were employed to carry through. A Mr Leck advanced to the pursuer the sum of £2000, and in return he obtained a personal bond for the sum of £10,000, and an heritable security consisting of an absolute disposition and back-letter of one-half *pro indiviso* of the estate of Shandwick. Mr Robertson Ross and his aunt Mrs Macpherson were claimants to the estate of Shandwick as the nearest heirs-portioners of the last heir in possession of that estate, and it was in expectation of their succeeding to it that this money was advanced. What Mr Leck got in return was the chance of obtaining a sum five times as large as what he gave, in the event of the success of the claim. There is no need to advert to the terms of the heritable security.

The account before us is charged on the principle that the matter to be dealt with was a personal bond with an heritable security for £10,000, and if that be the right view of it, an *ad valorem* fee, which is the charge made, is the proper one. The Lord Ordinary made a remit to the Auditor of Court, and has now adopted the view reported to him, that the transaction was not one of loan, but of purchase, and that Mr Leck bought from the pursuer and his aunt a chance of obtaining £10,000 for a present payment of £2000. I confess I do not care much what the nature of the transaction is. It must be either a loan or a sale, if it is a legitimate transaction at all. I may say it appears to me to look very like a bet, and perhaps that is another aspect of it. I am very clearly of opinion, with the Lord Ordinary, that according to the rule in the table of fees now in use the consideration is the proper sum upon which to charge the *valorem* fee.

It was very ingeniously argued that the responsibility of the agents was not limited to £2000, but that it might amount to £10,000. There would be a great deal of force in that contention if the holder of the bond were secured with what would at some future date for certain be worth £10,000. But here the chance was all the lender got, and although the agent's liability might be for £10,000 in the event of their being guilty of *crassa negligentia*, yet in another view it might be *nil*. I therefore see no reason to doubt that the conclusion to which the Auditor and the Lord Ordinary have come is quite right.

Lord Deas, Lord Mure, and Lord Shand concurred; and the Lord President added that he did not intend to express an opinion upon the amount of the agents' responsibility in the matter.

The Court adhered.

Counsel for Pursuer—Nevay — J. A. Reid. Agent—A. Nivison, S.S.

Counsel for Defenders — Asher—M'Kechnie. Agents—Ronald & Ritchie, S.S.C.

Friday, June 29.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MACKENZIE *v.* MACKENZIE'S TRUSTEES.

Succession—Direction to Trustees to accumulate Residue for the Purchase of Lands to be entailed—Right to Accumulations so arising—Where struck at by Thellusson Act (39 *and* 40 *Geo. III. cap.* 98).

A testator by trust-deed conveyed to trustees his whole means and estate other than certain lands of which he was heir of entail in possession, and directed that the residue should be laid out in the purchase of land to be entailed as therein directed. The purchases were to be made from time to time, as was judged most eligible, and the other purposes of the trust were not to postpone the fulfilment of this. The rents of lands so purchased were to go to the heir of entail in possession of the existing entailed estate, and, in the event of no purchase being made, three-fourths of the profits of the accumulated fund were to be paid to that heir, "the surplus interest being applied to increase the amount of disposable funds." *Held* (1) that this last direction, viz., to accumulate one-fourth of the profits with capital, was, after the lapse of twenty-one years from the testator's death, "null and void," under the Thellusson Act (39 and 40 Geo. III. cap. 98); and (2) (*revg.* Lord Rutherfurd Clark, Ordinary — *diss.* Lord Deas) that they fell to be paid to the person "who would have been entitled thereto if such accumulation had not been directed," viz., to the heir of entail, and not to the testator's next-of-kin, as intestate succession.

