The Court repelled the objections, adhered to the Lord Ordinary's interlocutor, and allowed the objectors a proof of their averment as to the rental of Bruntsfield Links and the Meadows.

Counsel for the Lord Provost and Magistrates of Edinburgh — Watson and M'Laren. Agents— Miller, Allardice, & Robson, W.S.

Counsel for the Common Agent—Adam and Gloag. Agent—William Montgomery, W.S.

Wednesday, October 16.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

LORD ADVOCATE *v.* MARCHIONESS OF LANSDOWNE.

Succession—Annualrent—Inventory-duty.

A, who possessed estates as heiress of entail, was authorised by the Court, under the Montgomery Act, to execute a bond of annualrent on security of these estates, corresponding to the sum expended by her in permanent improvements. It being afterwards found that the entails under which A held the estates were defective, she executed a new entail, in which she provided that, unless she specially bequeathed the bond of annualrent, the same should accrue to the heirs of entail, and the lands should be freed and relieved therefrom in all time coming. A died, and B succeeded as institute under this deed of entail, and paid the whole succession-duty due in respect of the lands. *Held* that B was not liable to pay inventory-duty on the sum in the bond of annualrent, under the statute 23 and 24 Vict. c. 80, as part of the succession of A, deceased.

This was an action at the instance of the Lord Advocate, on behalf of Her Majesty, against the Marchioness of Lansdowne, for payment of inventory-duty on a bond of annualrent, to which the defender had succeeded on the death of Baroness Keith. The following were the circumstances which gave rise to the action:—

In 1851 Baroness Keith, who then possessed estates in Perthshire and Kinross as heiress of entail, was authorised by the Court, under the Montgomery Act, to execute a bond of annualrent, on the security of the entailed estates, by which she bound and obliged herself "and the heirs of entail in their order successively succeeding to me in the foresaid entailed lands and estates . . . under and by virtue of the foresaid several deeds of entail, to make payment to myself, the said Margaret Mercer Elphinstone, Baroness Keith and Nairne, Countess de Flahault, and my heirs, executors, and assignees." of an annualrent of £485, 15s. 6d., or such other annualrent or interest during her life as should correspond to the sum of £9715, 10s. 9d., being three-fourths of the sums expended by her on improvements on the said estates. It was afterwards discovered that the entails under which the Baroness Keith held were defective as strict entails; and she thereupon, upon the narrative that such was the case, executed a new entail in 1866 in favour of herself and a certain series of heirs. The deed contained the following clause:—"And I hereby declare that in case I shall not during my lifetime, nor by any *mortis causa* deed or settlement, specially dispone or convey the whole or any part or portion of the foresaid two annualrents, then the whole, or such part or portion thereof as may not have been so disponed and conveyed by me, shall accrue to the institute or heir of entail succeeding under this present deed of entail, and the lands and others above disponed shall be freed and relieved from the same in all time coming." The deed also contained a power to alter or revoke, but the Baroness never altered the deed or made any bequest of the bond of annualrent. The Marchioness of Lansdowne, who succeeded to the estates as the institute in the above deed of entail, paid the whole succession-duty due in respect of these lands. Thereafter, and in addition, the Crown claimed inventory-duty from her on the bond of annualrent, under the Act 23 and 24 Vict. c. 80, as money secured upon heritage belonging to the deceased Baroness Keith, and to which the Marchioness had succeeded.

The Lord Ordinary pronounced the following interlocutor and note:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings—finds, in answer to the question submitted for the decision of the Court in the Special Case, that the Marchioness of Lansdowne is liable to pay inventory-duty on the sum in the bond of annualrent, under the statute 23 and 24 Vict. c. 80, as part of the succession of the Baroness Keith, deceased.

"*Note.*—By the statute referred to it is enacted that the money secured on heritage shall be liable in inventory-duty as if it had been personal or moveable estate.

"That the bond of annualrent in question was in itself of the nature and in the form of an heritable security is indisputable. But the defender contends that, as the entailed landed estate over which the bond bears to be heritably secured turned out not to be entailed at all, but held in fee-simple by the Baroness Keith, and as she was then also the creditor in the bond—or, in other words, as the Baroness was thus at one and the same time in right of the bond and unfettered proprietrix of the lands over which the sum in the bond was heritably secured—the latter became extinguished *confusione*. It appears to the Lord Ordinary that this contention of the defender is not well founded.

