LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Muirhead—J. P. B. Robertson. Agents—Bruce & Kerr, W.S.

Counsel for Defender (Respondent)—Asher—Mackintosh. Agents—Carment, Wedderburn, & Watson, W.S.

Saturday, May 17.

FIRST DIVISION.

LORD ADVOCATE *v.* WOOD AND ANOTHER (PATERSON'S TRUSTEES.)

Revenue—Legacy-Duty—Where Annuities Payable to Heirs of Entailer out of Rents of Entailed Estate—Act 45 *Geo. III. cap.* 28, *sec.* 4.

The Act 45 Geo. III. cap. 28, sec. 4, provides "that every gift by any will or testamentary instrument of any person dying after the passing of this Act, which by virtue of any such will or testamentary instrument shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any moneys to arise by the sale of any real estate, of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this Act. . . ." *Held* that annuities directed by an entailer to be paid by his trustees to the heirs who should succeed him, and payable out of the rents of the estate, the fee whereof was held under the same deeds by the same persons, were not gifts liable in legacy-duty under that clause.

Observed that to hold such annuities liable in duty would be tantamount to declaring that legacy-duty is exigible on sums of money payable to persons out of the rents of their own estates.

This was an action at the instance of the Lord Advocate on behalf of the Board of Inland Revenue against John Andrew Wood, advocate, and Findlay Anderson, trustees acting under the trust-disposition of the deceased George Paterson of Castle Huntly, Perthshire, dated July 27, 1812, and registered August 15, 1817.

The following narrative of the facts of the case is taken from the note to the interlocutor of the Lord Ordinary (CURRIEHILL):—"In this action the pursuer claims payment of legacy-duty upon certain annuities, payable under the trust-disposition and settlement of the deceased George Paterson of Castle-Huntly (hereinafter called George Paterson the elder) to his son the now deceased George Paterson the younger, and to his grandson, the also now deceased George Paterson, the last of Castle-Huntly. The claim is made under the Act 45 Geo. III. c. 28, § 4, which enacts:—'That every gift by any will or testamentary instrument of any person dying after the passing of this Act which by virtue of any such will or testamentary instrument shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon, or made payable out of any real estate, or be directed to be satisfied out of any moneys to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this Act.' . . . .

"By marriage-contract dated 30th November 1776, entered into between the said George Paterson the elder and Ann Gray, daughter of John Lord Gray, the said George Paterson in contemplation of the marriage became bound, against the term of Whitsunday 1780, to provide and secure upon land or other sufficient security the sum of £35,000 sterling, and to take the rights and securities thereof to himself and the sons to be successively born of the marriage and the heirs whatever of their bodies respectively, with power to him to restrain and tie up his heirs as to their dealing with said lands by all the fetters of a strict entail. Several children were born of the marriage, the eldest son having been the now deceased George Paterson the younger. By deed of entail dated 27th July 1812, George Paterson the elder, on the narrative of the said marriage-contract, and in implement of the obligations which he had therein undertaken, and for the better preservation of his estate, family, and name, executed a strict entail of his lands and estate therein mentioned (now known under the general name of Castle-Huntly), by which he conveyed the said lands and estate 'heritably and irredeemably to myself in liferent during all the days of my life, and to George Paterson, the eldest son of the marriage between me and the said Ann Gray, and the heirs whatsoever of his body without division, in fee, whom failing to my other heirs after written.' The deed contains obligation to infeft, procuratory of resignation, and precept of sasine, a condition being inserted that the said George Paterson the younger, or the heirs succeeding to the estate, should be bound within a year after the entailer's death to obtain themselves infeft and seised in the said lands and estate. The entail contains the usual prohibition against alteration of the order of succession, and against alienations of the estate, and the contraction of debt affecting the same, but with power to the institute and heir of tailzie to make provisions for their wives or husbands out of the estate by way of locality, and to their children by means of bonds of provision affecting the rents, and a clause to the following effect:—'And in order that this deed of entail and settlement may be more effectual, I hereby bind and oblige myself and my heirs-at-law, and successors whatsoever, to free and relieve my tailzied lands and estates before specified, and the heirs named or to be named to succeed thereto, of and from the payment of

all the debts and obligements which I shall be liable for at the time of my death.'

