the said increased provisions out of residue shall not be payable until my trustees shall have accumulated sufficient funds to meet the whole of the same, and shall not bear interest until the date of payment thereof: And in the second place my trustees shall divide, hold, and apply, pay and convey the remainder of the said residue equally to and among my said two sons: Declaring that in the event of either of my said sons predeceasing the term of payment and conveyance leaving issue, such issue shall on their respectively attaining the age of twenty-five be entitled equally among them to the share of the said residue which their parent would have taken on survivance, and also that in the event of either of my sons predeceasing the said respective time or times of payment and conveyance without leaving issue, or of their leaving issue but of such issue not surviving to take in terms of the destination hereinbefore contained, then the share which such predeceasor would have taken on survivance shall fall and accresce to the surviving brother, whom failing to his issue equally among them, and that on their respectively attaining the age of twenty-five: . . . . And I provide that during the minority of any of the beneficiaries under this settlement or under any codicils thereto my trustees shall be entitled to apply the whole or such portion as they may think proper of the annual income of such beneficiary's share, and even a part of the fee itself, towards such beneficiary's suitable maintenance, education, and upbringing." By codicil dated 19th May 1897 the testator increased the legacy of £70,000

provided to his son John under his settlement to the sum of £120,000, and instructed the trustees to hold and pay the said sum in the same manner as was provided in his settlement in regard to the legacy of £70,000.

The Case stated, *inter alia*—"2. The testator was survived by two sons Sir John Watson, Second Baronet of Earnock (now deceased leaving issue as after mentioned), who was the testator's heir-at-law, and the said Thomas William Watson, and also by six daughters and the issue of a daughter who predeceased him. The second parties are the testator's five surviving daughters and the children of two who are now deceased, and the fourth party is the said Thomas William Watson. The said Sir John Watson, second baronet (hereinafter referred to as the second baronet) died upon the 13th day of September 1903 leaving a testamentary settlement dated 3rd August and registered in the Books of Council and Session 19th September 1903, from the operation of which he expressly excluded the share of residue falling to him under article 24 of the trust-disposition and settlement of his late father and by which he nominated and appointed Dame Edith Jane Nott or Watson, his wife, who survived him, to be his sole executrix. She is the third party hereto. He was also survived by three children, viz.—(*First*) The said Mrs Doreen Agnes Edith Watson or Dorman-Smith, born 5th January 1896, who, and whose marriage-contract trustees (to whom she conveyed her whole interest in the testator's estate, excepting income in hand or accruing at the date of her marriage), are the sixth party hereto; (*Second*) Sir John Watson, third baronet, born 24th February 1898, who died unmarried and intestate, being killed in action in France on 23rd March 1918; (*Third*) The said Sir Derrick William Inglefield Watson, fourth baronet, born 7th October 1901, who is now heir-at-law of the testator. He and his curators are the fifth parties hereto. . . . 4. In addition to the provisions before narrated the second baronet was entitled to an alimentary liferent interest in the estate of Earnock in terms of the twenty-second purpose of the said trust-disposition and settlement, and he enjoyed this provision during his survivorship of the testator. 5. By deed of apportionment and nomination of tutors dated 17th August 1903 the second baronet directed and appointed the said £120,000 provision 'on my death to be divided and apportioned' as follows:—(*a*) To his eldest son the said Sir John Watson, third baronet, now deceased, £80,000; (*b*) to his son the said Derrick William Inglefield Watson, now Sir Derrick William Inglefield Watson, fourth baronet, the sum of £25,000; and (*c*) to his daughter the said Mrs Doreen Agnes Edith Watson or Dorman-Smith the sum of £15,000, 'payable on their respectively attaining the age of twenty-five years. But subject always to the declarations and conditions contained in article twenty-firstly of the said trust-disposition and settlement . . . in so far as applicable to the said sum hereby apportioned.' Consequent upon the death of the third baronet, and in terms of the testator's said testamentary writings, Sir Derrick Watson is prospectively entitled to sixty-five one hundred and twentieths of the £120,000 provision, and Mrs Doreen Agnes Edith Watson or Dorman-Smith and her said marriage-contract trustees are entitled to fifty-five one hundred and twentieths thereof. 6. At the date of the testator's death the trust estate consisted mainly of unexhausted minerals in the lands belonging to him, and was insufficient to pay the legacies bequeathed by the twenty-first purpose and the codicil of 19th May 1897, and also the residuary legacies bequeathed to his daughters and their issue by the twenty-fourth purpose, which residuary legacies amounted *in cumulo* to £95,000. As funds became available the trustees set apart sums in terms of the twenty-first purpose and the codicil, and by 11th November 1906 they had set apart also the said sum of £95,000 in accordance with the directions contained in the twenty-fourth purpose. 7. As before stated the second baronet died on 13th September 1903. During his lifetime he enjoyed the liferent of the sum of £120,000 provided for under the twenty-first purpose and said codicil. As the funds necessary to provide the said residuary legacies of £95,000 were not accumulated until after the death of the second baronet, no payment to account of the share of residue destined to him and his children (hereinafter referred to as the second baronet's share of residue) was ever made to him. A question was raised as to whether the second baronet had a vested interest in this share of residue, and on 9th January 1917 a Special Case was presented to their Lordships of the First Division for the purpose of obtaining a decision on this question and also on the question whether the whole of the provision of £120,000 (to which the original provision of £70,000 in favour of the second baronet was increased by the codicil of 19th May 1897) was subject to all the terms and conditions affecting the original provision. The Court held that the second baronet had not a vested interest in the share of residue destined to him and his children, and that the whole of the £120,000 provision was subject to all the terms and conditions affecting the original provision of £70,000. Since the second baronet's death sums estimated to amount *in cumulo* to over £100,000 have been set aside by the trustees to account of this share of residue. The income derived from these sums so set aside has been accumulated and added to capital. The amount of the second baronet's share of residue composed of the sums originally set aside, and the accumulations thereon to 26th September 1919, valued as at 5th January 1921, is about £130,540. Equalising payments have been made from time to time to the testator's surviving son the said Thomas William Watson, the fourth party hereto, who is entitled to the remaining one-half share of the residue. 8. The income of the £120,000 provision (in so far as not required for the maintenance, education, and upbringing of the children of the second baronet as hereinafter mentioned) has, since the date of the death of the second baronet on 13th

