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;

to my said niece Jane Black, the sum of £750; and to my said nephew Charles Boswell Black, the sum of £750; declaring that if the succession thereto shall open to my said nephews and niece, the sums falling to them shall be held to have vested in them at the time of my death; and declaring also that if the said Christina Black shall predecease me, the said sum of £2500 shall form part of the residue of my means and estate." (7) In the event of her death before George Black reached majority, to expend £500 in his maintenance and education; and (8) "I direct my said trustees, as soon as my said estate has been realised, and the foresaid specific and pecuniary legacies made over or paid to the respective legatees, and the legacy duties and whole expenses of realising and dividing my said estate, heritable and moveable, paid thereout, and the free residue of my said estate ascertained, to divide such free residue equally among the said John Sharp Thomson, David Kinnear Stephen, Jane Thomson Stephen, Johnston Stephen, Anne Kinnear Stephen, Mrs Jessie Forbes Stephen or Paterson, Mrs Jane Black or Allan, Christina Black, Charles Boswell Black, George Black, and Mrs Jane Hector or Compton."

Charles Boswell Black, George Black, Christina Black, and Jane Black or Allan, were the children of Jessie Stephen or Black, a sister of the testatrix. David Kinnear Stephen, Jane Thomson Stephen, Johnston Stephen, Anne Kinnear Stephen, and Jessie Forbes Stephen or Paterson, were the children of John Stephen, a brother of the testatrix. Jane Hector or Compton was the child of Mrs Jane Stephen or Hector, a sister of the testatrix.

Mrs Jane Black or Allan died on 7th January 1879, leaving a son, Stephen Strachan Allan. She was survived by her husband Alexander Miln Allan.

Mrs Christina Stephen or Thomson, the testatrix, died on 20th June 1882. At the time of her death her nephews and nieces were her nearest relatives.

Alexander Miln Allan, as tutor and administrator-in-law for his pupil son Stephen Strachan Allan, raised an action against Mrs Thomson's trustees for payment of (1) the sum of £250, being the amount of the legacy left to Mrs Jane Black or Allan by the fourth purpose of the trust deed, with interest at 5 per cent. from 20th June 1882, and (2) the sum of £172, 8s. 7d., being the estimated amount of the share of residue left to Mrs Allan by the eighth purpose of the deed with interest thereon from 20th June 1883, or alternatively, in the event of it being found that the pursuer as tutor and administrator-at-law foresaid was not entitled to the legacy of £250, the sum of £195, 3s. 1d. as the share of residue due him with interest from 20th June 1883.

The defenders lodged defences and pleaded—"(1) The *conditio si sine liberis* does not apply to the legacy or the share of the residue mentioned."

On 10th January 1893 the Lord Ordinary (STORMONTH-DARLING) pronounced the following interlocutor—"Repels the defences: Finds that the *conditio si sine liberis decesserit* applies both to the legacy of £250 and to the bequest of a share of residue in favour of the late Mrs Jane Black or Allan contained in the trust-disposition and settlement mentioned in the summons; and appoints the defenders, within fourteen days, to lodge an account showing the amount of the residue: Grants leave to reclaim.

"*Opinion.*—The question is, whether the *conditio si sine liberis decesserit* applies to a legacy of £250, or to the bequest of a share of residue in favour of the late Mrs Jane Black or Allan contained in the will of the late Mrs Christina Stephen or Thomson, or to both bequests? I am of opinion that it applies to both.

"It is clear, to begin with, that the testatrix and Mrs Allan stood in one of the relationships, that of aunt and niece, which admit of the application of the *conditio*. But that is not enough according to decisions. It must further appear, from the terms of the will itself, that the testatrix has placed herself *in loco parentis*, or in other words, that the will is of the nature of a family settlement, as opposed to a mere series of bequests in favour of selected and specially favoured individuals.

"It seems to me that Mrs Thomson's will satisfies these requirements. It is framed, like many ladies' wills, on the principle of disposing of the bulk of her estate by legacies of specific sums, rather than on the principle (more common among men) of leaving the bulk of the estate to be carried by the clause of residue. The effect of the deed viewed as a whole is to give the large proprtion of the estate to all the nephews and nieces of the testatrix, who were the nearest relations she had at the time when the will was made. I was informed by the parties that her estate was of the value of about £15,000, and that the legacies to strangers in blood and charities amounted to about £3500. All the rest, in one form or other, went to her nephews and nieces.

