this table pursuer regulated two perpendicular machines while they were doing boring work. The boring was regulated by pursuer's hand, but the force which did the boring was supplied to the spindles by steam. The spindles were kept constantly in motion, so as to be always ready when pressure was required in boring the holes. In the spindles there were a number of pinion-wheels, which, in terms of the Factory Act, should have been guarded, and which a number of defenders' workmen had previously informed defenders' foreman were dangerous, and should be guarded. (Cond. 4) While pursuer was working at the perpendiculars in the usual course of his work, he suddenly slipped on the iron surface of the table, and he fell forward towards the pinion-wheels of the spindle. To save his arm or body from being entangled in these wheels, pursuer stretched out his hands. The result was that the centre finger of the right hand came against the pinion-wheels of the spindle, and though it was instantly withdrawn, the point of it was split, and the nail torn off, and a portion of the bone shattered. (Cond. 5) . . . Defenders took no steps to remedy the defects complained of till after pursuer was injured in the way described, and the exposed pinion-wheels were then fully covered up. Had the wheels been covered in the same way when pursuer was injured, his fingers could not have been caught by the pinion-wheels in the way described."

The defender pleaded, *inter alia*, that the action was irrelevant.

On 14th February 1893 the Sheriff-Substitute (ERSKINE MURRAY) allowed a proof.

The pursuer appealed for jury trial, and proposed an issue.

The defenders maintained that the action was irrelevant, and argued — That the primary cause of the accident being a slip due to accident or carelessness, the defenders were not responsible—*Robb* v. *Bulloch, Lade, & Company*, July 9, 1892, 19 R. 971; *Greer* v. *Turnbull & Company*, October 27, 1891, 19 R. 21.

Argued for the pursuer—The action was relevant. The ground of judgment in *Robb's* case was not that the accident was due to a careless slip, but because the pursuer on his own statement had not shown that there was a duty on the defenders to fence the particular portion of the machine at which the injured man was working.

At advising—

LORD PRESIDENT—I think we must allow the pursuer an issue. The pursuer's averments seem to me sufficiently relevant, and I cannot think that we can derive any assistance from a case necessarily so different in statement as that cited to us from the 19th volume of Rettie (*Robb* v. *Bulloch, Lade, & Company*, 19 R. 971).

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court approved of the issue proposed and remitted the case to a Lord Ordinary.

Counsel for the Pursuer—Orr. Agent—W. A. Hyslop, W.S.

Counsel for the Defenders—Strachan—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Tuesday, May 30.

SECOND DIVISION.

GILLIES' TRUSTEES *v.* BAIN.

Succession — Trust—Settlement — Accumulation of Income—Thellusson Act 1800 (39 *and* 40 *Geo. III. cap.* 98), *sec.* 1—*Casus improvisus.*

A truster directed his trustees to hold the residue of his estate, with accumulations of income, after payment therefrom of annual allowances to his children, during the lives of his children, and after their death to pay the capital and any accumulations to the lawful issue of his children. The truster's only surviving child who attained majority, a daughter, repudiated the settlement, and a special case having been presented, the Court pronounced a judgment of which the effect was that the truster's direction to hold the residue of his estate with accumulations of income till his daughter's death, and thereafter to pay the capital and accumulated income to her lawful issue, became restricted to the "dead's part."

After the trustees had been in possession of and had been accumulating income on the said fund for twenty-one years from the date of the truster's death—*held* that further accumulation of income was prevented by the Thellusson Act, and that the directions of the truster on the matter not being applicable, the future income of the fund fell to be paid to the person who would have been entitled to succeed to it *ab intestato*, viz., the testator's daughter.

Robertson Gillies, silk mercer, Edinburgh, died on 12th October 1871. He was survived by his wife Mrs Sarah Gillespie or Gillies, and by two children, viz., a son, Thomas James Gillies, who survived his father only about a month, having died in pupillarity on 11th November 1871, and a daughter Mary M. Gillies, who was in minority at the date of her father's death.

