ment was made that he would cease to hold the office, and the income now to be charged was in respect, not of holding the office, but of his having held it. If there is to be a charge here it must be under Schedule D, the words of which apply to the case in hand. As to the provisions of section 105 of the Act exempting charitable institutions, I entirely agree with your Lordship.

LORD M'LAREN was absent.

The Court remitted with instruction to assess under Schedule D.

Counsel for the Appellant—Johnston, K.C. — Hon. Wm. Watson. Agents — Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondent—Lorimer, K.C.—Macpherson. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Thursday, June 24.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

WILSON'S TRUSTEES *v.* GLASGOW ROYAL INFIRMARY AND OTHERS.

Succession — Accumulations — Accumulations Act 1800 (39 *and* 40 *Geo. III, c.* 98) (*Thellusson Act*), *sec.* 1—*Residue Payable at Future Time—Right to Surplus Income—Intestacy.*

A testator who died in 1854 directed his trustees to accumulate the revenue of his estate (so far as not required for the payment of annuities), and therewith to pay off a bond with which his heritable estate was burdened. After the bond had been discharged the trustees were to invest the surplus accumulations in their own names, and "after the death of the last survivor of the said annuitants" to pay over "the whole surplus revenue and remainder of the said estates in their hands to the directors of the Glasgow Royal Infirmary, to whom I leave, bequest, and destine the same for the use and behoof of that valuable institution." The bond was paid off in 1875, being twenty-one years from the testator's death, when owing to the operation of the Thellusson Act further accumulations became illegal. In 1909 (one of the annuitants being still alive) a question arose as to the right to the surplus income which had accrued since 1875, the Infirmary claiming it as residuary legatee, and the testator's heirs as undisposed of succession.

Held that as there was no present gift to the residuary legatee, but a gift emerging on the death of the last annuitant (who was still alive), the intermediate income was undisposed of and fell to the heirs as intestate succession.

Weatherall v. *Thornburgh*, 8 C.D. 261, *followed.*

The Accumulations Act 1880 (39 and 40 Geo. III, c. 98) (Thellusson Act), enacts, sec. 1—"No person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, 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."

On 13th January 1909 James D. Hedderwick and others, trustees of the late Andrew Wilson, spirit merchant, Glasgow, brought an action of multiplepoinding and exoneration against (1) the Glasgow Royal Infirmary, and (2) Mrs Janet Wilson or Smith, 71 Dale Street, Glasgow, and another, the heirs *ab intestato* of the testator, both of whom claimed right to the surplus revenue of the residue of the trust estate, the further accumulation of which had, owing to the operation of the Thellusson Act, become illegal.

The circumstances in which the action was raised are given in the opinion *(infra)* of the Lord Ordinary (SALVESEN), who on 28th May 1909 found that the surplus accumulations of revenue subsequent to 26th September 1875 (being twenty-one years from the testator's death) were undisposed of and had fallen into intestacy.

Opinion. — "The late Andrew Wilson died on 26th September 1854, leaving a trust-disposition and settlement by which he conveyed his estate to certain trustees. The primary purposes of the trust were for payment of certain annuities to his children and other relatives; and the trustees were specially empowered to pay off a bond which rested on the heritable estate out of any surplus rents and interests which they might have in hand, and after the bond had been discharged, to invest any disposable accumulations of rents and interests on heritable securities in their own names. This bond was paid off so far back as 1875; and all the annuitants with the exception of one, who may survive for many years, are now dead. As it is illegal under the Thelluson Act to accumulate income for a longer time than 21 years after the death of the testator, a period which in the present case expired on 26th September 1875, the present action has been brought to determine to whom the surplus accumulations subsequent to that date fall to be paid. These accumulations are claimed on the one hand by the next-of-kin and heir-at-law of the testator, who have agreed amongst them-

selves as to the division of any sums to which they may be found entitled; and on the other by the directors of the Glasgow Royal Infirmary.

"The question depends on the construction of the ninth purpose of the trust-disposition and settlement, which is in the following terms:—'(*Ninthly*) After the death of the last survivor of the said annuitants, my trustees shall sell and dispose of all my said heritable subjects in whole or in lots by public roup, on advertisements for six weeks successively in two or more of the Glasgow newspapers, and that at such upset price or prices as may appear proper, and the purchase monies being obtained, and my estates, heritable and moveable, being totally realised, my said trustees shall pay over the whole surplus revenue and remainder of the said estates in their hands to the directors of the Glasgow Royal Infirmary, to whom I leave, bequest, and destine the same for the use and behoof of that valuable institution.' The claimants Mrs Smith and Mrs Swan maintain that they are entitled to the accumulations on the ground that they are undisposed of and have thus fallen into intestacy; while the directors of the Glasgow Royal Infirmary claim as residuary legatees of the whole estate not required to meet the primary purposes.

