ing Mary Wordie Allan, have taken equally the bequest *a morte*, subject to the powers, and that they ought to be, on failure to exercise the power, preferred accordingly. But it is premature to decide this question.

But then the testator is not content with giving this power to his trustees; he goes on to authorise them to transfer the share in question to other persons and to confer on these other persons the same powers as he had conferred on themselves. He gives them thus a power to delegate the power to others. I have very great doubt as to the validity of such a delegation and desire to reserve my opinion thereanent. No question on this point has been raised by the parties, and what the trustees have done is virtually to assume one other new trustee, which they might have done under the original deed of settlement, instead of by creating a new and separate trust. Had they done so the situation would have been covered by the decision in *Shedden's* case, 1914 S.C. 106, 51 S.L.R. 115, to which I was a party, though under reservations.

LORD MACKENZIE—I agree with your Lordship in the chair as to the way in which the questions should be answered.

LORD SKERRINGTON—The first and second questions relate to a legacy of £500 in favour of the testator's granddaughter Miss Mary Wordie Allan. I agree that this bequest cannot be held to be revoked, because nothing is better settled than that a legacy bequeathed in clear and unambiguous terms is not revoked by ambiguous language. It is also clear that the legacy vested *a morte*.

The third and fourth questions relate to the share of residue which the testator bequeathed to his daughter Mrs Allan and her family by his third codicil. The clause is peculiar in this respect, that while it confers upon the trustees a power of apportionment among Mrs Allan and her children or any of them, it does not go on, as is usual in such cases, to say what is to happen failing appointment. I agree with your Lordship that it is premature for us to decide whether any person will be found to have taken a vested right under the clause in the event of the power never being exercised. I may, however, express my concurrence with what I understand to be the opinion of your Lordship in the chair and also of Lord Johnston, to the effect that, failing appointment, there is here an implied gift to the persons who are the objects of the power, namely, Mrs Allan and her children—whatever that phrase may mean. It is necessary now to consider and decide what that phrase means in order that the trustees who are vested with the power of appointment may know among what persons they are entitled to divide. An authority was cited which seems to be entirely in point, the case of *Ross* v. *Dunlop*, 5 R. 833. That case indicates that this power may lawfully be exercised either in whole or in part in favour of Mrs Allan and any of her children who happen to be alive at the time when it is exercised. In other words, the objects of the power are not limited to the children alive at the death of the testator, but include children subsequently born. Of course the trustees in exercising the power might exclude any child, but on the other hand they would not be bound or entitled to exclude a child merely because he had been born after the will came into operation.

The question as to who are the objects of the power arises most directly with reference to question 4, which asks whether the trustees are entitled to retain the fund in their own hands or are bound to distribute it at once. I see no reason to doubt that question 4 (*b*) must be answered in the affirmative, namely, that the trustees are entitled to continue to retain the fund. Although the point is not put in the question, we ought, I think, to add that the objects of the power include children *post nati* as well as children in existence at the date when the will came into operation.

One of your Lordships indicated a doubt as to the legal validity of what the testator affected to do, namely, to give his testamentary trustees power to nominate a new body of trustees who should be entitled to exercise the power of apportionment. In point of fact they have exercised that power and are not themselves parties to this Special Case. In their absence it is impossible for us to decide whether the deed of nomination is valid or not. I may say, however, that I do not share the doubt in question.

The Court answered the first question of law in the negative, the second question in the affirmative, and branch (*b*) of the fourth question in the affirmative, with the addition that the first parties were entitled to include *post nati* as well as children in existence at the date of the testator's death in the exercise of their discretionary power.

Counsel for the First and Third Parties—R. C. Henderson. Agents—R. D. Ker & Ker, W.S.

Counsel for the Second Parties—W. J. Robertson. Agent—A. E. S. Thomson, LL.B., Solicitor.

Friday, January 25.

SECOND DIVISION.

[Lord Anderson, Ordinary.

CAMERON *v.* WOOLFSON.

Process — Proof — Expenses — Production of Evidence Taken on Commission—Discretion of Court—Expenses of Reclaiming Note.

In an action of damages the evidence of one of the witnesses for the pursuer was taken on commission, to lie *in retentis*. The report of the commission was opened prior to the proof, and both parties had an opportunity of being acquainted with its contents. The pursuer closed his case without having made the evidence taken on commission a part of his case. Counsel for the defen-

der at the hearing objected to any reference to that evidence. No motion to have the evidence made part of the proof was made, but the Lord Ordinary considering the matter in his discretion referred to it and granted decree. The defender reclaimed. In the Inner House counsel for the pursuer moved that the evidence be admitted. *Held* that the admission of the evidence was a matter for the discretion of the Court, that in the circumstances it should be admitted, but that the pursuer was only entitled to one-half of the expenses of the reclaiming note.