"As a general principle of law, it is no doubt true that when the same person comes to be both debtor and creditor in an obligation, it is to be held as extinguished *confusione*. But it is equally clear, on the authorities which will be afterwards referred to, that this principle is subject to modification and exception according to the circumstances in which it arises.

"When the bond of annualrent in question was constituted by the Baroness Keith, she was the heiress in possession of what are referred to in the Special Case as certain entailed lands. But whether these lands were held under the fetters of a strict entail or not, it is at least certain that, by the title to them, they were destined, as stated in article 4 of the Special Case, to the Baroness and her husband, 'and longest liver of us two, in conjunct fee and liferent, and to the heirs-male of our present marriage, and to the heirs-male of their bodies, whom failing, to the heirs-female of our present marriage, the eldest heir-female succeeding without division,' and so on, according to a certain order of succession. Now, whether the lands and estate so destined were strictly entailed or not, it is indisputable that, so long as the destination referred to remained unaltered, they would

descend in terms of it, and that after the death of the Baroness and her husband, leaving only two daughters, the elder of them would succeed as the proprietor. It is true that by the Baroness's trust-disposition and settlement, referred to in article 2 of the Special Case, the lands referred to, supposing they were not entailed, would come to belong to her two daughters equally. But then this trust-disposition and settlement was superseded by the disposition and deed of entail, which was executed by the Baroness in 1866, whereby, on the assumption that the lands and estate referred to were not entailed, but belonged to her in fee-simple, she disponed them to her eldest daughter, the present defender, whom failing, to the eldest son of that daughter, whom failing, to the younger sons to be procreated of her, and so on in such an order of succession as to render the prospect of her younger daughter succeeding a very remote one.

"So standing the titles and destination of the lands over which the bond of annualrent in question was heritably secured, what falls next to be attended to is the destination in the latter. According to the statement in the fifth article of the Special Case, the bond is taken payable in the usual terms to the Baroness herself, and 'her heirs, executors, and assignees;' so that, unless otherwise destined and disposed of by the Baroness, it would devolve on her death to her two daughters as heir-portioners, while her landed estate would, as already explained, wholly devolve, under the disposition and deed of entail thereof executed by her in 1866, upon the defender, her eldest daughter. But then by this disposition and entail the Baroness, in reference to the bond of annualrent, declares that 'in case I shall not during my lifetime, nor by any *mortis causa* deed or settlement, specially dispone or convey the whole or any part or portion of the foresaid two annualrents, then the whole, or such part or portion thereof as may not have been so disponed and conveyed by me, shall accrue to the institute or heir of entail succeeding under the present deed of entail, and the lands and others above disponed shall be freed and relieved from the same in all time coming.' And it is also important to keep in view that by this disposition and entail the Baroness expressly reserved (p. 14 of the Special Case) her liferent of the lands and estate thereby disponed, 'and full power and liberty to myself, at any time of my life, and myself alone, without the consent of my said husband, to alter and revoke these presents in whole or in part.'

"No alteration or revocation, however, having been made by the Baroness, the result is that the bond of annualrent in question has upon her death devolved upon her eldest daughter, the defender, as institute under the entail of 1866 of the landed estates; and in this way it may be said that the bond then came to be extinguished *confusione* in the person of the defender. But the duty now claimed is on the inventory, not of the defender's estate, but of that of the deceased Baroness Keith. In these circumstances, the Lord Ordinary thinks that in the person of the Baroness the bond had not been extinguished *confusione* or otherwise, but, on the contrary, must be held to have subsisted down to her death as a separate and independent heritable right, and that equally whether the landed estates are to be considered as entailed or unentailed when the bond was executed. It may be that, while and so long as the Baroness lived, and was herself in right both of the entailed lands and the bond of annualrent, the latter was dormant, but not extinguished, for she might, in the Lord Ordinary's opinion, have destined and left it not to the defender, but to her younger daughter, or any one else she pleased. It is true that she left it to the defender as institute in the entail of 1866, but of itself this shows that it had been down to her death a separate part of her estate, and so dealt with. Accordingly, if she had not by her deed of 1866 specially disposed of the bond in the way she did, the succession to it, and to the entailed lands, would have been different, the bond going to her two daughters equally, and the entailed lands devolving, in the first instance, wholly upon her elder daughter.

