proper in order to ensure a fair disclosure by the pursuers of the case which they propose to establish.

I think that the Lord Ordinary was right both when he sustained the defenders' first plea-in-law, and also when, on the argument which seems to have been submitted to him, he dismissed the action. I am disposed, however, to think that the action ought to be kept in Court, if only in order that the defenders may move for absolvitor in the event of the pursuers unduly delaying to constitute their claim before the proper tribunal. Although section 5 of the schedule deprives us of any jurisdiction to determine the dispute which has arisen between the parties, it is not so expressed as to prohibit us from taking (if in our discretion we think fit to do so) a course which is both convenient and also supported by authority. I do not think that it is possible to construe the dicta of Lord Cairns *in Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company*, 1874, 1 R. (H.L.) 8, 11 S.L.R. 494, as impliedly disapproving of the course taken by the First Division when it recalled the interlocutor of the Lord Ordinary dismissing the action. The same procedure was followed in the case already cited of *North British Railway Company* v. *Lanarkshire and Dumbartonshire Railway Company* (*cit.*).

LORD JOHNSTON was absent at the hearing and advising.

The Court pronounced this interlocutor—

"Recal said interlocutor [of 9th December 1915] in so far as it dismisses the action: *Quoad ultra* adhere thereto and sist the cause: Find the pursuers liable to the defenders in additional expenses since said 9th December 1915, and remit. . . ."

Counsel for the Pursuers the Caledonian Railway Company—Dean of Faculty (Clyde, K.C.)—Gentles. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Pursuers the North British Railway Company — Macmillan, K.C. — E. O. Inglis. Agent—James Watson, S.S.C.

Counsel for the Defenders—Horne, K.C. —Moncrieff, K.C.—W. T. Watson. Agents —Webster, Will, & Company, W.S.

Tuesday, November 28.

SECOND DIVISION.

BURNS' TRUSTEES *v.* BURNS.

Succession—Will—Construction—Bequest to Son's Children Born Prior to Death of Testator — Grandchildren Legitimated Subsequent to Testator's Death—Grandchild in utero at Testator's Death.

A man died leaving a trust-disposition and settlement whereby he bequeathed the residue of his estate to "such of the children then surviving of the said J. F. B." (his son) "who were born prior to the date of my death." At this date certain of the grandchildren were illegitimate, but were legitimised later *per subsequens matrimonium*. Further, at this date a grandchild was *in utero*. *Held* that neither the legitimised children nor the child *in utero* were included in the class of beneficiaries.

This was a Special Case presented for the opinion and judgment of the Court as to the disposal of the residue of the estate of David Burns, who died on 13th December 1904, and who left a *trust-disposition and settlement*, dated 11th August 1904, which ran as follows—" . . . In the third place, on the youngest, or the youngest survivor (as the case may be) of the children of my said son James Forsyth Burns, born prior to the date of my death, attaining the age of twenty-one years complete, I direct my trustees, subject to the declarations after written, to deal with the residue of my estate, and any interest which may have been added thereto and accumulated therewith, as follows, viz.—(*Primo*) In the event of my said son James Forsyth Burns being then in life, I direct my trustees to divide said residue into such a number of just and equal shares as will be two in excess of the number of children then surviving of the said James Forsyth Burns who were born prior to the date of my death, and to pay over said shares as follows—To my said son James Forsyth Burns two shares, and to each of his children then surviving who were born prior to my death as aforesaid, one share; or (*Secundo*) in the event of my said son James Forsyth Burns predeceasing said date of division, I direct my trustees to pay and make over said residue and interest in equal shares to such of the children then surviving of the said James Forsyth Burns who were born prior to the date of my death; declaring that should the whereabouts of one or more of my said beneficiaries be unknown to my trustees, my trustees shall not proceed to divide the estate until they have taken reasonable steps to discover the address of such missing beneficiary or beneficiaries, but should they fail to discover any trace of such beneficiary or beneficiaries within twelve months after the institution of such steps the right and interest of such missing beneficiary shall cease and determine and shall accresce to the remaining beneficiaries under this purpose according to their respective rights and interests, and my trustees shall be thereupon entitled to divide my estate accordingly: Declaring specially that in the event of any of the children of the said James Forsyth Burns who were born prior to the date of my death dying prior to said date of division and leaving issue who shall survive such date of division, such issue shall on no account receive the shares of my estate which their parents would have taken had they survived, it being my desire that only those children of the said James Forsyth Burns who are born prior to the date of my death and who survived said date of division shall be entitled to participate in my estate."