September 1903, been accumulated and added to capital. The said £120,000 with these accumulations is hereinafter referred to as the £120,000 fund. The amount of this fund and accumulations up to 26th September 1919, valued as at 5th January 1921, is about £148,000. 9. . . . In virtue of the power to apply income for behoof of minor beneficiaries the trustees have, since the death of the second baronet, applied annually out of the income of £120,000 fund certain sums for the maintenance, education, and upbringing of his children. . . . In the case of Mrs Doreen Agnes Edith Watson or Dorman-Smith this power remained in force until she attained the age of twenty-five on 5th January 1921, and in the case of the fourth baronet will remain in force until he attains the age of twenty-five years on 7th October 1926. All parties to this Special Case are agreed that this power conferred upon the trustees to make advances for the maintenance, education, and upbringing of minor beneficiaries is not affected by the questions which have been raised as to the application of the Thellusson Act. . . . 10. In consequence of twenty-one years having elapsed since the testator's death, questions have arisen as to the application of the Thellusson Act to the surplus income now arising from the £120,000 fund and the second baronet's share of residue. If it is held that the Thellusson Act applies, further questions arise as to the persons who are entitled to the surplus income, the accumulation of which is prohibited by that Act, until the date at which payment or conveyance of the said £120,000 fund and the second baronet's share of residue falls to be finally made. Mrs Doreen Agnes Edith Watson or Dorman-Smith attained the age of twenty-five on 5th January 1921, and all parties to this Case are agreed that she then became entitled to payment or conveyance of fifty-five one hundred and twentieths of the £120,000 fund and also to payment or conveyance of one-half of the second baronet's share of residue. . . . 12. The first parties offer no contention and will administer the trust estate in conformity with the decision of the Court. 13. The second parties maintain (*First*) that the Thellusson Act applies to the income arising after 26th September 1919 from the £120,000 fund and from the second baronet's share of residue (including in both cases the income arising from accumulations of income made prior to 26th September 1919) in so far as such income is not required for the maintenance, upbringing, and education of minor children, and that accumulations thereof are not lawful after said date. (*Second*) That as regards the period between 26th September 1919 and the attainment by Mrs Doreen Agnes Edith Watson or Dorman-Smith of the age of twenty-five on 5th January 1921, the heirs *in mobilibus ab intestato* of the testator are entitled to the whole surplus income arising from the £120,000 fund and also to such part of the surplus income of the second baronet's share of residue as is derived from moveable estate. Should the fourth party be successful in his contention that the surplus income of the £120,000 fund during this period comes under the operation of the residue clause, these parties maintain that the heirs *in mobilibus ab intestato* of the testator as at the date of his death are entitled to payment of one-half of such surplus income. (*Third*) As regards the period between Mrs Doreen Agnes Edith Watson or Dorman-Smith attaining the age of twenty-five on 5th January 1921 and the date at which the remaining sixty-five one hundred and twentieths of the £120,000 fund and the remaining one-half of the second baronet's share of residue fall to be paid or conveyed to the party entitled thereto, these parties maintain that the surplus income arising from the said remaining share of the £120,000 fund and also the surplus income arising from the said remaining one-half of the second baronet's share of residue in so far as it is derived from moveable estate are payable to the heirs *in mobilibus ab intestato* of the testator as at the date of his death. Should the fourth and sixth parties be successful in their contention that the surplus income from the said remaining share of the £120,000 fund during this period comes under the operation of the residue clause and is payable to the fourth party to the extent of one-half and to the sixth parties to the extent of one-fourth thereof, the second parties contend that the said heirs *in mobilibus* are entitled to payment of the remaining one-fourth. (*Fourth*) The second parties maintain that the accumulation made prior to 26th September 1919 of the rents and profits of heritable estate included in the second baronet's share of residue fall to be treated as moveable estate. (*Fifth*) As regards the claim of the third party, as executrix and sole legatee under the testamentary settlement of her husband, to participate along with the testator's heirs *in mobilibus ab intestato* in the surplus moveable estate falling under the Thellusson Act to which the said heirs *in mobilibus* may be found entitled, the second parties contend that the said claim should not be sustained. The third party's husband (the second baronet), had he survived and claimed as one of the said heirs *in mobilibus* to share in any moveable estate of the testator which had fallen into intestacy, could only have succeeded in such a claim on condition of collating the heritage which he took, and which he would have taken either under the testator's trust-disposition and settlement or otherwise. The third party as representing her husband is not in a position to collate the heritage as aforesaid, and accordingly it is submitted that she is not entitled to participate in the division of the said moveable estate. 14. The third party presents no contention as to the effect of the Thellusson Act, but contends that she is entitled to share with the heirs *in mobilibus* any share of surplus moveable estate to which they may be found entitled in respect that she is executrix and sole legatee of her husband, who as one of the next-of-kin of the testator was one of his heirs *in mobilibus ab intestato*. With reference to the fifth contention of the second parties, she contends that no question of collation arises, in re-