Angus Murray Cameron, 45 Abbotsford Place, Glasgow, *pursuer*, brought an action against Philip Woolfson, wholesale jeweller, 165 Trongate, Glasgow, *defender*, whereby he sought to recover the sum of £500 as damages in respect of injuries sustained through having been knocked down by a motor van belonging to the defender, and at the time of the accident driven by a chauffeur in the defender's employment.

The evidence of one of the pursuer's witnesses, who was at the time of the proof engaged on military service abroad, was taken on commission by a military officer, to lie *in retentis*. Prior to the proof the report had been opened, both parties had been given an opportunity of becoming acquainted with its contents, and it had been returned to process. It was not, however, made a part of the pursuer's case before his counsel closed it. At the subsequent hearing the defender's counsel objected to pursuer's counsel referring to the evidence taken on commission, on the ground that such reference would be prejudicial to his case if made after the case for the defender had been closed. Although no motion was made that the evidence in question be admitted, the Lord Ordinary (ANDERSON) held that in the exercise of his discretion he was entitled to take it into account in deciding the case.

The Lord Ordinary having granted decree for £100 with expenses, the defender reclaimed, arguing that the evidence taken on commission had neither been put in nor had the Lord Ordinary been moved to admit it, and accordingly that he was not entitled to read it or take it into any consideration whatever.

The pursuer argued that the Court had in its discretion power to admit the evidence taken on commission even after the pursuer's case had been closed, and referred to *Lowenfeld* v. *Howat*, (1891) 19 R. 128, 29 S.L.R. 119.

The Court, without delivering opinions on this part of the case, allowed the evidence to be admitted, and adhered to the judgment of the Lord Ordinary.

Counsel moved that no expenses of the reclaiming note be allowed to or by either party, on the ground that the defender might not have reclaimed had he known that the evidence in question would be admitted.

The Court found the pursuer entitled to one-half of the expenses of the reclaiming note.

Counsel for Defender—Christie—E. O. Inglis. Agents—Manson & Turner MacFarlane, W.S.

Counsel for Pursuer—Morton—Macgregor Mitchell. Agent—W. T. Forrester, Solicitor.

Saturday, February 2.

SECOND DIVISION.

TAYLOR'S EXECUTORS *v.* TAYLOR AND OTHERS.

Succession—Husband and Wife—Intestacy—Distribution of Estate—Widow's Provision where Intestacy only Partial—Intestate Husband's Estate (Scotland) Act 1911 (*1 and 2 Geo. 5, cap.* 10).

A testator, by holograph will disposing of his whole estate, left to his wife for her natural life certain heritable property and all interest accruing from investments and his life policy, such interests to be applied for her maintenance and that of his daughter. The fee of the estate was left to his daughter after his wife's death. On his death, his daughter having predeceased him, his widow claimed, *inter alia*, payment of £500 out of the residue of the estate under the Intestate Husband's Estate (Scotland) Act 1911. *Held* that she was not entitled to the £500, inasmuch as the Intestate Husband's Estate (Scotland) Act 1911 did not, like the Intestate Moveable Succession Act 1855, apply to cases of partial intestacy.

The Intestate Husband's Estate Act 1911 (1 and 2 Geo. V, cap. 10) enacts—Section 1—"The heritable and moveable estate of every man who shall die intestate, domiciled in Scotland, after the passing of this Act, leaving a widow but no lawful issue, shall, in all cases where the net value of such heritable and moveable estate taken together shall not exceed five hundred pounds, belong to his widow absolutely and exclusively." Section 2—"Where the net value of the heritable and moveable estate in the preceding section mentioned shall exceed the sum of five hundred pounds, the widow of such intestate shall be entitled to five hundred pounds part thereof. . . ."

A Special Case was presented by Hugh Taylor and another, executors of the late William Taylor, Greenlaw, Kilbirnie, *first parties;* the said Hugh Taylor and others, the next-of-kin and heirs *in mobilibus* of the deceased William Taylor, *second parties;* and Mrs Elizabeth Galt or Taylor, Greenlaw, Kilbirnie, widow of the deceased William Taylor, *third party.*

The Case set forth—"1. The late William Taylor, mercantile clerk, who resided at Greenlaw, Kilbirnie, died on 10th January 1917, leaving a holograph will dated 7th June 1910, and registered in the Books of Council and Session 9th November 1917. 2. The *will* is in the following terms, viz.—'Greenlaw, Kilbirnie, June 7th, 1910.—I desire to leave to my wife Elizabeth Galt Taylor, for her