in the management of the trust, and then there was the consideration that the investments having been proper trust investments, and duplicands having been decided by the three cases above cited to form part of the annual proceeds of an estate, it was hardly consistent with these decisions to divide them up into income and capital. But the necessity of considering this question for the first time is obviated by the decision which the Court was referred to at the close of the debate, in the case of *Curle's Trustees*, decided December 18, 1903, but reported for the first time in the Scottish Law Reporter of November 11th last (46 S.L.R. p. 7). In that case the trust estate consisted, *inter alia*, of a ground-annual which had been in possession of the testator, and of a large number of feu-duties and ground-annuals purchased after the testator's death. On many of these, duplicands were payable, some of them very soon after the date of purchase. Questions were put in the special case dealing separately with a number of the purchased feu-duties and ground-annuals, and the Court answered all the questions in the affirmative, to the effect that in every case duplicands of feu-duties and ground-annuals whenever payable formed part of the income or produce of the trust estate, and they held that the case was ruled by the decisions in the cases of *Fleming*, *Ross*, and *Dunlop's Trustees*. Accordingly, it may now be held to be settled that where part of an estate is invested in superiorities or ground-annuals, duplicands or casualties form part of the income of such estate, and will be held to be so, unless there is something to the contrary in the deeds under which the estate is administered, or, I may add, unless the improbable event has occurred of investments having been fraudulently made for the purpose of favouring liferenters at the expense of fiars.

I accordingly propose that the first question should be answered to the effect that all the duplicands and casualties enumerated in the appendix fall to be considered as income or revenue payable by the first party to the third party, and with regard to the second question I propose that it should be answered in the negative.

The LORD JUSTICE-CLERK and LORD LOW concurred.

LORD DUNDAS was sitting in the Extra Division at the hearing.

The Court answered the first question of law by declaring that all the duplications or casualties fall to be considered as income of the estate payable by the first party to the third party, and answered the second question in the negative.

Counsel for the First and Second Parties—Forbes—Irving. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Third Party—Ingram. Agent—Henry Robertson, S.S.C.

Saturday, November 28.

FIRST DIVISION.

LORD ADAM AND ANOTHER (CUNNINGHAM'S TRUSTEES) *v.* BLACKWELL AND OTHERS.

Succession—Vesting—Division per stirpes or per capita—"Among."

A testator directed his trustees that on the death of his widow, to whom he had given a liferent, "all of which I am possessed be divided equally among my cousins the Blackwells (leaving out Mrs Buckle), and among the children of my uncle James Hay."

Held (1) that the fee of the residue vested *a morte testatoris*, (2) that the residue fell to be divided among the Blackwell family and the Hay family *per capita*, (3) that a member of the Hay family born after the testator's death was entitled to a share.

By holograph last will or testament, dated 6th April 1841, and registered in the Books of Council and Session 30th September 1842, Robert James Hay Cunningham, hereinafter referred to as the "testator," conveyed to the trustees and executors therein mentioned his whole property, real and personal. The said will was in the form of a letter to his agents, and was as follows:—"Trafalgar Hotel, London, April 6th, 1841—To Messrs Tod & Romanes, Great Stuart Street, Edinburgh, who are hereby appointed my trustees and executors.—Gentlemen,—I hereby dispone and convey to you my whole property, real and personal, and the vouchers thereof, with directions to fulfil the obligations in my contract of marriage to my wife, and thereafter to pay and apply the free proceeds as follows:—£100 sterling to James Turner, schoolmaster, West Barns, Dunbar; £200 to my servant John Gibson Campbell; my collection of Latin and Greek Classics to James Turner, schoolmaster, West Barns, Dunbar; my geological and mineralogical collection to the Edinburgh Museum; £100 to my cousin Robert Blackwell; all furniture, pictures, plate, jewels, I bequeath to my wife, with also the liferent of all monies belonging to me after the above-mentioned legacies are paid off; on the event, however, of her either entering into a second marriage or not residing permanently *in Scotland*, she is not to be entitled to the interest of any money belonging to me; upon her decease, or second marriage, or non-residence in Scotland, I desire that all of which I am possessed be divided equally among my cousins the Blackwells (leaving out Mrs Buckle) and among the children of my uncle James Hay, Esq. of Belton. . . ."