"I was referred to various authorities which conclusively settle the principles which are to be applied to the provisions of the Thellusson Act. If the bequest in favour of the Glasgow Royal Infirmary was truly a bequest of residue and vested *a morte*, it is not seriously disputed that the direction to accumulate after twenty-one years would simply be a burden on the residue, which in virtue of the Act becomes inoperative. If on the other hand the trust-disposition makes no present gift in favour of the Royal Infirmary of the accumulations, then, to use the words of the late Lord Justice-Clerk in *Maxwell's Trustees* v. *Maxwell*, 5 R. 250, 'the right of the individual beneficiary will not be accelerated or arise at the term of twenty-one years, but the heir-at-law *in mobilibus* will take it as intestate succession.'

"The construction of the ninth purpose is not free from difficulty; but I have come to be of opinion with the next-of-kin that there was no present gift of the accumulations in question to the directors of the Glasgow Royal Infirmary. Their right only emerges after the death of the last survivor of the annuitants, when the trustees are directed to realise the estate and to pay over the whole surplus residue in their hands to the residuary legatees. I cannot see how under this clause the Infirmary can claim the surplus accumulations of each year subsequent to 1875. No doubt the clause concludes with the words 'to whom I leave, bequest, and destine the same for the use and behoof of that valuable institution'; but this does not seem to me to advance the matter; for what is bequeathed is just the same sum as the trustees are to pay over after the death of the last survivor. I do not suppose the testator intended that anybody else than the Glasgow Royal Infirmary should benefit, but it is plain that his attention had never been directed to the Thellusson Act or to the contingency of an annuitant surviving more than twenty-one years after his death. If I had been able to read the clause as being in effect a legacy of the residue, the payment of which was merely postponed until the death of the last annuitant, I should of course have reached a different result. As it is, I hold that the bequest of residue did not vest *a morte*; and that the right of the Infirmary is merely to receive the proceeds of the estate realised after the death of the last annuitant, with such accumulations as are not struck at by the Thellusson Act."

The Glasgow Royal Infirmary reclaimed, and argued—The claimants had a vested right to the residue *a morte*. The gift was a *de presenti* one, and there was no destination-over. That being so the illegal accumulations fell within the general residuary gift. The subject of the gift was the "corpus," and the yield of the "corpus" followed the "corpus." *Esto* that payment could not be accelerated, paying over the fruits of the gift was not accelerating payment. Reference was made to *Maxwell's Trustees* v. *Maxwell*, November 24, 1877, 5 R. 248, 15 S.L.R. 155; *M'Alpine* v. *Stewart and Others*, March 20, 1883, 10 R. 837, 20 S.L.R. 551.

Argued for respondents (the heirs *ab intestato*)—The Lord Ordinary was right. There was no disposal of the residue till the death of the last annuitant. That being so the intervening income fell into intestacy, for the date of payment could not be accelerated—*Green* v. *Gascoyne*, 34 L.J. Ch. 268; *Elder's Trustees*, October 20, 1892, 20 R. 2, 30 S.L.R. 28 (Lord Kyllachy's opinion). The case of *Maxwell's Trustees* (*cit. supra*) was distinguishable, for the gift there was already payable. *Esto* that there was a vested right to the residue in the Infirmary, that was not enough for the gift must be one "in possession," and there was no "gift in possession" here—Jarman on Wills, 5th ed., i. 281; *Weatherall* v. *Thornburgh*, 8 C.D. 261; *Nettleton* v. *Stephenson*, 3 De G. & S. 366.

At advising—

LORD PRESIDENT—The question in this case arises from the will of the late Andrew Wilson, who died in September 1854 leaving a trust-disposition and settlement by which he conveyed his estate to trustees. The trustees were directed to make payment of certain annuities to his children and others, and then, with his surplus funds, to pay off a bond which at that time existed upon the heritable estate, and after the bond had been discharged to invest any accumulations of rents and interests in their own names. The disposal of the corpus of the estate was regulated by the ninth purpose, and is in these words—"After the death of the last survivor of the said annuitants my said trustees shall sell and dispose of all my said heritable subjects, in whole or in lots, by public roup, on advertisements for