spect that her said husband did not, and could never, inherit any portion of the testator's estate as his heir-in-law. 15. The fourth party adopts the contention of the second parties with the exception that he maintains that during the period between 26th September 1919 and Mrs Doreen Agnes Edith Watson or Dorman-Smith's attainment of the age of twenty-five on 5th January 1921 the income arising from the £120,000 fund comes under the operation of the residue clause in the testator's trust-disposition and settlement, and that one-half thereof is payable to him, and the other half to the heirs *in mobilibus ab intestato* of the testator as at the date of his death, of whom he is one. . . . 16. The fifth parties maintain (*in the first place*) that the accumulation of the surplus income, accruing after 26th September 1919 on the sixty-five one hundred and twentieths of the £120,000 fund to which the fourth baronet is prospectively entitled, is not prohibited by the Thellusson Act, in respect that there is no direction to accumulate the said income within the meaning of the said Act. If, however, the accumulation of income of the £120,000 fund is prohibited after the said date, the fifth parties maintain further that the whole of this income up to 5th January 1921 and thereafter the income of the sixty-five one hundred and twentieths falls into the residue of the estate and forms part of the capital thereof. (*In the second place*) In regard to the income accruing after 26th September 1919 on the second baronet's share of residue and on the accumulation of the past income thereof, the fifth parties maintain that accumulation of this income is prohibited by the said Act; that the income so set free falls into intestacy; and that in so far as it consists of mineral lordships or the rents or produce of heritable estate it falls to the fourth baronet as the heir-at-law of the testator during the period of accrual of the said income. The fifth parties further maintain that the income arising from the accumulation prior to 26th September 1919 of the rents and profits of heritable estate (including therein mineral lordships) is income arising from heritable estate. 17. The sixth parties maintain (*First*) that the provisions of the Thellusson Act do not apply to surplus income arising from the £120,000 fund and from the second baronet's share of residue, or from accumulations of income from either of these funds made prior to 26th September 1919, in respect that there is no direction to accumulate such surplus income within the meaning of said Act, and that accordingly such surplus income (*a*) so far as arising between 26th September 1919 and 5th January 1921 from these parties' share of the £120,000 fund, and of the second baronet's share of residue, and relative accumulations made prior to 26th September 1919 fall to be paid to Mrs Doreen Agnes Edith Watson or Dorman-Smith; and (*b*) *quoad* the remainder falls to be paid to the fourth baronet when he attains the age of twenty-five, or other person ultimately entitled to his share of said funds. And (*Second*) In the event of its being held that such surplus income is affected by the provisions of the Thellusson Act, and that accumulation thereof is unlawful, the sixth parties offer no contention as regards surplus income arising from either of the funds between 26th September 1919 and 5th January 1921, or as regards surplus income arising subsequently from the share of residue retained by the first parties. As regards surplus income arising after 5th January 1921 from the sixty-five one hundred and twentieths of the £120,000 fund retained by the first parties, the sixth parties concur in the contentions of the fourth party, and maintain that such surplus income falls into residue, and that they are accordingly entitled to one-fourth thereof.

The *questions of law* were—"1. Is the accumulation of the surplus income arising from (*a*) the second baronet's share of residue and (*b*) the £120,000 fund, after 26th September 1919, prohibited by the Thellusson Act? 2. In the event of branch (*a*) of the first question being answered in the affirmative — (*a*) Is the surplus income arising from the second baronet's share of residue during the period between 26th September 1919 and Mrs Doreen Agnes Edith Watson or Dorman-Smith's attainment of the age of 25 years on 5th January 1921 payable, in so far as derived from moveable estate, to the testator's heirs *in mobilibus ab intestato* as at the date of his death, and in so far as derived from heritable estate to the person who is his heir-at-law at the time such income accrues? (*b*) Is the surplus income arising from the one-half of the said share of residue remaining in the hands of the first parties during the period between said 5th January 1921 and the date at which payment or conveyance thereof falls to be made to the parties entitled thereto payable, in so far as derived from moveable estate, to the said heirs *in mobilibus*, and in so far as derived from heritable estate to the person who is the testator's heir-at-law at the time such income accrues? (*c*) Is the surplus income accruing after 26th September 1919 on the accumulations made prior to that date of the rents and profits of heritable estate forming part of the said share of residue payable (1) to the said heirs *in mobilibus;* or (2) to the person who is the testator's heir-at-law at the time such income accrues? 3. In the event of branch (*b*) of the first question being answered in the affirmative —(*a*) Does the surplus income arising from the £120,000 fund between 26th September 1919 and 5th January 1921 (1) fall to be paid over to the testator's heirs *in mobilibus ab intestato* as at the date of his death; or (2) fall to be paid as to one-half to the fourth party, and as to the remaining one-half to the said heirs *in mobilibus;* or (3) does it fall to be treated as part of the capital of the residue of the estate? (*b*) Is the surplus income arising from the sixty-five one hundred and twentieths of the £120,000 fund remaining in the hands of the first parties during the period between 5th January 1921 and the date at which payment or conveyance falls to be made (1) payable to the said heirs *in mobilibus;* or