The testator died on the 15th of May 1842, and the trustees nominated by his said last will or testament entered into possession of his whole means and estate. The trustees duly implemented the prior purposes of the trust imposed upon them, and held the residue for the liferent use of the testator's

widow, hereinafter referred to as the liferentrix, in terms of the said last will or testament. The liferentrix survived the testator, and continued to enjoy the liferent of the residue of the testator's estate until her death on 23rd November 1907. She remained his widow, and continued to reside in Scotland till her death. In consequence of the death of the liferentrix the residue of the testator's estate amounting to about £16,000 became available for division in terms of the directions in his said last will or testament before narrated.

The testator was survived by two families of first cousins, viz. (1) the children of Mrs Richard Hay or Blackwell, a sister of his mother, six in number (including Mrs Buckle), and (2) the children of Admiral James Hay of Belton, a brother of his mother, ten in number.

Questions having arisen between the parties as to the construction and effect of the direction for the disposal of residue, a Special Case was presented.

The first parties to the case were the trustees acting under the will.

The second parties were the representatives of the five members of the family of Mrs Blackwell (designed in the said last will or testament as "my cousins the Blackwells (leaving out Mrs Buckle)," and hereinafter referred to as the Blackwell family) who survived the testator, but all of whom predeceased the liferentrix. The third parties were the members or representatives of members of the family (hereinafter referred to as the Hay family) of the late Admiral Hay of Belton (designed in the said last will or testament as "James Hay, Esquire of Belton") who were born in the lifetime of the testator, and who survived both the testator and the liferentrix. The fourth parties were the representatives of members of the Hay family who survived the testator but predeceased the liferentrix. The fifth party was the youngest member of the Hay family, and was the only one of that family who was born after the death of the testator.

The first parties, as trustees foresaid, offered no contention as to the meaning and effect of the testator's directions with regard to the disposal of the residue of his estate, and were willing to distribute the said residue in accordance with the findings of the Court in the case.

The second parties contended that upon a sound construction of the said last will or testament the residue vested *a morte testatoris* in the members of the Blackwell family and the Hay family then alive, subject to the widow's liferent thereof and not subject to defeasance *pro tanto* in favour of any members of the Hay family born after that date, and that the division should be *per stirpes* and not *per capita* as between the two families.

The third parties contended that vesting was postponed till the death of the liferentrix, and that the residue fell to be divided *per capita* among the members of the Hay family who were born during the testator's life and survived the death of the liferentrix.

The fourth parties contended that the fee of the residue vested *a morte testatoris* in the residuary legatees, and that the division fell to be made *per capita* and not *per stirpes*.

The fifth party contended that vesting was postponed till the death of the liferentrix; that the division ought to be *per capita;* and that in any event she was entitled to share in the said residue equally with the other members of the Hay family.

The questions of law were as follows—"(1) Did the fee of the residue of the testator's estate vest in the parties entitled thereto—(*a*) *a morte testatoris*, or (*b*) at the death of the liferentrix? (2) In the event of its being held that vesting took place *a morte testatoris*, does the said residue fall to be divided among the Blackwell family and the Hay family—(*a*) *per stirpes*, or (*b*) *per capita?* (3) Is the fifth party, though born after the testator's death, entitled to a share of the residue as a member of the Hay family?"

The second parties argued—(1) As regards the first question, there was nothing here to suspend vesting; (2) the division should be *per stirpes—Searcy's Trustees* v. *Allbuary*, 1907 S.C. 823, 44 S.L.R. 536; *Inglis* v. *M'Neils*, June 23, 1892, 19 R. 924, 29 S.L.R. 795 (*sub nomine Hamilton* v. *Inglis*); (3) on the third point they offered no argument.

The fourth parties argued—(1) There was nothing here to suspend vesting. (2) The general rule was that division was *per capita*, unless there was something to indicate the contrary—*Laing's Trustees* v. *Sanson*, November 18, 1879, 7 R. 244, at 245, 17 S.L.R. 128; *Bogie's Trustees* v. *Christie*, January 26, 1882, 9 R. 453, 19 S.L.R. 363; *Macdougall* v. *Macdougall and Others*, February 6, 1866, 4 Macph. 372, 1 S.L.R. 143. In *Inglis* v. *M'Neils* (*cit. sup.*), where the division was *per stirpes*, there was the repetition of the word equally.