"This entail was recorded in the register of entails on the 13th November 1817, shortly after the death of the entailer. George Paterson the younger, on his father's death in 1817, and his son George Paterson the last of Castle-Huntly, on his father's death in 1846, successively made up their titles as institute and heir of entail respectively under the entail, and were duly infeft in the entailed estate. . . . .

"George Paterson the elder, however, had contracted a considerable amount of debt, and being desirous to made adequate provision for his younger children, and to implement his obligation in the entail to relieve the heirs of entail of liability for his debts, he executed of even date with the entail a trust-disposition and settlement, whereby, on the narrative of the entail, and of his indebtedness to creditors, and of his having granted provisions to his younger children, and that 'it is proper and necessary to provide for the payment and security thereof, so as to do full justice to my younger children and my other creditors, and at the same time to effectuate and fulfil my intention of transmitting my estates to my heirs of entail free of debts and incumbrances, and for these purposes I am resolved to execute the trust after written,' he therefore, and in security and for more sure payment of the debts, provisions, obligations, legacies, and annuities which should be resting and owing by him at the time of his death, gave, granted, and disponed to Francis Earl of Moray and others, as trustees, his whole debts, heritable and moveable, his whole moveable estate (except his household furniture and certain other articles which were togo to the heir of entail for the time), and also the whole of the entailed lands, 'with full power to my said trustees immediately on my decease to enter into possession of the said lands and estates, and to uplift the rents, maills, and duties thereof, which I hereby assign and make over to them, but always in trust and for the security and payment of the provisions to my younger children, and the debts and obligations that may be resting and owing by me at my decease, and of any legacies or annuities which I have already granted or shall hereafter grant to any person or persons whatever, and of the expenses of executing this trust, and with and under the conditions, provisions, and declarations, and for the special interests, uses, and purposes hereinafter mentioned.'

"The first purpose was for payment to the successive heirs of entail of the expense of completing their titles to the entailed estate. The second was for payment to George Paterson the younger during the subsistence of the trust of a free yearly annuity of £1500 sterling from the truster's death to the term of Whitsunday 1820, of £1700 sterling from Whitsunday 1820 to Whitsunday 1824, and of £2100 from Whitsunday 1824 during his life, or until the expiration of the trust, to be paid free of property tax or of any tax of a similar nature to which annuities then were or should be liable; and in case of the death of George Paterson the younger before the execution of the purposes of the trust, the trustees were to pay to the heir of entail for the time a free yearly annuity of £1000 free of property tax during the continuance of the trust. . . . .

The sixth purpose is as follows:—'I direct and appoint my said trustees, after payment of the said annuity to my heir, public burdens, expense of necessary repairs, and expense of management, to pay and apply the remainder of the rents, maills, farms, profits, and duties of my said lands and estates towards the payment and extinction of the provisions to my younger children, and of the debts and obligations which shall be resting and owing by me, and of any legacies or annuities granted or to be granted by me to any other person or persons at my decease; and on paying these debts my said trustees are hereby directed and required to take full and ample discharges of the same, and to record these in the proper register, so that these debts may no longer affect my taillied lands and estate; and when the whole of the debts and obligations resting and owing by me, and the provisions to my children, and my legacies and annuities, are satisfied and paid, I hereby declare that this trust shall cease and determine (except in the event after mentioned), and the said George Paterson, or the heir of taillie for the time, shall enter into the full possession of my said taillied lands and estates, and that notwithstanding that there may then be subsisting annuities granted by me; but the said George Paterson, or the heir of taillie, before thus entering into possession, being always bound to grant sufficient security to the satisfaction of my trustees for the regular payment and discharge of such annuities, and that they shall not be kept up as debts against my said taillied estate; but declaring, nevertheless, that if at the period when the purposes of this trust shall have been fulfilled, the heir of taillie for the time being shall be in minority, then and in that event my trustees shall continue their possession and management of my said lands and estate until the said heir attain the years of majority, and after allowing a proper and reasonable sum yearly for the aliment and education of such heir, they shall, upon his or her majority, denude of this trust, and put him or her in possession of my estate, and account for and pay over to such heir the balance of their intromissions with the rents and produce of my said estate, after payment of my debts, provisions, and legacies and annuities, and fulfilling the whole other purposes of this trust.' The deed concludes with a precept of sasine for infefting the trustees in the said lands and estate; but 'under this special declaration, that the said sasine and infeftment to be granted to my said trustees shall be and subsist as a security only for payment of the provisions to my children, and debts and obligations resting and owing by me, and of any legacies or annuities granted or to be granted by me, and for fulfilment of the other purposes hereinbefore declared, but that the same shall not in any manner of way affect the fee and property of my said lands and estate, which notwithstanding hereof shall continue unalterably settled and secured upon the said George Paterson, and the heirs of taillie called by the foresaid deed of entail, ... who shall in their order be entitled to make up titles to the same, and to grant tacks thereof and settle localities upon their wives and husbands, and provisions to their younger children under the conditions and in terms of the said deed of entail.'