(2) is it payable as to one-half to the fourth party, and as to the remaining one-half to the said heirs *in mobilibus;* or (3) is it payable as to one-half to the fourth party, as to one-fourth to the sixth party, and as to the remaining one-fourth to the said heirs *in mobilibus;* or (4) does it fall to be treated as part of the capital of the residue of the estate? 4. In the event of the heirs *in mobilibus ab intestato* of the testator as at the date of his death being found entitled to any of the income to which the Thellusson Act applies, is the third party, as executrix and sole legatee of her husband, entitled to participate therein, and that without collating the heritage which he took or which he would have taken either under the testator's trust-disposition and settlement or otherwise?"

Argued for the fourth party—The accumulation of the income of the sum of £120,000 was the necessary consequence, in the circumstances which had arisen, of the provisions of the settlement and was clearly contemplated by the testator. It was not therefore due to the trustees having refrained from making advances to the minor beneficiaries and must be treated not as the result of extraneous causes but as the consequence of an implied direction by the testator. The Thellusson Act therefore applied—*Logan's Trustees* v. *Logan*, 1896, 23 R. 848, 33 S.L.R. 638; *Lord* v. *Colvin*, 1860, 23 D. 111, *per* Lord President at p. 124. The cases of *Mitchell's Trustees* v. *Fraser*, 1915 S.C. 350, 52 S.L.R. 293, where the accumulation was due to the failure of the trustees to carry out the purposes of the trust and to circumstances which had not been contemplated by the truster, and *Lindsay's Trustees*, 1911 S.C. 584, 48 S.L.R. 470, where the application of the Act was excluded by the fund being fully vested in the trustees as if they were individuals, had no bearing on the present case. In *Innes's Trustees* v. *Bowen*, 1920 S.C. 133, 57 S.L.R. 86, on the other hand, it was clear that if the accumulations had resulted from the nature of the provisions the Thellusson Act would have applied. The income of the shares of the £120,000 accruing after 26th September 1919 until the shares respectively became payable fell therefore under the operation of the Thellusson Act and could not be lawfully accumulated. The same principles applied to the shares of residue falling to Sir Derrick Watson and Mrs Dorman-Smith. (2) The effect of the Thellusson Act was to place the income, the accumulation of which was prohibited, in a position similar to that of a legacy which, having failed, fell into residue in accordance with the theory that the estate was given to the residuary legatee burdened with the bequests—*Storie's Trustees* v. *Gray and Others*, 1874, 1 R. 952, *per* Lord President at p. 957, 11 S.L.R. 552. But where, as in the present case, there was no beneficiary with a vested and present right to the residue such income must fall into intestacy, to add it to residue for a prospective beneficiary being merely an evasion of the Act—*Maxwell's Trustees* v. *Maxwell*, 1877, 5 R. 248, *per* Lord Moncreiff at p. 258, 15 S.L.R. 155; *Smith* v. *Glasgow Royal Infirmary*, 1909 S.C. 1231, *per* Lord President at p. 1236, and Lord Kinnear at p. 1237, 46 S.L.R. 860; *Wilson's Trustees* v. *Glasgow Royal Infirmary*, 1917 S.C. 527, 54 S.L.R. 468, *in re Hawkins*, [1916] 2 Ch. 570. The fourth party therefore having a vested right in one-half of the residue was entitled to the income of that half, while that of the other half and of the £120,000 so far as accumulation was prohibited fell to the heirs *in mobilibus* or to the heir in heritage of the testator according to its moveable or heritable character. (3) It was not disputed that the income of the residue accruing after twenty-one years and falling into intestacy in consequence of the Thellusson Act went, so far as derived from heritage, to the heir in heritage at the time. But the income of heritage accumulated by the trustees during the twenty-one years and the income from the accumulations were moveable—*Logan's Trustees* v. *Logan* (*cit.*), *per* Lord M'Laren at p. 853. (4) The third party was not entitled to participate in the intestate estate as one of the heirs *in mobilibus*. The heirs *in mobilibus* were ascertained at the date of the testator's death—*Lord* v. *Colvin* (*cit.*)—and the third party, as representing an heir in heritage who had not collated so as to share in the moveable succession, had no better right than her author. In any event she could not share in the intestate moveable succession without collating the heritage received by her husband and she was not in a position to do so—*Newbigging's Trustees* v. *Steel's Trustees*, 1873, 11 Macph. 411; *Adam's Executrix* v. *Maxwell*, 1921 S.C. 418, 58 S.L.R. 254; *Gilmour's Trustees* v. *Gilmour*, 1922 S.C. 753, 59 S.L.R. 563; *Moon's Trustees* v. *Moon*, 1899, 2 F. 201, 37 S.L.R. 140.