Robertson Gillies left a trust-disposition and settlement dated 26th January 1871, by which he conveyed his whole estate to trustees in trust for the following purposes—1st, For payment of the testator's debts and funeral expenses and the expenses of the trust; 2nd, for payment of an annuity and certain other provisions to the truster's widow; 3rd, for payment of various legacies and annuities to relatives and friends of the truster, said legacies amounting in all to £1275, and the annui-

ties to £26 a-year; and by the fourth purpose he directed the capital of the residue of his estate to be held by his trustees for the purpose of being divided, after the death of his children, among the issue of his children *per stirpes*, the respective shares to be paid over as the issue of said children respectively arrived at the age of twenty-one. He further directed an allowance to be made from the income of the said residue to his children, the said Thomas James Gillies and Mary Margaret Gillies, during their respective lives, the remainder of the income of the said residue to be accumulated along with the capital, and applied in the same manner as the capital. He further conferred powers on his trustees to make in their discretion certain advances from the capital of the said residue to his children. The trust-disposition and settlement also contained a declaration to the effect that if any of the truster's children should repudiate the provisions thereby made for them, the child or children so repudiating the same and the issue of such children should forfeit and lose all right and interest whatever under the said trust-disposition and settlement and in the estates thereby conveyed, and that the provisions thereby made for and left to such child or children so repudiating, and his, her, or their issue, should pass entirely to and be held for, the children abiding by the said settlement and their issue, as if the provisions had been destined to them alone. The trust-settlement further contained a declaration with regard to the shares of the residue of the testator's estate destined to the issue of his said children, that these should vest in said issue at the periods of payment thereof respectively and not sooner. The total value of the estate left by the deceased Robertson Gillies was a little over £11,000. It consisted entirely of moveable estate.

There had been no marriage-contract between Robertson Gillies and his wife, and upon her husband's death, accordingly, the widow claimed her legal rights and repudiated the provision made for her in the trust-settlement. In respect of said claim and repudiation, the trustees paid over to Mrs Gillies one-third of her husband's free moveable estate in name of *jus relictæ*.

On 19th June 1880 the daughter Mary M. Gillies attained majority, and she thereupon intimated to the trustees that she elected to claim her legal rights and to repudiate the provisions made for her in her father's trust-disposition. At the same time, she, in conjunction with her mother, made a claim upon the trustees for payment of the whole balance of the trust-estate in their hands, after payment of debts, legacies, annuities, and *jus relictæ*. This claim was based upon the alternative footing that either (1) assuming the deceased son Thomas James Gillies to be held to have elected to take legitim, the whole share of the estate so vested in him as legitim would go to his sister and mother as his heirs *ab intestato*, while as regards the remaining "dead's part" in such case there would be intestacy through forfeiture, and it would go to the daughter, with her mother's possible participation (as heir of her deceased son) to a certain extent; or else (2) assuming that Thomas James Gillies was to be held to have accepted his father's provisions, the daughter would be entitled to take her legitim, while as regards the remainder of the estate, in such case there would be intestacy through failure of the heirs of Thomas James Gillies, and it would go to the daughter as heir *ab intestato* of her father. In answer to these claims, the testamentary trustees declined to hand over the trust-estate without judicial authority, and maintained that the forfeiture of the shares originally destined to any issue that might be born to Mary Margaret Gillies in favour of the issue of other children of the testator having failed, they were bound, in the due administration of the trust, to retain the unexhausted portion of the "dead's part" for behoof of any children that might be born to the said Mary Margaret Gillies.

In consequence of these questions regarding the extent of the rights of Miss Gillies and her mother to the undistributed portion of the trust-estate, a special case was presented to the Second Division of the Court. In this special case the said Mrs Sarah Gillespie or Gillies and Mary Margaret Gillies were parties of the first part (they having agreed to adjust their respective claims *inter se*), and the testamentary trustees were parties of the second part.

The questions put to the Court were—1st, Whether the parties of the first part thereto were entitled to have paid over to them the whole remaining residue of the estate of Robertson Gillies? and 2nd, Whether the trustees were entitled or bound to retain the whole or any part of the residue of the said estate for behoof of any issue that might be born to Mary Margaret Gillies—and if a part, what part?

In answer to the questions put by the special case, the Court on 23rd February 1881 found, in answer to the first question, "that the parties of the first part are not entitled to have now paid over to them the whole residue of the estate of the deceased Robertson Gillies;" and in answer to the second question, "that the parties of the second part are entitled and bound to retain for behoof of any issue that may be born to Mary Margaret Gillies, and to be administered by them, the parties of the second part, in terms of the directions of the trust-deed and according to law, so much of the said residue as shall be equivalent to one-third part thereof, minus the legacies and annuities bequeathed by the truster, and the expenses of the special case." This case is reported, *ante*, February 23, 1881, vol. xviii. 323, 8 R. 505.

The effect of the judgment of the Court was that the direction in Mr Robertson Gillies' trust-disposition and settlement to the trustees to hold the residue of the estate, with accumulations of income, until the death of Mary Margaret Gillies, and

thereafter to pay the capital and accumulated income to the lawful issue of Mary Margaret Gillies on their attaining the age of twenty-one, became restricted to the "dead's part."