The Case stated the following *facts*—"(1) The late David Burns, portioner, who resided sometime at 5 Doune Quadrant, Kelvinside, Glasgow—hereinafter referred to as the 'truster'—died on 13th December 1904, leaving a trust-disposition and settlement, which is dated 11th August 1904, and registered in the Books of Council and Session on 7th January 1905. The *first parties* are the trustees nominated and appointed by and acting under the said trust-disposition and settlement. The truster was survived by a son—James Forsyth Burns. The said James Forsyth Burns was twice married. By his first marriage, which took place on 4th November 1887, he had six children, of whom two died in infancy. The *second parties* are the whole surviving children of the said James Forsyth Burns by his first marriage. They were born as follows, namely—James Burns, on 20th August 1886, Barbara Ferguson Burns, on 17th November 1892, Margaret Forsyth Burns on 21st March 1895, and David Burns on 7th September 1897. Three of the second parties, namely, James Burns, Barbara Burns, and Margaret Forsyth Burns, are in majority, and one, namely, David Burns, is in minority. By his second marriage — which took place on 13th January 1905 — the said James Forsyth Burns had five children, of whom one died in infancy. The *parties of the third part* are the two eldest children of the said second marriage. They were born respectively on 7th August 1899 and 13th February 1901, and are still in minority. The *party of the fourth part* is the widow of the said James Forsyth Burns, and as such is tutor, under and in terms of the Guardianship of Infants Act 1886, of Bessie M'Millan Burns, who was born on 28th May 1905, and is a child of the said James Forsyth Burns. The only other surviving child of the said second marriage was born on 22nd October 1910. . . . (3) The amount of the trust estate is about £1300. After the death of the truster the first parties paid or applied the income of the trust estate partly for the maintenance in lodgings of two of the children of the said James Forsyth Burns by his first marriage. They further paid or applied the balance of the said income in meeting the rent of the house occupied by the said James Forsyth Burns, and in the maintenance of him and of such of his children as resided with him. (4) The said James Forsyth Burns died on 22nd December 1915. His children by his first marriage are now able to support themselves either wholly or partially. The two eldest children of the said second marriage, being the third parties to this Special Case, were born prior to the date of the second marriage, which took place after the death of the truster. A question has accordingly arisen as to whether the third parties are children of the said James Forsyth Burns born prior to the date of the truster's death within the meaning of the trust-disposition and settlement. The pupil child of the said second marriage represented by the fourth party was born after the date of the said marriage and also of the death of the truster. The said pupil child was *in utero* at the date of death of the truster, and a question has accordingly arisen as to whether the said pupil child is included in the class of beneficiaries under the said trust-disposition and settlement."

The *questions of law* for the opinion and judgment of the Court were—"(1) Are the third parties within the class of beneficiaries under the said trust-disposition and settlement? (2) Is the pupil child of the fourth party within the class of beneficiaries under the said trust-disposition and settlement?"

The third parties argued—Legitimation *per subsequens matrimonium* rendered the children legitimate as from the date of their birth, subject only to the vested rights of others at that time, which the second parties did not have—Ersk. Inst., i, 6, 52; Bell's Prin., sec. 1627. The legitimation drew back—*Munro* v. *Munro*, 1840, 1 Rob. App. 492. It was analogous to the enlargement of a class by the subsequent birth of children—*Kerr* v. *Martin*, 1840, 2 D. 752, *per* Lord Mackenzie at p. 788, *per* Lord Fullarton at p. 794 *et seq.*; *M'Neill* v. *Macgregor*, 1901, 4 F. 123, 39 S.L.R. 45; Fraser, Parent and Child (3rd ed.), p. 45. Until the period of distribution had arrived one could not tell who those entitled to participate might be—*Hickling's Trustees* v. *Garland's Trustees*, 1898, 1 F. (H.L.) 7, *per* Lord Davey at p. 19, 35 S.L.R. 975; *Ross* v. *Dunlop*, 1878, 5 R. 833, 15 S.L.R. 580, *per* Lord President Inglis, who cited *Wood* v. *Wood*, 1861, 23 D. 338; *Bartholomew's Trustees* v. *Bartholomew*, 1904, 6 F. 322, *per* Lord M'Laren at p. 325, 41 S.L.R. 259. At each period of distribution one had to ask what the composition of the class was. There was no condition here that the children indicated were to be those born in lawful wedlock before the death of the truster. The implication of the term "lawful" was not the same as the expression of it, and the words of the will did not exclude those children who had been post-legitimated. Accordingly the third parties were entitled to a share of the residue, and the first question should be answered in the affirmative.