Argued for the sixth parties—The Thellusson Act did not apply. The accumulations of income of the £120,000 fund and of the residue were not expressly or impliedly directed by the testator, but were due to the extraneous circumstance that there had been no occasion for paying the whole income to the minor beneficiaries under the power in the settlement. Any direction to accumulate which might be implied from the settlement was only for the purpose of meeting the provisions to the daughters. Otherwise the testator never contemplated any accumulation, and what had been done was a mere act of administration by the trustees. In such a case the Act did not apply—*Mitchell's Trustees* v. *Fraser*, 1915 S.C. 350, *per* Lord Salvesen at p. 357 and Lord Guthrie at p. 358, 52 S.L.R. 293; *Lindsay's Trustees*, 1911 S.C. 584, 48 S.L.R. 470; *Innes' Trustees* v. *Bowen*, 1920 S.C. 133, *per* Lord Dundas at p. 141, 57 S.L.R. 86. The question of whether there was a beneficiary with a vested right was never raised in *Mitchell's Trustees* v. *Fraser*. If the Act applied, the sixth party adopted the argument of the fourth party that the income of the £120,000 which could not be lawfully accumulated was caught by the residue clause, and the argument of the fifth party that it fell to be added to the capital of the residue.

Argued for the second parties—The contentions of the fourth parties should be sustained except so far as they related to the application of the residue clause to illegal accumulations of income derived from the £120,000. On the question of the application of the Thellusson Act, *Mackay's Trustees* v. *Mackay*, 1909 S.C. 139, 46 S.L.R. 147, was also referred to. But although the Act applied, thus prohibiting the accumulation of the income of the £120,000 after twenty-one years, it did not alter the meaning or effect of the settlement in any other respect—*Green* v. *Gascoyne*, 1865, 34 L.J. (Ch.) 268. Whether that income was caught by the residue clause depended, therefore, on the intention of the testator. But the scheme of the settlement, by which the £120,000 was separated from the corpus of the estate for a class which the testator could scarcely have contemplated would fail, did not point to an intention that the residue clause should so operate, and the terms of the clause itself, limiting its application to accumulations "so far as not required for the purposes of the trust" impliedly excluded its operation from that income. Further, if accumulations of the income of the £120,000 after twenty-one years had been lawful, they would not have been caught by the residue clause. The income of the £120,000 therefore did not fall into residue, and so far as accruing more than twenty-one years after the testator's death went to his heirs *in mobilibus*.

Argued for the fifth parties—(1) The income accruing, after twenty-one years, from the fourth baronet's share of the £120,000 was not struck at by the Thellusson Act. On this question the argument of the sixth parties was adopted. But if the Act did apply, then the income fell into residue as an addition to the capital arising, not from the residue but from an extraneous source, and was not an "accumulation" of the residue in the meaning of the Act which would fall into intestacy as contended by the fourth parties—Hargreaves on the Thellusson Act, pp. 168 and 174; *Crawley* v. *Crawley*, (1835) 7 Sim 427; *O'Neil* v. *Lucas*, (1838) 2 Keen 313; *In re Pope*, [1901] 1 Ch. 64. In *In re Hawkins*, [1916] 2 Ch. 570, where these decisions had been doubted, Sargant, J., had merely followed the latest case, viz., *In re Cababé*, (1914) 59 Sol, J. 129, approving Malins, V.C., in *In re Phillips*, (1880) 49 L.J. (Ch.) 198, and had not given any satisfactory reason for doing so. The decision in *In re Garside*, [1919] 1 Ch. 132, simply followed *In re Hawkins*. (2) The accumulations of income from the second baronet's share of residue so far as derived from heritage, and the income derived from such accumulations, was heritable, and so far as they accrued after twenty-one years from the testator's death were struck at by the Thellusson Act, fell into intestacy, and went to the testator's heir-at-law. *Logan's Trustees* v. *Logan* (*cit.*) was not an authority to the effect that when income from heritage had been reduced into possession by trustees it became moveable. That decision depended on the fact that there had been constructive conversion of the heritage into moveables—*per* Lord M'Laren, 23 R. 853. In the present case there was no conversion, and the mere ingathering of the income of heritage by persons acting in a fiduciary capacity could not alter its heritable character. [The LORD PRESIDENT referred to *Cowan's Trustees* v. *Cowan*, 1887, 14 R. 670, 24 S.L.R. 469; and LORD SKERRINGTON to *Campbell's Trustees* v. *Campbell*, 1891, 18 R. 992, 28 S.L.R. 771.]

Argued for the third party—This party, as executrix and sole legatee of the second baronet, was entitled to be included amongst the heirs *in mobilibus* in the distribution of the income which in consequence of the Thellusson Act fell into intestacy. The fact that she was not in a position to collate was no objection to her contention. Estate set free by the Thellusson Act twenty-one years after the testator's death could not be subject to the ordinary rules of collation. The heritable part of such estate went to the heir-at-law at the time, not to the heir-at-law at the date of death—*Campbell's Trustees* v. *Campbell* (*cit.*). The third party, who represented an heir-at-law *a morte* who had never had any heritage to collate, and had never been put to his election in regard to heritage, could not be prevented from participating in moveable estate falling into intestacy. The only person bound to collate was the heir-at-law at the time if he claimed to share in the moveable estate. The passage in the interlocutor in *Logan's Trustees* v. *Logan* (*cit.*), which appeared to exempt the heir in heritage at the time from collation where intestacy was caused by the Thellusson Act, was expressly disapproved of in *Moon's Trustees* v. *Moon* (*cit.*), *per* Lord Trayner at 2 F. 209, and in *Hunter's Trustees* v. *Edinburgh Chamber of Commerce and Manufactures*, 1911, 2 S.L.T. (O.H.) 287.