Following upon this judgment, the trustees made out a state of the division of the said trust-estate upon a valuation obtained by them, and in respect thereof retained the sum of £3932, 7s. in their hands as the "dead's part," being the amount directed to be set aside for the possible issue of Mary Margaret Gillies. The balance they paid over to Mary Margaret Gillies subject to any claims thereon by her mother, and were duly discharged.

On 19th April 1886 Mrs Sarah Gillespie or Gillies died, leaving a testament dated 29th August 1885, and a general settlement dated 20th March 1886. By the said testament and general settlement she bequeathed her whole estate to her daughter Mary M. Gillies, and made her sole executrix.

On 8th September 1886 Mary M. Gillies was married to the Rev. John M'Leod Bain. There was one child of the marriage, viz., Sarah Florence Bain, born in 1887. Prior to their marriage Mary M. Gillies and John M. Bain entered into an antenuptial general disposition and deed of trust and marriage settlement dated 7th September 1886. By this deed Mary M. Gillies, with consent of John M. Bain, conveyed and made over to trustees, for the purposes therein specified, her whole estate, heritable and moveable, coming to her under her father's said trust-disposition and settlement and her mother's said testament and general settlement, and also the whole estates, heritable and moveable, and right and interest of whatever kind, belonging to her as heir in heritage and moveables of her said father and mother and deceased brother, and generally the whole estate that she might succeed to during the subsistence of the marriage.

On 13th October 1889 the testamentary trustees of Robertson Gillies had been in possession of, and had been accumulating income on, the foresaid sum of £3932, 7s. for a period of twenty-one years. By the Thellusson Act (39 and 40 Geo. III. c. 98), however, accumulation of income beyond a period of twenty-one years from the date of a testator's death is forbidden, and questions arose whether the present was not a case to which that statute applied, and also as to whether, if the Thellusson Act did apply, the testamentary trustees were bound to pay over the future income of the fund in their hands during Mrs Bain's life to Sarah Florence Bain and her father as her curator, or to the marriage-contract trustees of Mr and Mrs Bain.

In these circumstances a special case was submitted for the opinion of the Court by (1) the testamentary trustees of Robertson Gillies; (2) Miss Sarah Florence Bain and her father and curator, the Rev. John M. Bain; and (3) the marriage-contract trustees of Mr and Mrs Bain.

The questions submitted for the judgment of the Court were—"(1) Has the Thellusson Act the effect of preventing further accumulations, after 13th October 1892, of the interest of the trust-funds held by the parties of the first part? (2) Assuming the first question to be answered in the affirmative, is the interest of the trust-funds payable during Mrs Bain's life to the parties of the second part or to the parties of the third part?"

The second parties maintained that the Thellusson Act took effect, and that as Miss Sarah Florence Bain was the only person entitled to the fee of the "dead's part" and the income thereof at the period of payment mentioned in the trust-disposition and settlement, she was also entitled to the income which, but for the provisions of the Thellusson Act, would have been accumulated for the sole benefit of the issue of her mother. They made this claim, however, on the footing that any other lawful issue who might hereafter be born to Mrs Bain would be entitled to participate with Miss Sarah Florence Bain.

The parties of the third part, on the other hand, maintained that the Thellusson Act applied, but that they, as standing in right of Mrs Bain, were entitled to the income in respect that it was pure intestacy, and Mrs Bain was sole heir *ab intestato* to the truster, her father—*Cathcart's Trustees* v. *Heneage's Trustees*, July 13, 1883, 10 R. 1205.

At advising—

LORD JUSTICE-CLERK—The late Robertson Gillies left a trust-disposition and settlement by which he directed his trustees to hold the capital of his estate for the purpose of being divided after the death of his children among their issue *per stirpes*, the respective shares to be paid over by the trustees, as the individual members of the issue of the children respectively attained the age of 21 years. Meanwhile during his children's lifetime he directed that a certain annual sum should be employed in their behalf, and that the remaining income should be accumulated and added. He left two children, one of whom a son died in pupillarity one month after Robertson Gillies himself. The other, a daughter, is married to the Reverend John Bain and has one child, now five years old. In a previous special case in relation to the same estate the other Division of the Court pronounced an interlocutor deciding that Mrs Gillies, the widow, and the daughter, then unmarried, were not entitled to have payment to them of the whole residue of the trust-estate, and that the trustees were entitled and bound to retain for behoof of any children who might be born of the daughter, so much of the residue as might be equal to one-third part thereof, minus the legacies and annuities bequeathed by the truster and the expenses of the special case.

Accordingly a sum was set aside as directed by the Court, amounting to £3932, 7s. The trustees have held the estate and accumulated the income during a course of years. In 1892 the period of twenty-one years from the death of Robertson Gillies expired.