The fourth party argued—A child *in utero* might be considered as born in the lifetime of its father whenever, as in the construction of a will, that might be to its advantage—Bell's Prin., sec. 1642; M'Laren, Wills, vol. i, p. 696; *Grant* v. *Fyffe*, May 22, 1810, F.C.; *Mountstewart* v. *Mackenzie*, 1707, M. 14,903. Similar views had been expressed in English cases—*Trower* v. *Butts*, 1823, 1 S. & S. 181, approved by Lord Chancellor Westbury in *Blasson* v. *Blasson*, 1864, 2 De G. J. & S. 665. The maxim was only applied when it was for the benefit of the child. The second question should be answered in the affirmative.

The second parties argued—No definite rule of this nature had been laid down in Scotland as to such beneficial treatment of children *in utero*—*Grant* v. *Fyffe* (*cit.*). There was no Scottish authority quite in line with *Blasson* (*cit.*). The primary rule of construction was to ascertain the inten-

tion of the testator—*in re Corlass*, 1875, 1 Ch. Div. 460. The object of the testator's bounty were the lawful children existing at the date of his death, at which period vesting took place—*Davidson's Trustees* v. *Davidson*, 1871, 9 Macph. 995, *per* Lord Cowan at p. 1008, 8 S.L.R. 646. The class, having been ascertained, was fixed at the date of the testator's death, and could not be added to at a later date—*Walker* v. *Whitwell*, 1916 S.C. (H.L.) 75, 51 S.L.R. 438. Both questions should be answered in the negative.

At advising—

LORD DUNDAS—I am for answering both questions put to us in the negative. The case is an interesting one, but it seems to me that it may be decided and ought to be decided upon short and simple grounds, without trenching deeply on somewhat difficult regions of law which were more or less travelled over in the course of the discussion.

It is conceded that as matter of construction a bequest or provision to children, whether of the testator or of another, must mean lawful children; nor is there any doubt that the will speaks from the death of the testator. At this testator's death in December 1904 the second family of James Burns were not among the lawful children born prior to the testator's death, for James Burns was not at that time married to their mother. That *prima facie* would seem to afford sufficient ground for answering the first question in the negative.

But then it is contended that under this settlement there is no vesting and no distribution of the capital till a period which has not yet arrived, and it was argued that therefore the second family of James, having been legitimated by his marriage in 1905, are entitled to come in as lawful children born prior to the testator's death. The argument is ingenious, but I do not think it is sound. I think the class was fixed by the testator as at his own death, namely, the lawful children of James born prior to the date of the testator's death. That class, of course, might be diminished by the failure of one or more of its members before the period of vesting and distribution, but I do not think it can be extended by the introduction of persons who did not at the testator's death possess the essential qualification or certificate of entry to the class; nor do I think that the qualification of entry could be dependent on the voluntary act of third parties (the marriage of James Burns to his second wife) after the testator's death. Therefore upon a just construction of this settlement I think we must answer the first question in the negative.

As regards the second question, the child Bessie was not in fact born prior to the death of the testator. We were referred to English cases, but whatever may be the result of English decisions upon the law of England, I am not aware of any Scots law which should constrain us to disregard the fact that this child was not born before the testator's death, in view of the jealously guarded exclusion by the testator of James' children not born prior to the testator's death. It seems to me that this question also must be answered in the negative.

LORD SALVESEN—I am of the same opinion. The leading purpose of this trust-disposition and settlement is that the trustees are to retain the residue of the estate until the youngest or (as the case may be) the youngest surviving child of his son James, born prior to the date of the testator's death, attains the age of twenty-one years complete, and that they are to apply the income during that period for the benefit of these children. There is an unusual declaration also that in the event of children born prior to the date of the testator's death dying before the date of division and leaving issue who should survive that date, such issue are on no account to receive the shares of the estate which their parents would have taken had they survived, it being the testator's desire that only those children of James who were born prior to the date of his death and who should survive the said date of division should be entitled to participate in the estate.

It is needless for us to speculate upon the reasons which induced the testator to limit the objects of his bounty to such children of his son as were born prior to the date of his death, or to assign a reason why even in the case of those objects of his bounty their issue were not to take the share which would have fallen to their parents when the date of distribution arrived. We have simply to ascertain what was the intention of this testator as it can be deduced from the language of his settlement. That he had a clear intention in the matter is obvious from the fact that he repeated this limitation in regard to the beneficiaries being only those who were born prior to the date of his death no less than eight times throughout the will. Now at the date of his death who were the persons who fulfilled this description? I think clearly not the parties of the third part, because they were not lawful children at that date, and it is conceded that the word "children" in such a settlement must be read as meaning lawful children; nor the party of the fourth part, because she was not born before the date of the testator's death.