"As regards the residuary clause, therefore, I do not think there can be much doubt. It is true that the nephews and nieces are called *nominatim*, and this might have been a circumstance indicating *delectus personæ* if any of them had been left out. But none are left out. It is also true that a brother-in-law takes an equal share of the residue along with the nephews and nieces. But that, surely, does not derogate from the assumption by the testatrix of the parental character towards those to whom the law concedes that the parental character may be assumed.

"The legacy of £250 might have to be distinguished from the bequest of residue, if there were anything in the will to show that it was given merely out of personal favour to the institute. But there is nothing. All the nephews and nieces receive legacies. No doubt these are of varying amounts, and under varying conditions, for two of the nieces get merely a liferent

and their children the fee, while all the others get capital sums. But these very specialties occurred in the case of *Bryce's Trustees*, 5 R. 722, and yet the *conditio* was held to apply. I am unable to distinguish that case from the present. It seems to me that the legacy to Mrs Allan was given to her on account of relationship, and that it formed a material part of the provision which the testatrix thought proper to make for her.

"A good example of the opposite kind of legacy is afforded in this very deed by the bequest in favour of one of the nephews of £100, in the character of trustee. To that, undoubtedly, the *conditio* would not apply.

"The pursuer, who is father and administrator-in-law of Mrs Allan's pupil child, is therefore, in my view, entitled to prevail, but as the parties are not agreed as to the amount of the residue, I shall appoint an account to be put in before giving decree."

The defender reclaimed, and argued—The *conditio si sine liberis* applied neither to the legacies or to the residue. (1) *As to the legacies*—They were not of the character of provisions, but were of a discriminating character of different amounts, and were not given to the nephews as a class. No legacy had been left to Mrs Compton one of the nieces of the testatrix, a legacy had been left to another niece "over and above the provision hereinafter made for her," and all the legacies were left to nephews and nieces *nominatim*, and to fifty other people not relations of the testatrix at all. The legacies were also left "as mementoes of the testatrix. All these facts showed that the testatrix had not left the legacies to her nephews and nieces as a class, and acting *in loco parentis* to them, but as special and personal gifts to each nephew and niece named—*Greig* v. *Malcolm*, March 5, 1835, 13 S. 607; *Wilkie* v. *Jackson*, July 9, 1836, 14 S. 1121; *Hamilton* v. *Hamilton*, February 8, 1838, 16 S. 478; *Douglas' Executors*, February 5, 1869, 7 Macph. 504; *Bogie's Trustees* v. *Christie*, January 26, 1882, 9 R. 453. *Bryce's Trustees*, March 2, 1878, 5 R. 722, was distinguished from this case, as there the legacies were left solely to nephews and nieces. Here they were only given as mementoes to the nephews and nieces named, along with other strangers. (2) *As to residue*—The arguments on the question as to the legacies applied to the residue, although with diminished force. This was not a general settlement dividing the property of a testatrix among her nephews and nieces as a class, but it gave sums of varying amounts to each *nominatim*, and left the residue to them also *nominatim*, a share of the residue also going to a person who was not a blood relation of the testatrix at all.

Argued for pursuer—In order that the *conditio si sine liberis* should apply to such a settlement as the present, two conditions must concur—(1) the settlement must be universal, and (2) there must be no *delectus personæ*. Both conditions were fulfilled here. This was a universal settlement. It was also a family settlement, meaning thereby such a settlement as a parent would have made, looking to the circumstances of each member of the family benefited. Opinion of consulted Judges in *Hall* v. *Hall*, March 17, 1891, 18 R. 698. Three-fourths of the property of the testatrix went under the testament to the next-of-kin of the testatrix. The case of *Bryce's Trustees*, was precisely on all fours with this. In that case, as in the present one, the amounts left to nephews and nieces under the settlement varied, and bequests were left to persons outside the favoured class. It was said that the beneficiaries here were called *nominatim*. But that did not by itself prevent the *conditio* from applying—*Dixon* v. *Dixon*, June 10, 1836, 14 S. 938—February 9, 1841, Robertson's Appeals, 1; *Wilkie* v. *Jackson*, *supra*; *Thomson's Trustees* v. *Robb*, July, 10, 1851, 13 D. 1326. The legacies in this case were the real provisions to the nephews and nieces, the residue was a mere addition. The Court had often held that the *conditio* applied to legacies. The argument against the application of the *conditio si sine liberis* to residue was much weaker. The only consideration that might tell against its application was, that the brother of the testatrix's husband had been given a share of the residue along with the nephews and nieces. But the inclusion of a relation would not exclude the application of the *conditio*.