The third parties argued—(1) Vesting was postponed. There was no gift to the cousins till the death of the widow, and no direction to pay—*M'Alpine and Others* v. *Studholme*, March 20, 1883, 10 R. 837, Lord President at 844, 20 S.L.R. 551; *Scott's Trustees* v. *Dunbar*, January 26, 1900, 2 F. 516, at 519, 37 S.L.R. 375: *Ross's Trustees* v. *Ross*, May 29, 1902, 4 F. 840, Lord Trayner at 844, 39 S.L.R. 678. (2) The division was *per capita*. On this question they adopted the argument of the fourth parties. In *Searcy's Trustees* (*cit. sup.*) the word "family" was used as the unit, and there were double words of distribution.

The fifth party argued—(1) On the first question she adopted the argument of the third parties, and (2) on the second question that of the fourth parties. (3) In support of her contention on the third question she referred to *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, 4 S.L.R. 226; *Hickling's Trustees* v. *Garland's Trustees*, August 1, 1898, 1 F. (H.L.) 7, Lord Davey at p. 19, 35 S.L.R. 975.

At advising—

LORD PRESIDENT—The late Mr Cunningham left a will in the form of a letter to his agents, dated in 1841, whereby he appointed his agents his trustees and executors, and directed them to pay certain legacies, and then continued—"I bequeath to my wife . . . the liferent of all monies belonging to me after the above-mentioned legacies are paid of," restricted, however, on the event of her either entering into a second marriage or not residing permanently in Scotland; and the will proceeds that on the occurrence of either of these events or on her decease "I desire that all of which I am possessed be divided equally among my cousins the Blackwells (leaving out Mrs Buckle), and among the children of my uncle James Hay, Esquire, of Belton." The wife survived the testator and became his widow, and continued to enjoy the liferent until her death in November 1907. That event accordingly set free the money, and the question that has arisen is how that money is to be divided.

Now the first question that is put to your Lordships is whether the money vested *a morte testatoris* or upon the death of the liferentrix. I do not think that that question can admit of the slightest doubt. There is simply nothing here to prevent the vesting, and according to the ordinary rule, where there is no reason to prevent vesting, the vesting takes place *a morte testatoris*. Accordingly the persons who became entitled *a morte testatoris* were the persons described in the clause that I have read.

The next question, however, that arises is whether the division is to be *per capita* among the persons named or *per stirpes*. The expression is, "to be divided equally among my cousins the Blackwells (leaving out Mrs Buckle), and among the children of my uncle James Hay, Esquire, of Belton." Now of course a question of this sort always depends upon the words of the will, and anything that may be gathered from any part of the will as to intention. Here there is nothing to be gathered from any part of the will, and there is no suggestion why the testator should prefer one cousin to another. The word "among" in its natural sense means of course a division among a plurality, that is, in a case like this a division *per capita*. It is quite true there may be circumstances which may change the signification of the word "among," and which we have had to examine in two quite recent cases—*Searcy's Trustees* (1907 S.C. 823) and *Inglis* v. *M'Neil* (1892, 19 R. 924). In both these cases there were words used by the testator which suggested that there was to be a double operation of division—first, the operation of division among the families, and then the operation of division among the members of the families. That being so, it was held that these words could not be given effect to unless you had, first, a *per stirpes* division, and then a division among the family itself. Now I do not think that here the repetition of the word "among" will, so to speak, bear the weight of altering the ordinary rule; and in point of fact, so far as instruction can be got in one case from another, the law is laid down in the early case of *M'Kenzie* v. *Holte*, in 1781, M. 6602, where the expression was "equally among the children of Janet M'Kenzie and the children of Anne M'Kenzie and the children of Anne Munro." It was argued there that the repetition of the conjunction "and" showed that there was to be a *per stirpes* division, but that argument was not given effect to, and the Court held that the general rule must hold and the division be *per capita*. I think that the repetition of "among" here does not really make any difference, and accordingly I am of opinion that the division must be *per capita*.

The only other question is whether a certain party, one of the Hays, who is a *post natus*—born after the testator's death—comes in. I think it is settled that when a family are described as a class, as here, "the children of my uncle James Hay," that means that the whole family are called, and that as any child is born it comes in for its share.

Accordingly I propose that we should answer the first alternative of the first question in the affirmative, and the second alternative of the second question in the affirmative, and the third question affirmatively.