The late Colin Mackenzie, Esq. of Newhall, by his trust-disposition and deed of settlement, dated 1st August 1838, and registered in the Books of Council and Session 14th October 1842, on the narrative of his having of the same date executed a deed of entail of the lands of Drumcudden, Easter St Martins, and others, in favour of his nephew, the pursuer, and the heirs-male of his body, whom failing the other heirs of tailzie therein mentioned, and that it was his desire and intention that the said entailed estates should not only be freed of all debts and burdens, but that the same should be increased by new purchases from his free means and estate, after the several other purposes therein mentioned should be fulfilled, gave, granted, and disponed to certain trustees his whole means and estate, heritable and moveable (excepting the lands and heritages mentioned in the said deed of entail). After providing for the payment of the testator's debts and funeral charges, legacies, and annuities, the truster directed his trustees, in the ninth purpose of the trust, "to lay out and invest the whole free proceeds of my trust-estate, with the interest which may accrue thereon (subject to the explanations underwritten), in the purchase of lands and estates as near to the foresaid lands of Easter St Martins and Drumcudden as they can conveniently be had, and shall afterwards settle

and secure the lands and estates so to be purchased by a valid and formal deed or deeds of entail upon the same series of heirs (so far as then subsisting), and under the same provisions, limitations, restrictions, clauses irritant and resolutive, and other clauses, as are contained in the foresaid deed of entail executed by me: Declaring, in explanation of the foregoing appointment to invest the free proceeds and interest accruing thereon, that purchases may be made by my said trustees from time to time, as they may judge most eligible, according to the state of the trust funds and the opportunities which may offer of making suitable and convenient purchases, and that they shall not be bound to wait till the whole of the foregoing other purposes are fulfilled before making their first purchases, but that, so soon as they shall at any time have realised any free disposable sum or sums of money and a favourable opportunity of making a purchase or purchases shall occur, the same may be immediately so applied from time to time, but no purchase shall be made with any sum or sums of money necessary to be retained for answering any of the foregoing purposes till such purposes are completely fulfilled; and likewise declaring that when any purchase shall be made, the free rents and profits of the lands so purchased, after deducting the public burdens and expenses of collection, shall be payable by my said trustees to the heir of entail in possession for the time of the said entailed estates of Easter St Martins and Drumcudden; and further declaring, that in the event of any free disposable sum or sums of money being at any time realised, and no opportunity of making an eligible purchase occurring at the time, my said trustees shall be bound to make payment to the heir in possession of the said entailed estates of three-fourths of the free interest or profits of such disposable sum or sums of money until a purchase shall be made, the surplus interest being applied to increase the amount of disposable funds, but the amount of the said three-fourths shall be fixed and determined periodically by my said trustees themselves, and their statement thereof shall be final and conclusive against the said heir of entail and all other persons in his right."

The truster, Colin Mackenzie, died on 1st October 1842, and at his death the estate falling under the administration of the trust was entirely moveable. In the execution of the purposes of the trust the trustees paid over three-fourths of the interest or profits as realised to the heir of entail in possession of Drumcudden. The remaining one-fourth was retained as part of the capital, to be invested in land.

This was an action at the instance of Colin Lyon Mackenzie, the heir of entail in possession of Easter St Martins and Drumcudden, against (1) Colin Mackenzie's trustees, (2) Colin Mackenzie's next-of-kin, and (3) Colin Lyon Mackenzie junior and others, the three nearest heirs of entail of Easter St Martins and Drumcudden. The summons concluded for declarator (1) that the direction that the one-fourth part of the profits of the estate free to be disposed in the purchase of lands to be entailed under the trust-deed should be applied to increase the capital, was null and void under the Thellusson Act (39 and 40 Geo. III. cap. 98); and (2) that the pursuer was entitled to the accumulations from 1st October 1863 of the one-fourth part of the profits, and of the surplus of the profits accrued thereon prior to that date, and accumulated therewith in terms of the trust-deed, including interest. There were further conclusions for payment.