At advising—

LORD JUSTICE-CLERK — The late Mrs Christina Thomson left a trust-disposition and settlement, by which, after bequeathing certain trinkets and other articles, she left specific sums of money to her nephews and nieces *nominatim*, and to other relatives, and to strangers, and to charities. As regards the residue of her estate, she left it to certain persons by name, these being a brother-in-law and her whole nephews and nieces then alive. The two questions decided by the Lord Ordinary's interlocutor are, whether the *conditio si sine liberis* applies to the specific sums given to nephews and nieces, and whether it applies to the residue.

As regards the specific sums, the case stands thus. The testatrix, after leaving legacies of articles, proceeds—"To each of my before-named 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." The testatrix then goes on to leave legacies to a number of persons not relatives, and at the conclusion of this list of persons the words are added, "all as mementos of me."

Such being the character of the gift, can it be said that the testatrix has placed herself *in loco parentis* to her nephews and nieces? Is it a deed of the nature of a family settlement whereby the testator makes provision for a family as a parent may be expected to do in settling his affairs? I do not think so. It is true that she speaks of the nephews and nieces who are "children of John Stephen," but she does not do so as separating them from others, but simply as designating them as these to whom the first names to follow apply, and she gives a specific legacy to each, the amounts varying considerably. She leaves specific sums to various other nephews and nieces and other relatives, and to one of her trustees and to a sister-in-law, and then to other persons not relatives, and as to all these she declares that they are given as "mementos of her." It is further noticeable that the testatrix had very distinctly in her mind the making of a suitable provision for some of her nieces specially, for in one case the specific sum is directed to be paid to a niece, one of John Stephen's children who was already married, over and above the gift made to her from residue, and is expressly excluded from the operation of the niece's marriage-contract, thus giving this legacy the impress of a personal gift rather than of a provision, while in another case the specific sum is declared to be over and above a provision of £2500, the fee of which is expressly directed to be paid over to that niece's children, and if they do not survive or attain majority, to certain other nephews and nieces in certain proportions named. This brings the present case very much within the principle of *Douglas's Executors*, 7 Macph. 504, where a specific legacy given to a child over and above a provision made for it by a father in a marriage-contract was held not to pass to her child on her death.

I cannot hold that in giving those gifts of specific sums to named nephews and nieces, along with other persons not relatives, and with the provisos which the testatrix applied to particular cases, which seem to me plainly to indicate gifts for personal use, she can be held to have been acting *in loco parentis* or making a family provision. They appear to me to be specific gifts of sums of money given to selected legatees by a testator who was desirous to give to each of those named, whether relatives or not, a personal bequest of a sum of money, and who had at the time fully in view as a separate question the making of provision for those for whom she desired specially to provide. I doubt if the bequests of those sums, if only taken along with the other bequests expressed in the same purpose of the trust, could have been held to be family provisions to which the *conditio* applied, but when they are taken along with the rest of the deed, I come without doubt to the conclusion that they are specific legacies only, and cannot be held to pass to children of the legatee on the presumption based on the idea of family provision.

The Lord Ordinary founds upon the case of *Bryce's Trustees* which in some particulars resembles the present. That case certainly went very far, but I do not think that it rules the present. There the testator, after providing for a housekeeper and a natural son, left to all his nephews and nieces certain sums of money of varying amount, and directed that the residue of his estate should be divided among them in rateable proportion to the amount of the sum left to each. It appeared reasonable to hold in that case that the testator was throughout providing for the class alone and only considering specially how much to give to each in proportion, his direction being that the sums left were to be the measure of the shares of residue, and that if the estate would not provide these sums they were to be rateably diminished. I do not think that *Bryce's Trustees* rules the present case, where the testatrix leaves a number of small sums to a large number of persons, many of them not relatives at all, and declares them to be given as "mementos." The bequest is much more one for personal use than for family provision.

I am therefore of opinion that as regards the legacy of £250 to the late Jane Black or Allan the interlocutor of the Lord Ordinary should be altered.

The legacy of residue stands in a somewhat different position. That legacy is to the whole of the testatrix's nephews and nieces alive at the date of the deed. There are only two questions which require consideration. The first is, whether the fact that the nephews and nieces are all named destroys the presumption that the gift is to the class? I do not think that it can be held to do so. If the whole class is actually to be benefited, the fact that their names are given cannot be held to be negative of the testatrix's presumed desire to make provision for them as such. The insertion of the names may be useful to the working out of the trust, but it is just a detailed list of the class and nothing else. The other question is, whether the gift must be held to be not of the nature of a family settlement because a brother-in-law is brought in to share with the nephews and nieces? I see no ground for so holding, and therefore I agree with the Lord Ordinary that the *conditio* applies to the share of residue directed to be divided among the testatrix's nephews and nieces.