six weeks successively in two or more of the Glasgow newspapers, and that at such upset price or prices as may appear proper; and the purchase moneys being obtained, and my estates, heritable and moveable, being totally realised, my said trustees shall pay over the whole surplus, residue, and remainder of my said estates in their hands to the directors of the Glasgow Royal Infirmary, to whom I leave, bequest, and destine the same, for the use and behoof of that valuable institution." The trustees entered into possession, paid the annuities to such annuitants as survived, and having done so proceeded to pay off the bond. They paid off the bond in 1875, and from that time they, in terms of the direction, have accumulated the surplus funds. Now, the period of twenty-one years having elapsed in 1875, the Thellusson Act comes into operation, and the point raised is, To whom do these surplus accumulations belong? Do they go to the Infirmary as the residuary legatee, or do they go to the heirs *ab intestato*, there being no direction as to their destination? The Lord Ordinary has found the latter, and I think his Lordship is right.

The effect of the Thellusson Act has again and again been discussed, but probably the simplest way of putting it is this—You must take the will as it stands, but suppose that for the direction which is there this direction were substituted, viz.—"I direct my trustees to accumulate income for the period of twenty-one years after my death or until the debt has been paid off" (as your Lordships remember, it being perfectly allowable under the Thellusson Act to accumulate for the purpose of paying off debt), "and twenty-one years after my death, or as the case may be, I direct such accumulations to cease," and then (taking the will as it stands) see where the accumulations go. Now applying that to this will we have—"I direct such and such annuities to be paid; I direct the bond to be paid off; I direct my property to be accumulated for twenty-one years or until the bond is paid off; and I direct the whole residue and remainder of my estate to be paid to the Glasgow Infirmary"—When?—"not on the elapse of twenty-one years or when the bond is paid off, but at the date of the death of the last annuitant." In other words, the effect of stopping the accumulations can never be to accelerate the period of payment to a postponed residuary legatee; and accordingly, there being no gift of the intermediate accumulations, they must fall to the only person that can take them, viz., the heir *ab intestato*.

I cannot help thinking that the whole difficulty arises from what one might call the "sliding" use of the words "residuary legatee." A residuary clause may be conceived in such terms as will, by means of present gift, embrace everything, and there are cases of that description where there is a residuary clause which gives to a residuary legatee by way of present gift everything that has not been otherwise disposed of. Then, of course, any accumulation as to which there is no direction will fall within the residuary clause. But then there may be the case of a residuary legatee who, although he is residuary legatee, is not legatee under a residuary clause of the same description as that which I have just indicated, and this is one of these cases. The Glasgow Infirmary is the residuary legatee because it eventually takes the residue, but it is not residuary legatee by way of present gift, because the only gift given to it is a gift which is to take effect at the death of the last of the annuitants; and whatever the Thelluson Act did, it did not accelerate the period at which persons take under the will, because it leaves the will supremely alone, except that it prevents accumulation after the period of twenty-one years. Although I put it in my own words, I think exactly the same thing was said by the judges in the English Court of Appeal in the case of *Weatherall* v. *Thornburgh* (1878, 8 C. D. 261) which I think is a case exactly in point, and the only phrase in it which would not seem to accord with what I have said, and would seem for a moment to constitute a distinction between that case and this, is the last phrase in Lord Justice Thesiger's opinion, in which he says—"I will only add that the will does not constitute the appellant the residuary legatee, but a legatee of a particular fund after the death of the widow, and therefore his interest is one which does not take effect until after her death."

I think that phrase is completely explained by remembering—what I feel quite certain of—that clearly Lord Justice Thesiger is using the term residuary legatee in the first sense in which I have explained that term.

LORD KINNEAR—I agree with your Lordship that the construction of the Thellusson Act, as far as we have to consider it, is well settled, and the general effect of the clause in question is really simple enough. What the Act says is that a direction to accumulate after the lapse of twenty-one years is to be null and void, and the funds directed to be accumulated are to go to the person who would have taken them if there had been no such direction. The effect of that, as your Lordship has pointed out, is to strike out of the will the direction to accumulate, but to make no other alteration and to introduce no new direction in place of that which has been struck out. The will is therefore to be read as it stands with the direction to accumulate struck out. If the will is so read and there appears to be a clear gift of the moneys which were illegally directed to be accumulated to a residuary legatee or anybody else, of course that would receive effect; but if there is no direction whatever as to what is to be done with the money except that it is to be accumulated for a purpose that fails, then, as far as that surplus income is concerned, it follows that the testator died intestate.