"The views entertained by the Lord Ordinary in regard to this case, as now explained, are supported, he thinks, by the authorities, Stair, 1, 8, 19; Ersk. iii. 5, 27; and Bell's Principles, sec. 580. According to these authorities it is clear that *confusio* does not always, when the two rights come to be vested in the same person, effect an extinction of either right. Thus, in the words of Mr Erskine, —'Sometimes it produces only a temporary suspension of it, while the debtor and creditor continue one and the same person, or while the same person is entitled to the succession of the two several rights from the different destinations of which the *confusio* flows. But when the succession of these rights happens again to divide in two, the obligation or right which lay for a while sunk or dormant *confusione*, revives and recovers its first force.—(*Stair*, Dec. 21, 1680; *Cunningham* (Dict., p. 3038), Jan. 4, 1726; *Cumin* (Dict., p. 3045), cited (folio) Dict. i. p. 196; Stair, b. l, t. 18, § 9.) Hence the conveyance of a debt affecting an entailed estate in favour of the heir of entail and his heirs whomsoever, does not import a perpetual extinction of the debt. The debt is indeed dormant during the life of the disponee; but if the heir-at-law and the heir of entail happen at any time after to be different persons, the ground of the extinction, or rather of the suspension, ceaseth, and consequently the debt will revive in the person of the heir-at-law against the heir of entail, for it is considered as a separate estate in the absolute power of the heir who purchased it, and affectable by his creditors.—Fac. Coll., II, 63, art. 2 (*Gordon*, Dec. 1, 1757, Dict., p. 11,164.) Nay, though the deed assigning the debt to the heir of entail should also contain a discharge of it in his favour, as having made the payment, the discharge hath not the effect of extinguishing it *confusione*, seeing that part of the deed which assigns it is a sufficient indication of the heir's intention that it should still continue to subsist in his person.—Fac. Coll. II, 101 (*Kerr* v. *Turnbull*, Feb. 15, 1758, Dict., p. 15,551.)' Mr Bell states the same doctrine thus:—'Where the creditor has an interest to keep up the debt, it is held to be suspended, not extinguished. So the debt may be assigned, and money borrowed on it; or it may be kept up for the benefit of children, as by an heir of entail; or in contemplation of a divergence of the lines of succession, it may be made available to a particular heir,'—and both the learned authors refer for illustrations of the doctrine they state to numerous decided cases.

"It was argued, however, for the defender that the doctrine and decided cases referred to can have no application except where one of the rights relates to an entailed estate, the destination of which is beyond the power of the proprietor to alter. It no doubt appears to be true that in most of the

decided cases the question has arisen where one of the rights related to an entailed estate; but the doctrine, as stated by the commentators, is not limited to such cases, and the decisions do not in every instance relate to entailed estates. For example, in the case of *Lady Halgreen* v. *Burnett*, July 30, 1702, vol. 4 of Broun's Supplement, p. 533, where it was held that one having first acquired an infeftment of annualrent and then the right of property, he was entitled to use both as separate rights, the property was not entailed.

"The defender, besides maintaining that the authorities and cases which have been now referred to were favourable rather than adverse to her, cited and seemed to rely on the case of *Burnett* v. *Burnett*, April 30, 1766, (Paton's Appeals, vol. 2, p. 122). The principles of decision, however, in that case appear to be inapplicable to the circumstances of the present. The destination of both the rights there, although expressed in different terms, were held to result in the same thing; and it was on this ground, and having regard to what clearly appeared to be the intention of the party, that no separate estate was to be kept up, it was decided that *confusio* had taken effect.

"For the reasons which have now been explained, the Lord Ordinary has, although not without difficulty, come to the conclusion that the question in the Special Case ought to be answered favourably for the Crown, and he has accordingly so answered it."

The Marchioness of Lansdowne reclaimed, and maintained that the Baroness Keith having, at the time of the execution of the bond, held the unfettered right to the lands, the bond was a nullity, as one cannot be debtor and creditor to himself, and that the execution of a bond by a party in favour of himself over his lands, which he holds absolutely, cannot create money belonging to that party, and does not make him hold money heritably secured. Further, that if the bond was not a nullity it was extinguished by confusion, as the debtor and creditor were the same, and there never could be any divergence in the succession to the estate and the bond. Further, that the Baroness Keith, by her deed of entail, freed and relieved the estates of the bond, and the deed of entail did not carry the bond to the Marchioness of Lansdowne, who never had any right to, or beneficial interest in the same, and who could not assign it or keep it up as a debt against the estate. And the unburdened estates conveyed to the Marchioness of Lansdowne as institute under the entail, having paid the whole duties exigible by the Crown, the claim for inventory-duty was unfounded.