At advising—

LORD PRESIDENT—I have had an opportunity of reading Lord Skerrington's opinion, with which I concur.

LORD SKERRINGTON—This Special Case requires us to decide five legal questions in regard to the effect of the Thellusson Act upon the rights of certain of the beneficiaries under the trust-disposition and settlement and codicils (for shortness "the will") of Sir John Watson, First Baronet of Earnock. He died on 26th September 1898, and his testamentary trustees are the first parties to the Special Case. The questions are of a general character, and they admit of being treated briefly and without much discussion of the particular terms of the will.

1. The first question is whether the restrictions of the Thellusson Act applied to the income of a sum of £120,000 which the testator directed his trustees to set apart as at his death and to hold for behoof of his elder son (the second baronet) in liferent and the children of his said son in fee. The second baronet died on 13th September 1903 survived by three young children, none of whom would acquire a vested right to his or her share either of the capital or of the income of the £120,000 fund unless and until he or she should attain the age of twenty-

five. Accordingly during the sixteen years which elapsed between the death of the second baronet and the expiry of twenty-one years from the death of the testator, the trustees accumulated so much of the income of the fund as they did not think proper (in terms of a power to that effect contained in the will) to apply towards the suitable maintenance, education, and upbringing of the prospective fiars. The surplus income thus accumulated amounted to about £28,800 at the expiry of the twenty-one years on 26th September 1919. None of the parties to the Special Case challenged the propriety of the course adopted by the trustees, and I do not see what else the latter could have done consistently with the trust reposed in them by the testator. In short, the case seems to afford a typical illustration of an implied direction to accumulate. Accordingly I was surprised when counsel for the sixth parties argued that accumulation though unavoidable in the circumstances was rendered necessary, not in consequence of any implied direction by the testator, but owing to an event extrinsic to the will which the testator could not be supposed to have foreseen, viz., the fact that the income of the fund largely exceeded what the trustees thought proper to expend upon the suitable maintenance, &c., of the prospective fiars. I have no hesitation in rejecting this contention as unsound in itself, and also as inconsistent with a long series of authorities both Scottish and English. Of these it is enough to mention three—*Lord* v. *Colvin*, (1860) 23 D. 111; *Logan's Trustees* v. *Logan*, (1896) 23 R. 848; and *Innes's Trustees* v. *Bowen*, 1920 S.C. 133. I refer to the last of these decisions mainly because of what was there said by their Lordships of the Second Division with reference to an earlier case in the same Division, which was really the mainstay of the argument which I have described. The case is that of *Mitchell's Trustees* v. *Fraser* (1915 S.C. 350), and it is apparently one which is liable to misconstruction because it was cited as supporting the contention of the sixth parties, whereas if rightly understood it stands in sharp contrast to the present case, and indeed has no bearing upon it. In *Mitchell's* case the family of the testator were held to have a vested right to have a fund applied for their benefit in accordance with a discretionary power conferred upon the trustees by the testator, from which it followed that any savings of income effected by the trustees belonged to the trust and did not fall into intestacy. The salient feature in the present case is the non-existence of any person who had a vested right either to the capital or to the income of the fund.

Seeing that in the events which happened there was a plainly implied direction to the trustees to accumulate the income of the £120,000 fund it necessarily follows that the Thellusson Act applied, and that accumulation became unlawful from and after 26th September 1919. The same considerations apply, *mutatis mutandis*, to the income of one-half of the residue of the estate of the first baronet. In the events which happened this one-half share of residue was destined to the three children of the second baronet, but so that none of them would acquire a vested right either to the capital or to the income of his or her prospective share unless and until he or she should attain the age of twenty-five years.

I understand that the parties are agreed, and I see no reason to doubt, that as soon as any of the persons with a contingent right to a share of the £120,000 fund or of the residue acquired a present and vested right to payment thereof, there could be no intestacy in regard to the income which subsequently accrued on such vested share.

2. The next question is whether the residuary clause of the will is wide enough to catch the income of the £120,000 fund from and after 26th September 1919, when it was no longer lawful to accumulate it. The word "residue," according to its natural and primary meaning includes the whole estate so far as not otherwise effectually disposed of. In short, legacies, whether general or special, are merely burdens on the gift of residue—*Storie's Trustees* v. *Gray and Others*, (1874) 1 R. 953. Accordingly there is no reason why a gift of residue in general terms should not include the income of a fund which a testator expressly or impliedly, but ineffectually as it turned out, directed to be accumulated. There was such a gift of residue in the will, and its generality was not limited by the words which followed, viz., "including therein all accumulation of profits, mineral rents or lordships, and other revenue in so far as not required for the purpose of the trust." Accordingly it is not necessary to decide whether counsel for the second parties was right or wrong in his contention that income which a testator has ineffectually directed to be accumulated does not answer to the description of income "not required for the purpose of the trust." As at present advised I think that he was wrong, but I prefer to answer this question in the affirmative upon the more general ground which I have indicated.

