Wednesday, June 24.

OUTER HOUSE.

[Lord Stormonth Darling, Ordinary.

GIBSON *v.* CALEDONIAN RAILWAY COMPANY.

Proof—Admissibility of Evidence—Public Policy—Evidence of Government Inspector as to Official Report.

In an action of damages against a railway company for personal injuries sustained through an accident on the line, the defenders admitted fault, but pleaded contributory negligence. The pursuer proposed to call an inspector of the Board of Trade as a witness, and to examine him as to a report he had made on the accident. Counsel for the Board of Trade appeared and objected. *Opinion* (*per* Lord Stormonth Darling) that as a general rule it was undesirable that officers of public departments should be examined as to their official reports, and that in this case it was unnecessary as the defenders admitted fault.

David Gibson, linen manufacturer, Belfast, brought an action of damages against the Caledonian Railway Company for personal injuries he had sustained through an accident to a train in which he was a passenger from Glasgow to Ardrossan.

Colonel York, inspector of the Board of Trade, conducted an official inquiry into the circumstances of the accident, and prepared a report, which was laid before Parliament.

At the trial the Caledonian Railway Company admitted that the driver of the train in question was in fault, but pleaded contributory negligence on the part of Gibson. Gibson proposed to call Colonel York as a witness in order to examine him as to his report and the inquiries he had made in preparing it. The Board of Trade objected.

Argued for the Board—It was contrary to public policy that the officials of public departments should be examined as witnesses either as to their reports or to the grounds on which they were based. It was important that such officers should be regarded as impartial, which they would no longer appear if they gave evidence in cases of the present description.

The presiding Judge (LORD STORMONTH DARLING), said—"Mr Maconochie has raised a question of great importance, which I do not think it is necessary to decide in the present case. No unfailing rule can be laid down, but I think it is desirable, in the larger interests of the public, that the officers of a public department like the Board of Trade should be able to keep themselves entirely free from even the suspicion of partisanship, and preserve as far as possible their semi-judicial character. I can imagine cases where it might be necessary to examine them owing to there being a difficulty in getting the same kind of evidence from others, but unless strong reason were shown for it I should always (speaking for myself) be adverse to the examination of such officers as witnesses. In this case I think it is unnecessary to ask Colonel York to give evidence, because there is an admission of fault by the defenders."

Counsel for the Board of Trade—Maconochie.

Counsel for the Pursuer—Comrie Thomson—Wilson. Agents—J. B. Douglas & Mill, W.S.

Counsel for the Defenders—Balfour, Q.C.—Nicolson. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, June 24.

FIRST DIVISION.

SMITH AND OTHERS (LOGAN'S TRUSTEES) *v.* LOGAN AND OTHERS.

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

A testator, after providing annuities to certain persons, directed his trustees upon the death of the last survivor of the annuitants to realise his estate and to divide the residue among his children and grandchildren, declaring that their respective shares should become vested interests "at and only upon the arrival of the period above mentioned."

The annual income of the estate, being considerably larger than the sum required to meet the annuities and general expenses of the trust, had accumulated in the hands of the trustees.

After the lapse of twenty-one years from the death of the testator, two of the annuitants still survived.

Held (following *Lord* v. *Colvin*, December 7, 1860, 23 D. 111) that there was an implied direction to the trustees to accumulate, and that consequently the surplus income of the estate fell under the Thellusson Act.

Succession—Heritable and Moveable—Conversion—Intestacy.

A testator directed his trustees upon the death of the last survivor of certain annuitants to "realise and convert into cash" his whole estate and to "divide" the residue among his children and grandchildren, declaring that their respective shares should become vested interests "at and only upon the arrival of the period above mentioned."

The estate left by the testator was entirely heritable, and the income therefrom being considerably larger than the sum required to meet the annuities and the general expenditure of the trust, had accumulated in the hands of the trustees. Two of the annuitants still survived.

In a question between the heir in

heritage and the next of kin of the testator, *held* (following *Thomas* v. *Tennent's Trustees*, November 17, 1868, 7 Macph. 114, and *Cowan* v. *Cowan*, March 19, 1887, 14 R. 670) that constructive conversion had not taken place as regards the income of the heritable estate as it fell due, on the ground that such income had fallen into intestacy, there being no present gift of the estate, and vesting in the residuary legatees being postponed to a period which had not yet arrived.

Succession—Heritable and Moveable—Accumulation—Thellusson Act (39 *and* 40 *Geo. III. cap.* 98).