Upon the construction of this will I agree with the Lord Ordinary and your Lordship that there is no gift of the

surplus income, which the Act sets free from the direction to accumulate, to any person whatever. There is no gift of income to any person whatever except the annuitants, and no gift of the residue to anybody until the death of the last annuitant. The right of the Infirmary to take the residue remaining in the hands of the trustees at the death of the last annuitant is not accelerated, according to the rule settled by the decisions, by the operation of the Thellusson Act; it remains exactly what it was before. And that being so, as I can find no gift of the income arising between the date when the twenty-one years came to an end and the death of the last annuitant, that income being undisposed of falls into intestacy. I entirely agree that if there had been a gift of the residue in the larger sense by which a testator gives to a residuary legatee his whole estate subject to certain purposes, some of which may have failed, the accumulations which are rendered illegal by the Act would simply have been money directed to be devoted to purposes which have failed, and having failed would fall within the residuary gift. But then that rule cannot be applicable to a bequest which, although it uses the word "residuary," defines the estate which the so-called residuary legatee is to take by reference to the position of the funds in the trustees' hands at a specific date. What is given in name of residue are the surplus revenue and the remainder of the estate in the hands of the trustees after the death of the last survivor of the annuitants, and after the sale and realisation of the heritable and moveable estate in their possession. That is what is given to the residuary legatee and nothing more. Now the testator begins by saying "accumulate until that event," and if you apply to that direction the rule of the Thellusson Act, it comes to be exactly the same as if he had said "accumulate income for twenty-one years, and on the death of the last annuitant, and not sooner, give the estate to the legatee." If the will had been so expressed it would have been clear enough that the testator had failed to provide for application of the surplus income between the date when the twenty-one years came to an end and the earliest date when the money could be divided in accordance with the will. I think with your Lordship that the case of *Weatherall* v. *Thornburgh*, 8 C. D. 261, is directly in point, and that we should follow it.

Lord Pearson—I also agree with your Lordship.

Lord M'Laren was absent.

The Court adhered.

Counsel for Claimants (Reclaimers) The Glasgow Royal Infirmary — Macphail — Moncrieff. Agents—Webster, Will, & Company, S.S.C.

Counsel for Claimants (Respondents) the Heirs *ab intestato*—Hunter, K.C.—D. Anderson. Agents—Dove, Lockhart, & Smart, S.S.C.

Wednesday, July 7.

SECOND DIVISION.

TRANENT MINISTER AND ANOTHER v. TRANENT HERITORS.

Church—Glebe—Mines and Minerals—Sale of Minerals for Lump Sum.

A offered to buy for a lump sum from the minister of a parish the coal lying under the glebe thereof. The proposed sale was approved by the heritors of the parish subject to the validity thereof being determined by the Court, and it was sanctioned by the presbytery of the bounds. The sum realised from the sale of the said coal was to be invested at the sight of the presbytery and heritors, and the proceeds only of the investment was to be paid to the minister and his successors in the benefice.

Held that the proposed sale was competent and that in the event of its being concluded the price obtained fell to be invested for behoof of the minister and his successors in the benefice.

The Rev. A. M. Hewat, B.D., minister of the parish of Tranent, *first party;* J. R. Wilson, coalmaster, Musselburgh, *second party;* and the heritors of the parish of Tranent, *third parties*, presented a Special Case, the subject-matter being the coal in the glebe of the parish of Tranent.

The case stated—"2. Coal exists in or under that portion of the glebe lands known as the 'west glebe,' lying adjacent to the estates of Bank Park and Bankton, and extending to seven and two-thirds acres or thereby. The amount of said coal is too small to admit of its being profitably worked as a separate venture. The only possible method of having the same worked is by some adjacent coalowner or lessee, having a larger field and pit sinkings of his own. The said coal can be worked out completely in a few years.

"3. In August 1902 a lease of the coal of said glebe lands was granted by the Reverend William Cæsar, Doctor in Divinity, then minister of the parish of Tranent, in the presbytery and county of Haddington, with the consent and approval of the heritors of said parish and the presbytery of Haddington, to the Forth Collieries, Limited, incorporated under the Companies Acts 1862 to 1898; but, in virtue of a break in said lease, it was relinquished in 1907 by the said Forth Collieries Limited.

"4. After the relinquishment of said lease, the party of the second part, who is an adjacent coalowner, made an offer to the party of the first part to lease said coal, which offer, on being laid before the heritors, was rejected. The party of the second part thereupon entered into negotiations with the party of the first part with a view to the sale of said coal to him, and by arrangement a report was obtained as to their value from Mr John Gemmell, mining engineer, Edinburgh, on 7th August 1908. Mr Gemmell reported that the present