3. The next question is whether the requirements of the Thellusson Act would be satisfied if at the expiry of twenty-one years from the death of the testator the income from the £120,000 fund which could no longer be lawfully added to the capital of that fund was added to the capital of the residue and was ultimately disposed of as directed by the residuary clause of the will. It appears that there has been a difference of judicial opinion in England in regard to this matter. No decision however, either in Scotland or in England, was cited to us which gave support to the view that income which could no longer be lawfully accumulated might, by the simple process of adding it to the residue, be lawfully retained by the trustees for behoof of a prospective beneficiary who had no present and vested right to a share either of the residue or of the fruits thereof. On principle it seems plain enough that the income of the £120,000 fund, in so far as it fell into residue and was held by the trustees for behoof of a residuary legatee who had no present right to demand payment of such income, became

intestate estate of the testator. The case of *Mackay's Trustees* v. *Mackay* (1909 S.C. 139) supports the opinion which I have expressed, although the judgment primarily turned upon the construction of section 2 of the Thellusson Act which has since been repealed as regards Scotland by section 9 of the Entail (Scotland) Act 1914.

4. The next question relates to the income arising from the rents of heritable property lawfully accumulated by the trustees. Does such income if and when it falls into intestacy through the operation of the Thellusson Act belong to the heirs *in mobilibus* of the testator, or does it belong to the heir in heritage as being indirectly the produce of heritable estate? This question is, in my judgment, concluded by authority and was decided in favour of the heirs *in mobilibus* by the case of *Logan's Trustees* already referred to. Counsel for the fifth party tried, but as it seemed to me unsuccessfully, to distinguish between the present case and *Logan's Trustees.* He also challenged the soundness of that decision as regards this point, though he did so in a somewhat half-hearted way. I do not think that the present is a case in which it is necessary to reopen this question.

5. The last question is whether the third party, who is the widow and testamentary representative of the second baronet, is entitled, without offering to collate the heritage to which her husband succeeded from his father, to claim a share of the income from moveable estate which falls to be divided among the testator's heirs *in mobilibus* owing to the operation of the Thellusson Act. The difficulty, if difficulty there is, arises from the anomalous rule of heritable succession which was laid down in *Campbell's Trustees* v. *Campbell* ((1891) 18 R. 992) in regard to intestacy caused by the Thellusson Act. In *Moon's Trustees* v. *Moon* ((1899) 2 F. 201) the person who was held bound to collate was the representative of the true heir-at-law of the testator, and was also the heir-at-law *pro tempore* within the meaning of *Campbell's case.* The decision in *Moon's case* is, I think, adverse to the claim of the third party, and on principle I see no ground for absolving the true heir from the burden of collating the heritage to which he actually succeeded from the testator. If that be so, the claim of the third party necessarily fails, because she is unwilling to collate even if she were otherwise entitled to do so.

In furnishing us with the foregoing five questions as a substitute for the unavoidably intricate "questions of law" which are printed at the end of the Special Case, the learned Solicitor-General acted in accordance with the spirit of section 63 of the Court of Session Act 1868. I understand, however, that my brother Lord Cullen has indicated in his opinion the manner in which the questions as put in the Special Case ought to be answered.

LORD CULLEN—The first question raised by the argument is whether the Thellusson Act applies in the case of the income of the £120,000 fund accruing after 26th September 1919. I am of opinion that it does. The argument to the contrary is founded on the clause giving the trustees power to advance, *inter alia*, the whole or part of the income of shares of minor beneficiaries for their benefit. It is to the effect that in view of this clause it cannot be said that there is any implied direction to accumulate such income. But the clause gives a power only, and in the event of the trustees paying away in the shape of advances a part only of the income the terms of the settlement impliedly directed the accumulation of the surplus, as the trustees are not directed to make present payment of it to anyone. The sixth parties appealed to the cases of *Lindsay's Trustees* (1911 S.C. 584) and *Mitchell's Trustees* v. *Fraser*, 1915 S.C. 350. This, however, is not a case of trustees making savings from their own income as in *Lindsay's Trustees.* In *Mitchell's Trustees* v. *Fraser* the Court were able, in the circumstances of that case, to reach the conclusion that the *de facto* accumulation resulted not from any direction by the testator but from extraneous causes operating adversely to his intentions. In the circumstances of the present case I do not think there is any room for such a view.

Esto the Act applies, the next question is whether the income of the fund of £120,000 accruing after 26th September 1919 falls into residue or into intestacy. I am of opinion that the former alternative is right. The residue clause is conceived in ample and comprehensive terms, which are habile to include all parts of the estate not otherwise effectively disposed of. Now the income here in question was not otherwise effectively disposed of, because the testator's purpose regarding it cannot be given effect to. It is not, therefore, required for that purpose, and it falls into the residue equally under the initial general words in the residue clause as under the special inclusion in residue of revenue not required for the purposes of the trust.

The next question is raised by a contention for the fifth party to the effect that, *esto* the income of the £120,000 falls into residue, then so much of it as does not fall to be immediately paid away under a vested and payable residuary gift but falls to be retained by the trustees directly adheres in some way to and augments the capital of the residue without going through any process of accumulation. I have difficulty in following this argument. It means that within the sphere of residue the trustees may lawfully do the very thing which they may not do in the sphere of the special fund, that is to say, keep and accumulate income of the trust estate accruing after the end of the twenty-one years instead of paying it away as the statute directs. I am of opinion that this contention must be repelled.