Where in obedience to the implied direction of a testator, trustees had accumulated the income of his heritable estate, such accumulated income not having been effectually disposed of by him, *held* (1) that the income of the estate, though heritable as it fell due at each term, became moveable when reduced into possession of the trustees, and that the accumulations of income during the period of twenty-one years from the death of the testator fell to his next of kin; (2) that the revenue derived from the investment of such accumulated income whether before or after that period was moveable, and fell to the testator's next of kin; and (3) (following *Campbell's Trustees* v. *Campbell*, June 30, 1891, 18 R. 992) that the income of the heritable estate after the lapse of twenty-one years fell to the testator's heir in heritage for the time being as each termly payment accrued—*diss.* Lord Adam, who held that it fell to the heir in heritage or his representative as at the death of the testator.

Succession—Heritable and Moveable—Collation—Thellusson Act (39 *and* 40 *Geo. III. cap.* 98).

The heir in heritage of a testator, being also one of his next of kin, who is entitled under the Thellusson Act to the rents of the testator's heritable estate, is also entitled to a share of his moveable estate.

By trust-disposition and settlement John Logan conveyed his whole heritable and moveable estate to trustees for certain purposes.

He directed them, *inter alia*, to pay an annuity of £50 to his widow, and to each of his daughters, Alice Logan and Elizabeth M'Dermott, during their respective lives, and an annuity of £12 to his sister during her life. He provided as follows with regard to the residue of his estate:—"Lastly, upon the death of the last survivor of my said spouse and sister, and my daughters Alice and Elizabeth, or at such other time thereafter as my trustees shall think proper, my trustees shall realise and convert into cash my whole estate and effects, and after meeting or providing for the foregoing purposes, so far as the same shall not have been previously met or provided for, divide the residue and remainder of my said means and estate equally among my sons William Logan and Charles Logan, and my daughter Mrs Mary Ann Logan or Shannon, or the lawful issue of them respectively *per stirpes*, and the lawful issue *per stirpes* of my daughters Elizabeth Logan or M'Dermott and Alice Logan. . . . And it is hereby declared that the shares of residue effeiring to my said sons William and Charles, and my daughter Mrs Mary Ann Logan or Shannon, or their lawful issue respectively, and to the lawful issue of my said daughters Elizabeth and Alice, shall become vested interests in their persons at and only upon the arrival of the period of division above mentioned."

Mr Logan died on 30th March 1871, survived by his wife and sister (who, however, both died soon after), by a daughter, Mrs Shannon, by the said Mrs M'Dermott, by the said Alice Logan, and by two sons, William and Charles Logan.

The testator's heritable estate at the time of his death amounted to about £8000. After payment of his debts, &c., practically no moveable estate was left for the trustees to administer.

The annual income of the heritable estate, after providing for the annuities payable to the testator's daughters Alice and Elizabeth, was so largely in excess of the expenditure that in twenty-one years from the testator's death the accumulations of income, together with the income derived from the same as they were from time to time invested, amounted to close on £8000.

To determine certain questions which had arisen in view of the Thellusson Act with regard to the disposal of the testator's estate, a special case was presented by the following parties:—(1) Mr Logan's testamentary trustees. (2) Mrs Logan, the widow and universal disponee of the testator's son William Logan, who died in 1879. Mrs Logan maintained that as disponee of her husband, who was the testator's heir in heritage as at the date of his death, she was entitled to the surplus income derived from the heritable estate from 30th March 1892, and to continue to receive the same termly as it fell due. (3) The said Mrs Logan and others, being the heirs *in mobilibus*, or their representatives, of the testator as at the date of his death. These parties claimed in accordance with the following alternative contentions, viz.—1. That the whole of the testator's estate had become moveable in virtue of his trust-disposition and settlement, and that the accumulations thereof must be treated as moveable; 2. That, alternatively, the accumulations of the rents and profits of the heritable estate between the testator's death and the 30th March 1892 formed part of the testator's moveable estate. (4) Charles Logan, the heir in heritage of the testator from the death of the elder son William in 1879. This party maintained that he was entitled to the free income of the whole heritable estate since 1879, or alternatively since 30th March 1892. (5) Mrs M'Laughlin, the daughter of Mrs Shannon, and others, heirs *in mobilibus* of the testator as at 30th March 1892, who claimed the surplus income of the estate from that date.

(6) Charles M'Dermott and other children of the testator's said daughter Elizabeth, residuary legatees under the truster's settlement, who maintained that the provisions of the Thellusson Act did not apply to the circumstances of the trust, and that the estate must be allowed to accumulate in the hands of the first parties till the period of division fixed by the testator should arrive.