In these circumstances the trustees have

to consider the disposition of the income which can no longer be accumulated if the Thellusson Act applies, and the first question put to us is, whether or not the Thellusson Act applies so as to prevent further accumulation? I think the question does not admit of doubt. I think the Act applies, and that further accumulation must therefore cease.

The Act being held to apply, that brings us to the second question, whether is the interest of the trust funds payable during Mrs Bain's life "to the child of Mrs Bain and any other children Mrs Bain may yet have," or to Mrs Bain and those in her right as those entitled to succeed to it on the footing of intestacy. Now, I think that the answer to that question is also clear. This income cannot be disposed of as the testator directs. The law put a stop to his mode of disposing of it, and therefore his directions on the matter are not applicable; they have come to end. It therefore passes to the person who would have succeeded to it *ab intestato*, Mrs Bain, or rather the marriage-contract trustees who are in her right. I move your Lordships to answer the questions accordingly.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court answered the first question in the affirmative, and in answer to the second question found that the interest of the funds referred to in the special case was payable to the parties of the third part.

Counsel for First and Second Parties—W. C. Smith—Grierson. Agents—Scott & Glover, W.S.

Counsel for Third Parties—C. N. Johnston. Agents—John Glover junior, W.S.

Tuesday, May 30.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

ALLAN *v.* THOMSON'S TRUSTEES.

Succession—Testament—Conditio si sine liberis decesserit—Legacies—Bequest of Residue.

A testatrix left a trust-disposition and settlement, by the fourth purpose of which, after bequeathing certain trinkets and other articles, she left specific sums of money to nephews and nieces *nominatim*, and other relatives and strangers, "all as mementos of me." The amounts of the legacies varied considerably; the legacy to one niece was said to be over and above the provision hereinafter made for her in another purpose of the deed, and one of the testator's nieces, for whom provision was made in another part of the deed, was not given a legacy at all. By the eighth purpose of the deed the testator bequeathed the free residue of her estate to be equally divided among her brother-in-law, and all her nephews and nieces *nominatim*.

Held that the *conditio si sine liberis decesserit* did not apply to the legacies left to nephews and nieces of the testator in the fourth purpose of the deed, but did apply to the shares of residue directed to be divided among nephews and nieces by the eighth purpose.

By trust-disposition and settlement dated 6th April 1878 Mrs Christina Stephen or Thomson, widow of Charles Duirs Thomson, disponed her whole estate, heritable and moveable, belonging to her at the time of her death, to trustees for the following purposes—(1) To realise her whole estate, except so far as the same may be specially disponed; (2) to pay debts and funeral expenses; (3) to convey a house in High Street, Montrose, to her husband's brother J. S. Thomson in liferent, and to his cousin Alexander Thomson and his heirs in fee; (4) to deliver over or make payment of the following legacies and bequests; here followed legacies of specific articles. The deed then went on—"To each of my beforenamed trustees, the said David Kinnear Stephen, Alexander Thomson, and Oliver Ross, the sum of £100; to my nephews and nieces, the children of the deceased John Stephen, farmer, Commieston, my brother, as follows — to the said David Kinnear Stephen, the sum of £500; to Jane Thomson Stephen, the sum of £250; to Anne Kinnear Stephen, the sum of £250; to Johnston Stephen, the sum of £250; and to Mrs Jessie Forbes Stephen or Paterson, the sum of £150: Declaring that this legacy of £150 shall be paid to her irrespective of the conveyance by her in her antenuptial contract of marriage, as also the share of residue hereinafter bequeathed to her, and they shall not form part of the funds under said contract; to my said niece Christina Black, the sum of £100, over and above the provision hereinafter made for her; to my niece Mrs Jane Black or Allan, the sum of £250; to my nephew Charles Boswell Black, the sum of £250; to my nephew George Black, the sum of £750, on his reaching majority; to the said John Sharp Thomson, the sum of £250; to the said Alexander Thomson, the sum of £250; to my sister-in-law Mrs Mary Sharp Thomson or Savege, the sum of £250." Then followed a number of legacies to persons not relatives, and at the conclusion of the list were added the words "all as mementos of me." Thereafter followed legacies to charities, &c. (5) To invest £1000 for behoof of her niece Mrs Jane Hector or Compton, in liferent, the fee to be paid over after her death to her children when they attained majority. (6) To invest £2500 for behoof of her niece Christina Black in liferent, the fee to be paid over after her death to any children she might have when they attained majority—"And failing such child or children, or failing their reaching majority, I direct my said trustees to realise and pay over the said sum of £2500 as follows, viz.—to my said nephew George Black, the sum of £1000;