Lord Young—I agree that the *conditio si sine liberis* should be held to apply to the residue, and I am rather disposed to hold with the Lord Ordinary that it applies also to the legacy of £250. My inclination in cases of this kind has always been in favour of children taking their parents' share if the latter dies before the testator.

I should like to observe that I think it is a pity that this matter is not settled definitely by legislation. It is not creditable to the law to have such cases as we have been referred to, and such arguments as this case presents. The question in every one of such cases is, whether, if a provision or legacy is left to a person, and that person predeceases the testator and leaves children, the children take as coming in the parent's place. I think it might be a fitting subject of enactment that children in such circumstances are to take their parents' places, or are not, in the event of the testator saying nothing on the matter in his will. He has it always in his power to let the provision or legacy go to children or not, but if there is nothing said in the will to that effect the cases like the present arise, and arguments are submitted to us in order to reach the testator's intention, on the assumption that he knew the involved decisions on the subject and had framed the deed in order to meet them. This is not a satisfactory state for the law on this matter to be in, and I think it ought to be settled definitely by enactment. But as long as the law continues as at present, I think conveyancers in framing trust-deeds should bring the matter under the notice of testators in order that their intention may be definitely expressed in the deed.

Lord Rutherfurd Clark — I agree with your Lordship.

Lord Trayner—I agree with the decision of your Lordships with regard to the legacy of £250. As regards the residue the disposition of my mind would have been to hold that the *conditio* did not apply to it either, but I do not dissent, as the considerations in favour of the *conditio* applying expressed by your Lordship and pressed at the bar are as strong as if not stronger than the considerations against its application.

The Court pronounced the following interlocutor:—

> "Find that the *conditio si sine liberis decesserit* applies to the bequest of a share of residue in favour of the late Mrs Jane Black or Allan contained in the trust-disposition and settlement mentioned in the summons: Find further, that the said *conditio* does not apply to the legacy of £250 to the said Mrs Jane Black or Allan, and in that repect recal the interlocutor of 10th January last, and *quoad ultra* adhered."

Counsel for the Pursuer—Sym—Cook. Agents—Mackintosh & Boyd, W.S.

Counsel for the Defenders—H. Johnston—Law. Agents—Jack & Bryson, S.S.C.

Friday, February 24.

OUTER HOUSE.

[Lord Low.

GLOVER AND OTHERS (MANUEL'S TRUSTEES), PETITIONERS.

Expenses—Railway—Liability of Promoters for Expenses of Re-investment of Consigned Money—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. cap.* 19), *secs.* 67 *and* 79.

In an application by marriage-contract trustees for authority to uplift money consigned by a railway company under the Lands Clauses Consolidation Act, and to invest the same in any way authorised by the marriage-contract or prescribed by the Trusts Acts, or in the purchase of heritable subjects—*held* (1) that the trustees were "absolutely entitled to" the consigned money within the meaning of the 67th section of the Act, but (2) that they were not entitled under section 79 to receive from the promoters the expenses of re-investing the money as craved in their petition.

Opinion that promoters are not liable under section 79 in the expenses of re-investment unless authority is expressly given to invest the consigned money in one of the particular investments there specified.

In virtue of the compulsory powers contained in the North British Railway (Waverley Station, &c.) Act 1891, the company acquired certain subjects in Torphichen Street, Edinburgh, vested in Thomas Craigie Glover and others as trustees under the marriage-contract between David Manuel and Louisa Brown. The compensation payable for the subjects was fixed at £520; and, as the trustees had not a power of sale specially expressed, it was agreed that the company should consign the money in bank, and the trustees should give a conveyance in terms of the Lands Clauses Consolidation (Scotland) Act 1845.

By section 67 of the said Act it is provided that "the purchase money or compensation which shall be payable in respect of any lands, or any interest therein purchased or taken by the promoters of the undertaking from any corporation, heir of entail, liferenter, married woman seised in her own right or entitled to terce or dower, or any other right or interest, husband, tutors, curators, or other guardians for any infant, minor, lunatic or idiot, fatuous or furious person, or for any person under any other disability or incapacity, judicial factor, trustee, executor or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same except under the provisions of this or the special Act, or the compensation to be paid for any permanent damage to any such lands, shall, if it amount to or exceed the sum of £200, the same shall be paid into the bank,