The following questions of law were submitted to the Court:—"(1) Is the surplus income of the trust-estate accruing during the period between the testator's death and the final division of the trust-estate undisposed of by the testator? (2) If there is an implied direction to accumulate the said income, is such accumulation, subsequent to 30th March 1892, prohibited by the Thellusson Act? (3) Are the whole estates left by the testator to be treated as moveable in virtue of the terms of the said trust-disposition and settlement? (4) Are the accumulations of the rents and profits of the heritable estate, which have accrued from the date of the testator's death till 30th March 1892, part of the moveable estate of the trust? (5) Are the parties entitled to succeed to such of the surplus income as is held to be moveable estate—(*a*) The heirs *in mobilibus* of the testator as at the date of his death; or (*b*) The heirs *in mobilibus* of the testator as at 30th March 1892; or (*c*) The heirs *in mobilibus* of the testator when such income accrued or may accrue? (6) Is the party entitled to succeed to such of the surplus income as is held to be heritable estate—(*a*) The second party as representing the heir-at-law of the testator as at the date of his death; or (*b*) The fourth party, who is the heir-at-law of the testator as at 30th March 1892; or (*c*) The heir-at-law at the time when such income accrued or may accrue? (7) In the event of the fourth party's claim as heir-in-heritage being sustained, is he also entitled to a share of such of the estate as may be held to be moveable as one of the third or fifth parties as the case may be?"

The Thellusson Act (39 and 40 Geo. III. cap. 98), enacts—"Whereas it is expedient that all dispositions of real or personal estate, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof postponed, should be made subject to the restrictions hereinafter contained, . . . be it enacted that no person or persons shall, after the passing of this Act, . . . settle or dispose of any real or personal property so . . . that the rents . . . thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such granter or granters, settlor or settlors, or the term of twenty-one years from the death of any such granter, settlor, 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, proceeds, 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."

Argued for the second party—(1) The Thellusson Act applied to the accumulations—*Lord* v. *Colvin*, December 7, 1860, 23 D. 111. The necessary consequence was intestacy as regards the accumulations after twenty-one years; for this was not the case of a present gift burdened with an accumulation, like *Maxwell's Trustees* v. *Maxwell*, November 24, 1877, 5 R. 248, but it fell under the principle of *Cathcart's Trustees* v. *Heneage's Trustees*, July 13, 1883, 10 R. 1205. Here there was no gift apart from the direction to pay at a certain postponed period, and vesting was expressly declared not to take place till that period arrived. (2) The estate was heritable, and therefore the accumulations of rents after the twenty-one years must fall to the heir in heritage. (3) It was well established by *Lord* v. *Colvin*, *ut supra*, that in such cases the heir must be looked for as at the time of the testator's death. The decision, indeed, in *Campbell's Trustees* v. *Campbell*, June 30, 1891, 18 R. 992, and especially Lord Rutherfurd Clark's opinion at p. 1008, seemed to lay down that accumulations as they fall due go to the heir in heritage for the time being. In so far as *Campbell's Trustees* was inconsistent with *Colvin*, it was not well decided.

Argued for the third parties—The whole estate here was moveable in virtue of the direction to convert—*M'Gilchrist's Trustees* v. *M'Gilchrist*, March 8, 1870, 8 Macph. 689. The beneficiaries' right was a right to money, and therefore the accumulations of income were moveable as well as the capital—*Lord* v. *Colvin*, *ut supra*, was conclusive as to the time at which the heirs must be sought.

Argued for the fourth party—(1) The Thellusson Act applied. (2) The succession here was heritable, and the *corpus* of the accumulations was heritable. There had been no actual conversion, and, at all events, conversion would not take effect as regards the accumulations which the testator had not disposed of—*Cowan* v. *Cowan*, March 19, 1887, 14 R. 670. *Campbell's Trustees*, *ut supra*, had settled that the heir must be selected as at the date when the rents come into existence. In *Colvin* the question had been dealt with as one of ordinary intestacy, and not of intestacy under the Thellusson Act. The fourth party was therefore entitled to accumulations since 1879, and to the rents since 1892. Nor, with regard to question 7, was he bound to collate; for he did not take under ordinary intestate succession.

Argued for the fifth parties—*Campbell's Trustees* and not *Colvin* now ruled the question as to when heirs must be looked for in cases of intestacy.

Argued for the sixth parties—The residuary legatees were entitled to the accumulations—*Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H. of L.) 45, *per* Lord Watson, at p. 49.