The Crown maintained that the disposition and deed of entail of 1866 being revocable, was testamentary, and was one of the instruments forming the will of the Baroness Keith, and that the said entail of 1866 being unrevoked, and no other testamentary deed disponing of the said bond of annualrent having been made by the Baroness Keith, the bond was carried by the destination in the entail to the Marchioness of Lansdowne, who was liable in duty accordingly.

At advising—

Lord Justice-Clerk—The first section of the Act 23 and 24 Vict. c. 80, enacts that all money secured on heritable property in Scotland, constituting the succession or part of the succession of any person, shall be liable to inventory-duty; and the second section enacts that the said duty shall be payable by any person who shall take any money secured as aforesaid, whether he shall take it by conveyance or by inheritance, &c. So the question is, whether in the first place, the money contained in these bonds of annualrent was secured upon the estate in terms of the statute, and, in the second place, whether it constituted part of the succession of the deceased Lady Keith.

Now, Lady Keith was uncontrolled proprietrix of the estate, and the explanation of her executing the bond of annualrent is, that it was done under the supposition that the estate was held under fetters when in reality it was not so held. In the bond she bound and obliged herself, "and the heirs of entail in their order, successively succeeding to me in the foresaid entailed lands and estates, under and by virtue of the foresaid several deeds of entail, to make payment to myself, the said Margaret Mercer Elphinstone, Baroness Keith and Nairne, Countess de Flahault, and my heirs, executors, and assignees, of an annualrent of £485, 15s. 6d. Now, seeing that the deeds of entail here referred to were ineffectual, and that Lady Keith really held her property unfettered, this bond did not constitute any relation of debtor and creditor between Lady Keith and the estate, formed no burden upon the estate, and effected nothing during Lady Keith's life, nor did it effect anything after her death; for in the deed of entail executed by her in 1866 she makes the following provision—"And I hereby declare that in case I shall not, during my lifetime, nor by any *mortis causa* deed or settlement, specially dispone or convey the whole or any part or portion of the foresaid two annualrents, then the whole, or such part or portion thereof as may not have been so disponed and conveyed by me, shall accrue to the institute or heir of entail succeeding under this present deed of entail, and the lands and others above disponed shall be free and relieved in all time coming." Now, Lady Leith never disponed or conveyed these bonds, and the Marchioness of Lansdowne succeeded as institute of entail. Thus, if the bonds had been for a separate debt secured upon her estate, it might have been a different matter, but here the bonds were executed under a misapprehension, and the money secured is no part of the succession.

I am therefore of opinion that Lady Lansdowne is not liable in inventory-duty.

Lord Cowan—I concur with your Lordship. The clause in the deed of entail of 1866, referred to by your Lordship, shows that the estate was left unburdened in favour of the eldest daughter, and she took as absolute and uncontrolled fiar. There was no succession to the bond of annualrent, and never could be. What we have to deal with here is only a reserved right to burden the estate if the party thought fit; and as that reserved right was never exercised, it fell to the ground. As to the argument that the debt created by the bond had been extinguished by confusion, I do not think it is sound, for there was no proper creation of debtor and creditor by the constitution of the bond.

Lord Benholme—This bond of annualrent was constituted in reference to the provisions of the Montgomery Act, the object of which is to enable a proprietor of an estate held under the fetters of an entail to lay out money on the estate; and this procedure is only applicable where the fetters of the entail are good. In this case, as it subsequently appeared, the fetters of the entail were not

good, for the mere circumstance that the destination was to heirs-male did not make it fettered. The bond was thus executed under a misapprehension. So I agree with your Lordship that the bond of annualrent was of no effect at all, and so on the one hand it laid no burden upon the heir, and on the other it conferred no benefit. Now, the Act under which this action is brought requires that the money heritably secured shall be part of the succession of the party in reference to whom the inventory-duty is to be paid,—the subject must have belonged to the deceased. Thus, it is not possible that there should be inventory-duty exigible upon a subject in which the party had never any interest.

Lord Neaves—This case has been much complicated by bringing in conclusions as to debtor and creditor and extinction *confusione*. Now, it is to be observed that although the same person becomes debtor and creditor in an obligation, the debt may only be suspended, but not extinguished. But in this case no such question arises, for it is quite clear that a thing cannot be extinguished before it exists; and here no debt was ever constituted, for it is the case of a person binding herself to pay to herself after her death.