The Thellusson Act (39 and 40 Geo. III. cap. 98) was entitled—"An Act to restrain all trusts and directions in deeds or wills, whereby the profits or produce of real or personal estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited;" and enacted, "That no person or persons shall, after the passing of this Act (28 July 1800), 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 granter or granters, settler or settlers, or the term of 21 years from the death of any such granter, settler, devisor, or testator . . . and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

The pursuer averred that he was entitled to be paid these accumulations by the trustees, as he was the person who would have received them but for the direction to accumulate.

Colin Mackenzie's trustees stated that they were willing to administer the funds in dispute as the Court might direct.

Colin Mackenzie's next-of-kin pleaded that the accumulated funds were intestate succession, and therefore fell to be divided amongst them.

Colin Lyon Mackenzie junior pleaded, *inter alia*—(1) That the pursuer's claims were not maintainable with reference to the terms of the Thellusson Act and the trust-deed in question; and "(2) The pursuer having aquiesced in the trustees' administration under the said deed, and received payment in terms thereof of three-fourths of the free interest or profits realised since 1st October 1863, is barred from insisting in his present claim; and the interest or surplus profits so accumulated fall to be invested forthwith, along with the funds from which they are derived, in the purchase of lands to be entailed, as directed by the trust-deed of the late Colin Mackenzie."

At the date of the action only one of the annuitants survived, and the amount of the profits affected by the action amounted to about £6600.

The Lord Ordinary assoilzied the defenders from the conclusions of the action, and added this note to his interlocutor:—

"*Note.*—The Lord Ordinary is of opinion that the Thellusson Act applies. There is no allegation that the trustees have not acted in conformity with the trust, and the accumulations are the result of a direction to accumulate, express or implied, contained in the trust-deed.

"The question remains, Who is entitled to the accumulations? They are claimed by the pursuer

as the person who would be entitled thereto if the accumulations had not been directed.

"The pursuer is the heir of entail in possession of the entailed estates of Easter St. Martins and Drumcudden. The trustees are directed to employ the trust-funds in the purchase of lands and estates as near to St. Martins and Drumcudden as they can conveniently be had, and thereafter to settle them by a valid deed of entail on the same series of heirs, so far as then subsisting, as is contained in the entail in which St. Martins and Drumcudden are held. The trust-deed declares that when any purchase is made, the rents and profits of the lands shall be payable to the heir in possession for the time of the estates of St. Martins and Drumcudden, and that until the purchase the heir in possession of the estates shall be entitled to three-fourths of the interest of the trust-funds and accumulations. The truster therefore provides by express direction for the event which has happened, of no purchase being made. Till the purchase is made, three-fourths of the income of the trust-funds is payable to the heir in possession of St. Martins and Drumcudden. The remainder is to be accumulated, and it is only when lands are bought that the full income becomes payable to the heir in possession for the time.

"Under the trust-deed, therefore, the pursuer cannot claim more than three-fourths of the income of the trust-funds. But he contends, that as the direction to accumulate is illegal, he is in the same position as if the truster had simply directed the lands to be purchased and settled on him as the institute of entail, so that, on the principle of *Lord Stair's* case (2 W. and S. 416), he is entitled to the income of the trust-funds until the lands are bought. In the opinion of the Lord Ordinary this argument is not well founded. The trust-deed in this case fixes the interest of the heirs of entail until the lands are purchased, and there is no room for the presumption on which the case of *Lord Stair* proceeded. Hence the Lord Ordinary conceives that the pursuer cannot claim the accumulations. He cannot do so under the trust-deed, and he has no other right. It seems to the Lord Ordinary that the accumulations are to be dealt with as intestate succession, on the principles recognised in the case of *Lord Keith's Trustees* (19 D. 1040), and *Lord* v. *Colvin* (23 D. 111, 3 Macph. 1083). There is no disposal of residue into which would fall any bequests which failed, from whatever cause."