At advising—

LORD M'LAREN—The subject of dispute between the parties may be considered under three heads. (1) Is there an implied direction to accumulate rents, so that the income of the heritable property falls under the operation of the Thellusson Act? (2) Assuming that the residue of the truster's estate does not vest until the period of distribution, so that the surplus income cannot be treated as residue, is this income heritable or moveable, as to succession? (3) If the income is heritable, who is the heir?

On the first point I think there is no room for doubt. If a truster directs that to be done, which as a consequence leads to indefinite accumulation, he must, within the meaning of the statute, be taken to have directed accumulation. This is the principle of the decision in *Lord* v. *Colvin*, 23 D. 111, where the cause of the accumulation was the failure of the parties to whom the testator had left the intermediate income of his estate. Here, the income of the trust estate is undisposed of; and if the trustees were to act up to the letter of the will, they would be under the necessity of adding the income year by year to the capital until the arrival of the period of vesting. I think this is a plain case of accumulation contrary to the express provisions of the statute.

On the second point it is only necessary to read the residuary destination in the last trust purpose, to see that the beneficiaries cannot be ascertained until after the failure by death of the truster's spouse and sister, and his daughters Alice and Elizabeth. Then the principle to be applied is stated by Lord Justice-Clerk (Moncreiff) in the case of *Stirling-Maxwell*, 5 R. 248—"If the fund directed to be accumulated is not the subject of any present gift, the right of the eventual beneficiary will not be accelerated or arise at the term of twenty-one years. . . . But if there be a present gift of the fund itself, and the direction to accumulate be only a burden on the gift, then the burden will terminate at the expiration of twenty-one years."

In the case before us there is certainly no present gift of the residue; and as the income cannot lawfully be accumulated for the benefit of unknown residuary legatees, it must go to heirs-at-law, or to next of kin. But in considering who is entitled to the income, it is necessary to distinguish the sources from which the residue is derived, because the existing residue consists in part of the truster's heritable estate, and in part of the rents which have been lawfully accumulated during the permitted period of twenty-one years.

As regards the rents of the truster's heritable estate, my opinion is that these, as they fall due, are heritable, and that the principle of constructive conversion is inapplicable. In the argument addressed to us on this subject our attention was called to the introductory part of the last trust-purpose, where the truster directs his trustees to "realise and convert into cash" his whole estate and effects, with a view to distribution. If we were here considering the devolution of a share of residue given under the will, I should think it perfectly clear that the heritable estate was constructively converted, and that the next of kin of the beneficiary were the persons entitled to take as his representatives. But then it is settled law that constructive conversion in virtue of a direction to sell only exists and takes effect for the purposes of the trust, and it cannot well be said that the application of surplus income in terms of an Act of Parliament is one of the purposes of this will.

If the question were, who is entitled to take a heritable subject, or a share of heritage, which in a certain event is undisposed of, the answer must be the heir in heritage; and I am unable in this question to distinguish between undisposed-of capital and undisposed-of income, because the principle is that the heir cannot be displaced except by giving the estate to another. I think the reasoning of Lord Barcaple in *Thomas* v. *Tennent*, 7 Macph. 114, and of the Lord President in the case of *Cowan*, 14 R. 670, applies just as truly to the case of estate set free by the operation of an Act of Parliament, as to cases of proper intestate succession arising through the failure of the objects of a trust; and if this view be well founded, it follows that the rents which accrue after accumulation ceases are heritable.

Again, with respect to the income which has accrued and may accrue by the investment of the rents which were lawfully accumulated during the permitted period of twenty-one years, I am of opinion that such income must go to the truster's next-of-kin, because, as soon as these rents were lawfully reduced into possession by the trustees, for the purposes of the trust, they became moveable in every sense, and the income derived from their investment is also moveable. I need hardly add that next-of-kin are always ascertained at the death of the intestate. There are no other next-of-kin known to the law.

On the third point, my opinion is, that the right to uplift rents which are not disposed of by the will falls under the heir's title of apparency. It is, of course, an elementary rule that the apparent heir has a title to receive the rents of his ancestor's estate, and this title must subsist until it is displaced by a better title.

I do not think it is possible in the actual circumstances of this trust to make up a title to rents *in genere*, and it follows, in my opinion, that each termly payment as it accrues vests in the heir-apparent, that is, in the person who at the time has the character of nearest heir of the truster. My view is supported by the judgment of the other Division of the Court in the case of *Campbell's Trustees* v. *Campbell*, 18 R. 992, and I desire to express my concurrence in the reasoning of Lord Rutherfurd Clark on this point.

LORD KINNEAR concurred.