It is argued that the right to this annualrent vested in Lady Keith during her lifetime. I cannot see that it could have been so. She could not have done anything to make it *in bonis* of her, and, if it was not *in bonis* of her, it is quite plain that it cannot be made subject to inventory-duty. I therefore concur with your Lordship.

The Court therefore recalled the interlocutor of the Lord Ordinary, and found the Marchioness of Lansdowne not liable to pay inventory-duty on the sum contained in the bond of annualrent.

Counsel for Pursuer — Solicitor-General and Rutherfurd. Agent—Angus Fletcher, Solicitor of Inland Revenue.

Counsel for Defender—Shand and Marshall. Agent—Lockhart Thomson.

Saturday, October 19.

SECOND DIVISION.

SPECIAL CASE—GREIG & OTHERS.

Tutors and Curators—Nomination—Deathbed.

In an antenuptial contract of marriage certain persons were nominated to be tutors and curators to the children of the marriage, failing any other nomination by the husband. Subsequently, in a trust-disposition and settlement, the husband nominated certain other persons to be tutors and curators to his children. He died of the disease under which he was labouring at the date of the deed, and within sixty days of its execution. This deed was reduced in so far as it affected the interests of the heir at law. *Held* that the parties named in the trust-deed were entitled to be tutors both to the heir at law and to the younger children of the marriage.

Opinions as to whether the parties named in the marriage-contract would be entitled to the office of curators.

The parties to this case were, 1st—John Borthwick Greig and Others, who were nominated under the antenuptial contract of marriage between George Greig and Mrs J. Richardson Dickson or Greig, to be tutors and curators to the child or children of the marriage—of the first part; and 2d, the said John Borthwick Greig and Others, nominated in a trust-disposition and settlement executed by the said deceased George Greig, to be tutors and curators to the children of the said marriage—of the second part.

The circumstances under which the question arose were as follows:—Mr George Greig of Eccles died on 19th June 1869, and was survived by his wife Mrs J. Richardson Dickson or Greig, and by three children, viz., Mary Greig, aged five years, James L. Greig, aged four years, and George Greig, aged two and a half years, who was a posthumous son. The antenuptial contract of marriage between the said Mr and Mrs Greig contains the following nomination by Mr Greig of tutors and curators to the children of the marriage—"And failing any other nomination or appointment by him, the said George Greig hereby nominates and appoints the said trustees, and the survivors or survivor of them, and the said Isabella Dickson Richardson Dickson, to be tutors and curators to the child or children of the present intended marriage; and he hereby expressly dispenses with their lodging tutorial or curatorial inventories, and declares that they shall be entitled to the same immunities and privileges as if they were to lodge such inventories." Two of the parties named declined to accept the said offices of tutors or curators. The other parties named, being the parties hereto of the first part, were willing to accept the said offices in the event of their being found entitled to do so. On 22d May 1869 Mr Greig executed a trust-disposition and settlement, whereby he conveyed his whole estates, heritable and moveable, to the parties hereto of the second part, as trustees for the purposes therein mentioned, and *inter alia* for fulfilment of the obligations incumbent upon him in his said contract of marriage. The said trust-disposition and settlement contained the following nomination by Mr Greig of tutors and curators to his children:—"And whereas the persons who are nominated and appointed by me, under my said contract of marriage, to be tutors and curators to the children of the marriage, are not all the same persons as my trustees named herein, and it is desirable that they should be the same: Therefore I do hereby revoke and recall the nomination of tutors and curators contained in said contract of marriage; and in lieu and place of the nomination therein contained, I hereby nominate and appoint my trustees herein before named, and the said Mrs Isabella Dickson Richardson Dickson or Greig, and the survivors or survivor of them, to be tutors and curators to the said James Lewis Greig and Mary Mitchell Greig, and to any other child or children who may yet be born of my said marriage; and I expressly dispense with their lodging tutorial or curatorial inventories, and declare that they shall be entitled to the same immunities and privileges as if they were to lodge such inventories: Declaring hereby, that if from any cause the nomination of tutors and curators contained in this deed shall not take effect or be set aside, then I expressly declare that the nomination of tutors and curators as contained in my said contract of marriage shall stand and be of full force and effect." Mr Greig died on 19th June 1869, possessed of the