The pursuer reclaimed, and argued—(1) The Thellusson Act applied. The deed resulted in accumulations which it was the object of the Act to prevent. It was true there was no direction to accumulate, but it was the result which was to be looked at. (2) It was not to be assumed that the result was intestacy. In *Lord Stair's* case it had been held that the primary intention of the truster should be looked at. If there had been no direction to accumulate, the pursuer would have got all. The money was to be invested in land to be entailed on him, and if there had been no direction how the income was to be expended before the purchase, it would have gone, on the authorities, to the pursuer.

Authorities—*Lord Stair* v. *Stair's Trustees*, June 19, 1827, 2 W. and S. 614 (Lord Redesdale, p. 618); *Howat's Trustees* v. *Howat*, Feb. 17, 1838, 16 S. 622; *Campbell's Trustees* v. *Campbell*, June 30, 1838, 16 S. 1251; *Dickson's Tutors* v. *Scott*, Nov. 2, 1853, 16 D. 1; *Moncrieff* v. *Menzies*, Nov. 25, 1857, 20 D. 94; *Lord* v. *Colvin*, Dec. 7, 1860, 23 D. 111, and July 15, 1865, 3 Macph. 1083; *Ogilvie's Trustees* v. *Kirk-Session of Dundee*, July 18, 1846, 8 D. 1230; *Combe* v. *Hughes*, Jan. 27 and May 2, 1865, 34 L.J. Chanc. 344; *Green* v. *Gascoyne*, Dec. 10, 1864, 34 L.J. Chanc. 268; *Macpherson* v. *Macpherson's Trustees*, June 1852, 1 Macq. 243.

At advising—

LORD PRESIDENT—The question here is, whether under the Thellusson Act the accumulation directed in the trust-deed of the late Mr Mackenzie of Newhall, dated 1st August 1838, is not illegal after twenty-one years from the death of the testator, *i.e.* since 1863, Mr Mackenzie having died in 1842?

I am of opinion, with the Lord Ordinary, that the Thellusson Act does apply, and that the accumulations since 1863 are in violation of the Act. The question now comes to be, what is to be done with the profits so accumulated? and that depends on the words of the Act itself, which provides for that event—[*reads Act ut supra*]. The question we have to solve is, who is the person who would have been entitled to these events and profits if they had not been directed to be accumulated? On the one hand, it is maintained that the rents and profits so directed to be accumulated become intestate succession. On the other hand, the pursuer maintains that they belong to him, because if there had been no direction to accumulate he would have been entitled to them under the trust-deed.

I am of opinion that this latter contention is right, and I differ from the Lord Ordinary. I think that the pursuer is the person who would have been entitled to the interest if there was no direction to accumulate. Observe what the capital sum is. It is money which the trustees are to invest in land, to be entailed on the pursuer as institute, and the heirs of his body afterwards. If there had been no direction as to the disposal of the income during the period which elapsed before the purchase of land was made, it cannot be doubted that the income would have gone to the pursuer. That is the inevitable result of the case of *Lord Stair* and the cases which followed on it. The same view of the rights of an institute of entail may be illustrated by reference to the provisions of the Entail Amendment Act. If the heir in possession had been in a position to disentail his lands, he might equally have disentailed this very money which has produced the rents and profits. That shows that, subject to the conditions of the existing entail, the pursuer is absolute owner of the money and of the entailed lands. He is no more limited as to the money than as to the land.

The ground of the Lord Ordinary's judgment is that this is not the ordinary case of a direction to purchase land without any provision as to what is to be done with the money in the meantime. After the lands are purchased, the rents are to go to the heir of entail in possession of Easter St. Martins and Drumcudden, but before that only three-fourths are to go to the heir and one-fourth is to be accumulated. Does that make any difference? I do not think it does. He restricts the right of the heir of entail to three-fourths, in order

to enable the trustees to accumulate one-fourth. It is the same thing as if he had directed the whole to be accumulated. The accumulations, being illegal, go to the party who, but for the direction to accumulate, would have been entitled to get them, and he is the heir of entail under the provisions of the trust-deed. This is quite settled by the case of *Ogilvie's Trs.* v. *Kirk-Session of Dundee*, 8 D. 1230, in the Court of Session, and by the case of *Combe* v. *Hughes*, 34 L. J. Chan. 344, in England. The principle is laid down with great accuracy and precision also in the case of *Lord* v. *Colvin*, 23 D. 111, and 3 Macph. 1083. It seems quite clear, and I have nothing to add.