The next question relates to income accruing on the share of residue which is here in question. There is no dispute that there fall into intestacy (1) the whole income accruing between 26th September 1919 and 5th January 1921, and (2) one-half of the income after 5th January 1921. And the remaining half of the income after the

latter date falls, the parties are now agreed, to the sixth parties. But a subordinate question has been raised regarding part of the income falling into intestacy, and thus: A portion of the share of residue which yields this income is composed of sums which were received by the trustees as rents of or annual returns from heritage, and which have been capitalised and accumulated during the twenty-one years. And the income falling as aforesaid into intestacy by the operation of the Act consists in part of income yielded by the capitalised sums whose source was heritage. It is contended by the fifth parties that such part of the income falls to be regarded as heritable and to be taken by the heir-at-law who is *in titulo*. The contention to the contrary for the heirs *in mobilibus* is that this part of the income is moveable, because it is income from a capital which was received as money and in a due course of administration has remained in the hands of the trustees as money. I am of opinion that the question thus raised is ruled in favour of the heirs *in mobilibus* by the case of *Logan's Trustees* v. *Logan*, 23 R. 848. Counsel for the fifth parties endeavoured to distinguish that case from the present but I do not think they succeeded in doing so.

The remaining question relates to collation. The third party is the widow and testamentary representative of the second baronet, who was the testator's heir in heritage *a morte*, and as her author was, in respect of propinquity, within the class of heirs *in mobilibus* she claims a share of the income which has fallen into intestacy so far as moveable in character, and that without collating the rights in the testator's heritable succession which her author took under the settlement. This claim is resisted by the heirs *in mobilibus*. The third party founds on the rule laid down in *Campbell's Trustees* v. *Campbell* (18 R. 992), under which the heir *a morte* is excluded from taking the rents of heritage falling into intestacy by the operation of the Thellusson Act at a period subsequent to his death, these rents going to the heir in heritage for the time being. She argues that as she is thus excluded from taking the heritable part of the income here in question she should be admitted to share in the moveable part unconditionally. This argument appears to me untenable. The third party's author was the heir *a morte*. He took under the settlement rights in the heritable succession to which he was the heir *alioquin successurus*. Under the ordinary rule of collation therefore he could not claim to participate in the distribution of any moveable estate falling into intestacy without collating. The fact that moveable estate has emerged for distribution under intestacy only after a lapse of time since the death does not, of course, displace the application of the rule. Nor, in my opinion, is it displaced by the rule of *Campbell's Trustees*, the effect of which is that the heritable part of the income here in question does not fall within the ambit of the succession which opened *ex lege* to the heir *a morte*. The third party is not being asked to collate such heritable part of the income, to which under that rule she has no right. The collation demanded is collation of rights in heritage which did fall within the ambit of the succession *ex lege* of her author, and which he took through the medium of the settlement.

LORD SANDS did not hear the case.

The Court answered the first question in the affirmative, question 2 (*a*), 2 (*b*) and 2 (*c*) (1) in the affirmative, and 2 (*c*) (2) in the negative, question 3 (*a*) (1) and 3 (*a*) (3) in the negative, and 3 (*a*) (2) in the affirmative, 3 (*b*) (1), 3 (*b*) (2) and 3 (*b*) (4) in the negative, 3 (*b*) (3) in the affirmative, and question 4 in the negative.

Counsel for the First and Fourth Parties—The Solicitor-General (D. P. Fleming K.C.)—Macmillan K.C. — Jamieson. Agents—Drummond & Reid, S.S.C.

Counsel for the Second Party — Chree, K.C.—Russell. Agents—Carment, Wedderburn & Watson, W.S.

Counsel for the Third Party—Cowan, K.C. —Crawford. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Fifth Parties—Henderson, K.C. — Macdonald. Agents — Russell & Dunlop, W.S.

Counsel for the Sixth Parties—The Lord Advocate (Hon. W. Watson, K.C.) — Maconochie. Agents — Fraser, Stodart, & Ballingall, W.S.

Thursday, February 1.

SECOND DIVISION.

REGISTRAR-GENERAL FOR SCOTLAND, PETITIONER.

Public Records—Loss, Destruction, Mutilation, and Illegibility of Duplicate Registers—Petition for Authority to Renew in Whole or in Part Duplicate Registers—Registration of Births, Deaths, and Marriages (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 80), *sec.* 55.

The Registration of Births, Deaths, and Marriages (Scotland) Act 1854, sec. 55, enacts—"If any duplicate register in the custody of the registrar shall be lost, destroyed, or mutilated, or shall have become illegible in whole or in part, such fact shall be forthwith communicated by the registrar to the Registrar-General, who shall require the registrar immediately to transmit to him the duplicate register which shall have been mutilated or become illegible; and the Registrar-General shall thereupon present a petition to one of the Divisions of the Court of Session setting forth the fact of the loss, destruction, mutilation, or total or partial illegibility, as the case may be, of such duplicate register, and the date of the discovery of such loss, destruction, mutilation, or total or partial illegibility of such duplicate; and the Court, on being satisfied