LORD KINNEAR—I am of the same opinion on all the points.

LORD SKERRINGTON—I do not propose to add anything to what your Lordship in the chair has said with regard to the first and third questions, as there is no real difficulty with regard to either of them.

There is perhaps some delicacy with regard to the second question. As your Lordship observed, in a case of this kind a great deal depends upon the exact phraseology of the will. It will be remembered that the testator expressed the desire that upon the termination of his widow's liferent, all of which he was possessed should be divided equally among his cousins the Blackwells, and among the children of his uncle Mr Hay. *Prima facie* I should understand this direction as meaning that every member of both families should take an equal share of the testator's whole estate. This impression is confirmed by the fact that the beneficiaries were all equally nearly related to him, and that no good reason appears why he should have desired to give one-half of his estate (say) to a single Hay cousin if it so happened that only one of that family survived him. The opinion at which I have arrived upon a construction of the language of the will is confirmed by the authorities. I refer in particular to the general statement of the law by Lord M'Laren in *Allen* v. *Flint*, 1886, 13 R. 975, at p. 977. As I can find nothing in this will which indicates an intention contrary to what I have described as the *prima facie* construction, I am of opinion with your Lordship that the division should be *per capita*.

LORD M'LAREN and LORD PEARSON wer absent.

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

Counsel for the First Parties—James Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties—Macfarlane, K.C.—Grainger Stewart. Agents—J. & F. Adam, W.S.

Counsel for the Third Parties—Macphail—C. H. Brown. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Fourth Parties—Hon. Wm. Watson. Agents—Blair & Caddell, W.S.

Counsel for the Fifth Parties—A. P. Carnegie. Agents—Rutherfurd & Don Wauchope, W.S.

Tuesday, November 24.

SECOND DIVISION.

[Lord Dundas, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* BUDHILL COAL AND SANDSTONE COMPANY AND OTHERS.

Railway—Mines and Minerals—Sandstone—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 70.

Held (Lord Ardwall *dissenting*) (1) that sandstone is a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845, and (2) that the substance comprising the upper portion of the stratum of sandstone lying between the subsoil and the sandstone proper, which was of value when ground down as moulder's sand, was also a mineral in the sense of the section, although it was soft and friable and not hard enough for building purposes.

Railway—Mines and Minerals—Notice of Intention to Work Minerals—Bona Fides—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 71.

Circumstances in which *held* that a railway company had failed to prove want of *bona fides* on the part of lessees of the minerals under the railway in serving a notice under sec. 71 of the Railways Clauses Consolidation (Scotland) Act 1845 of intention to work the minerals and subsequently working them, although there was evidence that the substance obtained was not of great value and the mode of working it was for it unusual.

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), enacts, sec. 70—"The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug and carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

Section 71—"If the owner, lessee, or occupier of any mines or minerals lying under the railway . . . be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; . . . . and if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway, and if the company be desirous that such mines, or any part thereof, should be left unworked, and if they be willing to make compensation for such mines or minerals, . . . they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines under the railway . . . . which they shall desire to be left unworked, and for which they shall be willing to make compensation; and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice; and the company shall make compensation for the same, and for all loss or damage occasioned by the non-working thereof, to the owner, lessee, and occupier thereof respectively. . . ."

On 14th December 1906 the North British Railway Company brought an action of declarator and interdict against the Budhill Coal and Sandstone Company, Glasgow, and others, in which they sought declarator (*first*) that the pursuers, as proprietors of certain lands at Shettleston Station, in the parish of Shettleston, were proprietors "of (*a*) the soil, (*b*) the clay, (*c*) the sand, and (*d*) the other substances presently being worked and removed by the defenders the Budhill Coal and Sandstone Company, . . . lying in, under, or upon the said lands, and that the said soil, clay, sand, and other substances are not comprehended or included either (1) in the mines of coal, ironstone, slate, or other minerals deemed to be excepted in terms of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845, out of the conveyances of the said lands . . . . or (2) in the mines or minerals expressly excepted out of the said conveyances so far as mines or minerals are expressly excepted therefrom;" (*second*) that the defenders were not entitled to work or remove the above-named substances; and (*third*) that the defenders were not entitled to work or remove any of the said substances so as to injure the pursuers' lands or their works, railway, and station, or so as to interfere with their traffic.

Conclusions for interdict followed.