Lord Deas—There can be no doubt that in this case the testator has directed the proceeds of his estate to be partially accumulated for a longer period than the Thellusson Act allows. I agree with your Lordship that that Act is clearly applicable. The accumulation which is directed beyond the legitimate period is by the Act "null and void." It is very difficult to see, before proceeding further, how an accumulation which is so declared "null and void" is nevertheless to be made applicable to the very purpose directed by the truster. That seems to be the result of giving the accumulation here to the pursuer. It appears to defeat the Act, the very object of which was to prevent the occurrence of such a thing. I have always understood that the meaning of the Act was that if the truster had appointed a residuary legatee, the accumulations struck at by it fell to him. Where there is no residuary legatee, they would fall to the testator's next-of-kin, on the footing that what is not legally disposed of is not disposed of at all.

The only question under the Act is, whether, where there is no residuary legatee, the testator's next-of-kin will take the fund? That was so decided in the well-known case of *Lord* v. *Colvin*. For reasons which I need not repeat, I expressed no opinion in that case on its merits, and I had occasion to refer to my reasons for that in my opinion in the case of *Ferrier* v. *Angus*, Jan. 21, 1876, 3 Rettie, 396. I then stated that I held it settled that that was the law, and that I concurred in it. But what is here proposed is not to give this fund to the residuary legatee or the next-of-kin, but to the person to whom the testator intended it to go, and for whom the testator directed the accumulations to be made. The case of *Ogilvie's Trs.*, and the English case of *Combe* v. *Hughes*, which were cited, proceed on the footing of giving to the residuary legatee what is illegally accumulated.

The only object of the statute was to prevent testators from doing what your Lordships now propose by the operation of the statute to do. I entirely concur in the interlocutor and views of the Lord Ordinary.

Lord Mure—I concur with the Lord Ordinary and with your Lordships that the provision to accumulate in the trust-deed before us is struck at by the Thellusson Act. The question remains, What is to be done with these accumulations? I think that is decided by the clause in the statute which declares that they shall go "to such person or persons as would have been entitled thereto if such accumulation had not been directed." They are to get them to do what they please with them. They may purchase lands with them, or apply them to any other purpose. It appears to me therefore that they belong to the pursuer here, because by force of the trust-deed they would have gone to him along with the other three-fourths if there had been no direction to accumulate the remaining one-fourth. The leading purpose in this part of the trust-deed is a gift to the pursuer of the proceeds of the monies to be invested in lands to be entailed. They would have gone to the pursuer in the absence of such a provision, under the authority of the cases of *Lord Stair* and *Ogilvie's Trs.* The whole free proceeds belonged to the heir of entail one year after the death of the previous heir. I think the observations of Lord Romilly (Master of the Rolls) and of Lords Justices Knight, Bruce, and Turner, in the case of *Combe* v. *Hughes*, clearly apply. There is a gift to the heirs of entail of the proceeds of this fund.

But it is said, on the other side, that the truster has taken the disposal of the one-fourth which is reserved here into his own hands. But, in the early part of the clause the whole proceeds are said to belong by force of gift to the heirs of entail, and in the result I quite concur in the opinion expressed by your Lordship in the chair.