LORD ADAM (whose opinion was read by LORD KINNEAR)—The late John Logan died on 30th March 1871, leaving a trust-disposi-

tion and settlement by which he conveyed his whole estates, heritable and moveable, to trustees for certain purposes.

Inter alia, he directed his trustees, who are the first parties to this case, to pay out of the annual proceeds of his estates an annuity of £50 to his wife during her life or widowhood, an annuity of £50 to each of his daughters Alice and Elizabeth, and an annuity of £12 to his sister Mrs King. Lastly, he directed his trustees, on the death of the last survivor of his spouse, sister, and daughters Alice and Elizabeth, to realise and convert into cash his whole estate, heritable and moveable, and divide the residue equally among his sons William and Charles and his daughter Mrs Shannon, or their lawful issue respectively, and among the lawful issue of his daughters Elizabeth and Alice, but it was declared that their shares of the residue should only become vested in their persons at and only upon the arrival of the period of division.

The truster's daughters Alice and Elizabeth are still alive, so that the period of division has not arrived, and consequently no right to a share of the residue has vested in the persons named as residuary legatees, but their contingent interest in the residue is represented in this case by the parties of the sixth part, who are the children of the truster's daughter Elizabeth Logan or M'Dermott.

It appears that after providing for payment of the annuities, the income of the estate has been largely in excess of the expenditure. That income is now derived from the income of the original estate left by the truster, which appears to be entirely heritable, and from the income derived from the accumulations of the surplus income which has been invested from time to time.

The period of twenty-one years from the truster's death expired on 30th March 1892, and the principal questions raised in this case are, whether the Thellusson Act applied, and if so, who are the parties entitled to the surplus income subsequent to the 30th March 1892, first from the heritable estate left by the truster, and second, from the before-mentioned accumulations.

It seems to me to be very clear that there is an implied direction to accumulate the surplus income in this case, and that therefore the Thellusson Act applies to the effect of prohibiting such accumulation after the 30th March 1892. It is also sufficiently clear that the surplus income must now be paid over to some one or other of the claimants who can show a present right to it, but as the residue has not vested in the residary legatees, and they have no present right to it, and may never have any right at all, they can have no right to the surplus income, and that disposes of the claim of 6th parties.

The Act says that the direction to accumulate beyond twenty-one years shall be null and void, and that the proceeds of the property so directed to be accumulated shall go to such person or persons as would have been entitled thereto if such accumulation had not been directed. Now, as the only testamentary direction with regard to this surplus income is null and void, it seems to follow that it must be treated as estate not disposed by the truster, and therefore to go to the person entitled to succeed to him therein *ab intestato* at the time of his death. But the estate left by the truster was entirely heritable, therefore it seems to me the surplus income subsequent to 30th March 1892, in so far as derived from that estate, must go to the heir in heritage of the truster at the time of his death, or to the person now representing him, that is, to the party of the second part.

The future income derived and to be derived from the accumulations of surplus income during the period of twenty-one years appears to me to be in a different position. That income was properly received and administered by the trustees during that period. Although derived from heritable estate it became moveable in their hands. But the truster must be held to have given no direction as to the disposal of the future income derived from these accumulations, and being derived from moveable estate, I think it must go to the truster's heirs in moveables at the date of his death, or to their representatives, that is, to the third parties to this case.

I am therefore of opinion that the first question should be answered to the effect that the surplus income accruing after the period of twenty-one years from the truster's death is undisposed of. That the 2nd question should be answered in the affirmative; the 3rd in the negative; the 4th in the affirmative. Question 5 (*a*) in the affirmative, 6 (*a*) in the affirmative.

LORD PRESIDENT—I agree with Lord M'Laren.

The Court answered the 1st and 2nd questions in the affirmative; found, in answer to the 3rd question, that the rents accruing subsequently to the 30th March 1892 were heritable and fell to the heir in heritage for the time being; answered the 4th question, the 5th question, branch (*a*), the 6th question, branch (*c*), and the 7th question, in the affirmative; and found in answer to the 7th question that a party who is heir and also one of the next of kin may take a share of the moveables as well as the rent falling to him by statute.

Counsel for the First Parties, Logan's Trustees—Burnet. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Second Party, Mrs Catherine Logan—Guy. Agents—Carmichael & Miller, W.S.

Counsel for the Third Parties, Mrs Catherine Logan and Others—T. B. Morison. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Fourth Party, Charles Logan—W. Campbell. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Fifth Parties, Mrs M'Laughlin and Others, and Sixth Parties, Charles M'Dermott and Others—Watt. Agents—Macpherson & Mackay, S.S.C.