It is true that from a remote period in the history of English law it has been settled that the words "born before the date of my death" shall mean the very opposite, or at least shall have a signification different from that which they would have in ordinary language. Indeed the English Courts have held that "born" shall be read as meaning "not born" but "procreated," and therefore the word "born" in the cases in England in which the rule was applied was held to signify "procreated before, although born after, my death." That has been fixed apparently by judicial decision in England in cases where such a construction would be for the benefit of the child in question, but strangely enough not for any other purpose, and not to the effect of postponing distribution if that would not be for the benefit of the child. I do not think we receive any encouragement from the recent

pronouncement by the House of Lords in the case of *Villar*, [1907] A.C. 139, to import that ancient rule of construction (which the House of Lords found themselves constrained to follow) into the law of Scotland. I am not for putting at this time of day an artificial and unnatural meaning upon perfectly plain English words which are reasonably capable of only one meaning.

The case is interesting, as it is the first time that children who were born before the date of the testator's death but legitimated after that date have sought to have the same privileges as a *post natus* could legitimately claim where there is no limitation of the class to those who were born before the date of the testator's death; but I do not think there is anything in the law which was so fully developed in Mr Hamilton's argument which can have any bearing upon the true construction of this will, or force us to put an artificial meaning upon the language which the testator has employed.

LORD GUTHRIE—I am of the same opinion. It was admitted that, apart from any light to be derived from the context, the word "children" in a provision such as we have here is limited to lawful children. Again, apart from the context, the word "born" means actually born. I find no context to introduce any alteration on the ordinary meaning of these words. I read the words "the children of my son James Forsyth Burns born prior to the date of my death" as equivalent to "the lawful children of my son James Forsyth Burns actually born as such prior to the date of my death." No doubt there might have been authorities binding on us which would have compelled us to give either an extended or a restricted signification to one or other of these terms. It appears that in England the rule that the word "children" in a provision such as we have here means lawful children is the same as in Scotland. In reference to the word "born" it may be that in England the Court would construe the words "children born prior to the date of my death" as including those then procreated as well as those actually born; but they adopt this construction reluctantly and only in deference to authority, as appears from the case of *Villar*.

There is no such authority binding on us. If the above construction of the provision in question is sound, then none of the numerous cases quoted and ably commented on by Mr Hamilton have any application. In none of them did the Court either extend or diminish a class apart from the express, or what the Court thought was the implied, intention of the testator.

LORD JUSTICE-CLERK—I confess I have had some difficulty as to the first question, but that difficulty is not such as compels me to dissent from the judgment which your Lordships have agreed upon. As to the second question I have no difficulty at all. We will answer both questions in the negative.

The Court answered the first and second questions of law in the negative.

Counsel for the First Parties—Greenhill. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second Parties—D. M. Wilson. Agents — Miller, Mathieson, & Miller, S.S.C.

Counsel for the Third Parties—Hamilton. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Fourth Parties—Dykes. Agents—J. L. Hill, Dougal, & Co., W.S.

Wednesday, November 29.

FIRST DIVISION.

[Bill Chamber.

A B AND OTHERS *v.* C D AND THE LORD ADVOCATE.

War—Defence of the Realm—Interdict—Officer Taking Possession of Lands—Relevancy—Defence of the Realm Consolidation Act 1914 (5 *Geo. V, cap.* 8)—*Defence of the Realm Regulations Consolidated* 28*th July* 1916, *Regulations* 1 *and* 2.

The Defence of the Realm Regulations Consolidated, dated 28th July 1916, by regulation 1, provide that the enjoyment of property will be interfered with as little as may be, and by regulation 2 authorise the competent naval or military authority, and any person duly authorised by him, where it is necessary to do so for the public safety or the defence of the realm, to take possession of any land and to construct military works thereon.

A commissioned officer of H.M. Army having taken possession of certain lands and others and proceeding to execute certain works thereupon, the proprietors brought a note of suspension and interdict against him and the Lord Advocate as representing the Secretary for War for any interest he might have. They did not aver that the officer was acting without orders, or that the lands had not been taken by the competent military authority, or that they had been taken without statutory power, but they stated that the officer had acted without their consent, that his actions would have harmful results, that no endeavour had been made to arrange the matter with them, and that such works as were necessary for the defence of the realm could be carried out effectively so as at the same time adequately to safeguard their interests. *Held* (*rev.* Lord Anderson) that the averments of the complainers were irrelevant, and that the prayer of the note should be *refused*.

The Defence of the Realm Regulations Consolidated, dated 28th July 1916, enact—"*General Regulations*—1. The ordinary avocations of life and the enjoyment of property will be interfered with as little as may be permitted by the exigencies of the measures required to be taken for secur-