Lord Shand—I am of the opinion expressed by the majority of your Lordships. It is maintained that the Thellusson Act does not apply because it does not appear on the face of the deed that the testator intended that the accumulations should continue beyond twenty-one years, as he expected that the direction to purchase land would be fulfilled within that time. But it has been settled by the case of *Lord* v. *Colvin*, 23 D. 111, 3 Macph. 1083, and by other cases here and in England, that it is not the intention of the truster which determines the question of the application of the Thellusson Act. If *de facto* the accumulations extend beyond twenty-one years, they are struck at by the Act.

The question remains, assuming that the accumulations are prohibited, to whom do they go? It appears to me that the whole series of cases, beginning with that of *Lord Stair* v. *Lord Stair's Trustees*, have a material bearing on this question. By these decisions it is settled that where there is a direction to purchase lands to be entailed, which comes into operation at once on the death of the truster, and is not deferred till the occurrence of some future event, and where it is the duty of the trustees therefore to proceed to purchase and to entail without delay, the institute and other heirs in their order are entitled to receive the income of the fund after the lapse of a year, just as they would draw the rents if the purchase had been made. However long a time may elapse before the purchase is made, the heir of entail is entitled to the income of the fund.

The general direction in this deed as to the application of the residue of the estate is in the ordinary terms which have been the subject of decision in the cases I have referred to. The truster directs his trustees to lay out and invest the whole proceeds of his trust-estate and interest thereon in the purchase of lands to be entailed, and the trustees evidently contemplated that the purchase might take place within a short time after his death. In the absence of a direction to accumulate, the interest of the whole fund would thus have gone to the pursuer as the first person

entitled to the succession to the entailed estates.

The deed, however, contains a subsequent and separate clause, providing that the surplus interest exceeding three-fourths of its amount should be accumulated with the capital, so as to increase the amount of the fund to be applied in purchasing lands. This clause, though effectual for twenty-one years, is struck at by the statute for all time thereafter. The direction, so far as regards the time after the lapse of twenty-one years, is declared to be null and void, and the interest is directed by the statute to "go to and be received by such person . . . as would have been entitled thereto if such accumulation had not been directed."

Who would have been entitled to this surplus interest "if such accumulation had not been directed?" I think the answer to this inquiry must be the heir of entail in possession. The deed must be read as if expressed in all respects as it is, but without this illegal direction to accumulate a part of the interest, and, so read, the surplus interest belongs to the heir of entail for his own personal benefit and use.

The view I take is very well illustrated by the cases of *Ogilvy* v. *Kirk-Session of Dundee*, July 18, 1846, 8 D. 1230, and *Combe* v. *Hughes*, May 2, 1865, 34 L.J., Ch. 344, to which reference was made in the course of the argument. I cannot express the principle better than in the language of Lord Justice Knight-Bruce in the latter case:—"We must, I think, consider that, had the will not contained any direction as to accumulation, but had been in other respects as it is, or had it been expressly confined in its direction for accumulation to the period of twenty-one years next after the testator's death, and had been in other respects as it is, the income of the share called by the testator his daughter's share would in the first case, of the residue, have belonged to herself during the husband's lifetime." So the test is to consider what the result would have been here if there had been no direction to accumulate, and the deed had been in other respects as it is. The heir of entail would then have received this money.

In giving the money to him we are giving direct effect to the literal interpretation, and, as I think, to the true meaning of the statute. The Lord Ordinary says in his note—"The trust-deed in this case fixes the interest of the heirs of entail until the lands are purchased, and there is no room for the presumption on which the case of *Lord Stair* proceeded." It seems to me that in this way the Lord Ordinary gives effect, contrary to the statute, to the direction to accumulate, because it is in the clause directing accumulation that he finds the expressions which enable him to reject the claim of the pursuer. Without that clause of direction, which the statute declares shall be null and void, there is nothing limiting or fixing the interest of the heirs of entail in the interest so as to alter the ordinary rule. I think we must read the deed as if that direction to accumulate after twenty-one years were not contained in it.

I only desire further to distinguish this case from those which have weighed with the Lord Ordinary in coming to his decision that the surplus interest must be dealt with as intestate succession. I think there is an obvious distinction between the present and the cases of *Lord Keith's Trustees*, 19 D. 1040, and *Lord* v. *Colvin*, 23 D. 111, 3 Macph. 1083. Here the direction to purchase and entail might at once have been carried out. In the other cases there was a direction which necessitated a postponement of the purchase of lands, with this result, that till the defined date there could be no heir of entail interested either in the capital or interest. If that had been the case here, I should have agreed with the Lord Ordinary. A single passage from the opinions of Lord Ivory and Lord Curriehill will illustrate my meaning. Lord Ivory says (19 D. 1062):—"As the case stands, the entail cannot be executed until the death of the Countess Flahault. Therefore Mrs Villiers cannot take anything under the directions of the deed. She is not an heir of entail until the very moment when the entail is ordered to be executed. It is not like the case of a trustee being directed to entail from this moment, and where the heir during the period that it is impossible to purchase lands gets the interest of the money. She has no interest or legal right until the time that the trustees are directed to execute the entail, and they are forbidden to execute it until the Countess Flahault dies. The effect of that is, that the accumulated rents (which are now made null by force of statute) belong to nobody. They are intestate, and therefore must go to the two daughters." So too Lord Curriehill says:—"The distinction between this case and that of *Ogilvie's Trustees* is this—In that case the accumulation was directed to take place merely for the purpose of increasing the amount of the fund; and at the period when the accumulation was to cease the fund was to be invested. But here that is not the case. The trustees are forbidden to make any investment until the arrival of an event which has not yet taken place; and it is still a matter of uncertainty who will be the institute under the entail when that contingency shall be purified. In the meantime, neither Mrs Villiers nor any other person can claim this yearly revenue under the settlement; and there being no direction at all regarding them to which effect can be given, these fall to the legal representatives as intestate succession." The facts were similar in the case of *Lord* v. *Colvin*. I concur entirely in the law laid down in these cases. But there was in these cases a postponement of the right of any one even in the capital sum, and there being no provision about the payment of the accruing interest on that fund, the accumulations would have gone to residue had there been a destination of residue. In the absence of a clause of that kind they become intestate succession. Here there is a direction to purchase and entail at once, and when the direction to accumulate flies off, and is practically struck out of the deed, it follows that the fruit of the fund belongs to the heir of entail. I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and that the pursuer should be found entitled to the surplus interest in question.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for Colin Lyon Mackenzie against Lord Rutherfurd Clark's interlocutor of 8th February 1877, Recal the said inter-

locutor: Find that the pursuer, as heir of entail in possession of the estates of Easter St Martins and Drumcudden, is entitled to the whole income of the free residue of the trust-estate in the hands of the defenders, the trustees of the late Colin Mackenzie of Newhall, which had accrued since the 1st October 1863, with any interest which may have accrued on the said income in the hands of the said trustees: To the above extent and effect, decern in terms of the declaratory conclusions of the libel, and remit to the Lord Ordinary to proceed further as shall be just."

Counsel for the Pursuer (Reclaimer)—Balfour—Guthrie. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Colin Mackenzie's Trustees and Miss Mackenzie (Defenders)—Rutherfurd. Agents—Murray, Beith, & Murray, W.S.

Counsel for Colin Lyon Mackenzie jr. (Defender)—Moncreiff—Keir. Agent—J. W. Moncreiff, W.S.

Saturday, June 30.

FIRST DIVISION.

NASMYTH *v.* NASMYTH'S EXECUTORS, *et e contra.*

Entail — Improvement Expenditure — Rutherfurd Act (11 *and* 12 *Vic. c.* 36), *secs.* 15 *and* 18.

An heir of entail obtained from the Court a decree entitling him to charge three-fourths of a sum expended in Montgomery improvements against the heirs of entail, but died before doing so. *Held* that the succeeding heir of entail was bound, under the Rutherfurd Act, secs. 15 and 18, to execute a bond of annual-rent over the estate when called upon to do so by the executors of the deceased heir, and that it was not in his option to grant a bond and disposition in security for two-thirds of the three-fourths.

Sir John Murray Nasymth of Posso, while heir of entail in possession of the entailed estate of Posso and others, executed various improvements of the nature contemplated by the Montgomery Act (10 Geo. III., cap. 51). He afterwards obtained a decree from the Court declaring three-fourths of the sum expended in the execution of the improvements (which were all prior to the date of the Rutherfurd Act, 14th August 1848), amounting to £4982, 18s. 3d., to be a debt against succeeding heirs of entail. The debt contained in that decreet was, on 16th February 1838, assigned to certain trustees acting under a deed of assignation granted by Sir John in security of a sum of £2500 advanced by them to Sir John. Sir John died on 16th July 1876 without executing a bond of annual-rent or bond and disposition in security over the entailed estate in respect of the improvements.

Thereafter, on 9th March 1877, Erskine Campbell Colquhoun of Killermont, and others, his executors, presented a petition to the Junior Lord Ordinary praying that Sir James Nasymth, the heir of entail who succeeded to Sir John, should be ordained to execute over the entailed estate a bond of annual-rent in respect of the improvement outlay, in terms of the statute. Section 15 of the Rutherfurd Act provides—"That where any heir of entail in possession of an entailed estate in Scotland shall have executed improvements on such estate prior to the passing of this Act, and recorded the same in terms of the said last recited Act, and died without having executed a bond of annual-rent as hereinbefore authorised, or having charged the estate as hereinafter authorised, and where decree shall have been obtained, in terms of the said last recited Act, for three-fourth parts of the sums expended thereon, it shall be lawful for the executor or personal representative of such heir of entail, or for any party to whom such heir may have conveyed or assigned such debt, to make application by summary petition to the Court of Session, praying the Court to decern and ordain the heir in possession of such entailed estate to execute, in favour of any party such petitioner may think fit, a bond of annual-rent in ordinary form over such entailed estate or any portion thereof, binding himself and his heirs of tailzie to make payment of an annual-rent during the period of twenty-five years from the date of the death of the heir of entail who shall have executed the improvements, such annual-rent not exceeding the sum of £7, 2s. for every £100 of such three-fourth parts aforesaid, and so in proportion for any greater or less sum . . . . which bond such heir of entail in possession shall be bound to execute accordingly at the sight of the Court.'

Sir James Nasmyth lodged answers to that petition, and also himself brought a petition asking for authority to execute a bond and disposition in security, in respect of the outlay over the estate, in favour of Sir John's executors, or in favour of a creditor advancing him two-third parts of the whole sum of £4982, 18. 3d. He set forth section 18 of the Act—"That in all cases in which it may be competent for an heir of entail in possession of an entailed estate in Scotland, or in which such heir of entail may be called upon, to grant a bond of annual-rent in terms of this Act, it shall be lawful for such heir of entail, and such heir of entail may be called upon to charge, under the authority of the Court of Session as after mentioned, the fee and rents of such estate, other than the mansion-house, offices, and policies thereof, or the fee and rents of any portion of such estate other than as aforesaid, with two-third parts of the sum on which the amount of such bond of annual-rent, if granted, would be calculated in terms of this Act, by granting in favour of any creditor who may advance the amount of such two-third parts, bond and disposition in security over such estate, or any portion thereof other than aforesaid, for such amount, with the due and legal interest thereof from the date of such advance till repaid, and with corresponding penalties."

Answers were lodged for Sir John's executors, objecting to this petition on the ground, *inter alia*, that the 18th section did not confer any option upon the heir of entail in possession. The proposal to charge two-thirds of the said sum of £4982, 18s. 3d. upon the estate by way of bond and disposition in security would, it was stated, if carried out, have the effect (1) of changing the nature of the security from a charge upon the