"The trustees were infeft in the estate in terms of the warrant of infeftment contained in the said trust settlement, and the title has been renewed in the persons of the present trustees, the defenders in this action. They paid to George Paterson the younger the annuity of £1500 from Whitsunday 1817 to 1820; the annuity of £1700 from 1820 to 1824, and the annuity of £2100 from 1824 till his death in 1846. They also paid to George Paterson last of Castle-Huntly the annuity of £1000 from 1846 till his death in 1867. Legacy-duty was paid on George Paterson the younger's annuity of £1500 from 1817 to 1820, but no duty was paid on any of the other annuities, and it is for the annuities from 1820 to 1867 that legacy-duty is now claimed by the pursuer."

The pursuer pleaded—"The said annuities of £1700, £2100, and £1000 respectively, being legacies within the meaning of the Statute 45 Geo. III. cap. 28, and the other Acts relating to legacy-duty, the pursuer is entitled to decree in terms of the conclusions of the libel."

The defenders pleaded, *inter alia*—"(1) On a sound construction of the various deeds libelled, the annual sums received by the successive heirs of entail were not annuities on which legacy-duty was payable within the meaning of the statutes founded on. (2) The entail of 1812 having been executed in implement of the marriage-contract obligation libelled, no legacy-duty was payable by the successive heirs in respect of their succession to the estate or in respect of any right which accrued to them thereunder. (3) The trust created by the trust-disposition of 1812 having been truly a temporary burden on the entail, the annual sums so received by the successive heirs were received by them in virtue of their radical titles as heirs of entail, and were not annuities in the sense of the Legacy-Duty Acts."

The Lord Ordinary (CURRIEHILL) pronounced an interlocutor assoilzieing the defenders. He added the following note:—

"*Note.*— . . . George Paterson the elder died in 1817, leaving heritable estate of considerable value, and personal estate of the value of nearly £10,000, which sum, however, was fully exhausted in paying his personal debts, which amounted to upwards of £30,000. It is clear, therefore, that no annuities bequeathed by him could have effect or be satisfied out of his personal estate. And the alleged annuities were not to be paid out of moneys arising from the sale of real estate. The only question to be decided is, whether these annuities are gifts by the will or testamentary instrument of the said George Paterson, which by such will 'have been charged upon or made payable out of his real estate,' and as such are chargeable with legacy-duty under the statute? It is immaterial to the present question that in the settlement of George Paterson the elder the annual payments directed to be made to his son and grandson are termed 'annuities.' In all such questions substance is more to be regarded than form; and unless these so-called 'annuities' are gifts by the said settlement, charged by the settlement upon George Paterson the elder's real estate, the claim for legacy-duty fails. It is necessary, therefore, to inquire into the circumstances under which they were granted. These are shortly as follows:—[*Here followed the facts, as narrated above*].

"After the best consideration which I have been able to give to the whole case, I have come to be of opinion that the claim for legacy-duty is not well founded. The trust infeftment of the trustees of George Paterson the elder was declared by him to be, and was in fact, a mere burden or security upon the entailed estate which was feudally vested in his son and grandson in succession. The estate did not belong to the trustees in property, but merely in security for payment of certain debts of the truster. The property itself belonged to the truster's son and grandson in virtue of the entail executed by the truster in implement of an onerous obligation undertaken by him in his marriage-contract, which conferred upon his son and grandson a *jus crediti* to demand such a conveyance, and which he was not entitled gratuitously to defeat. And it was for the express purpose of ultimately securing to them the full enjoyment of the estate, free and unencumbered of all his debts, that the truster temporarily imposed upon them the burden of the trust. They were to have immediate and full possession of the mansion house and part of the estate, and had full power to grant leases of the estate and to affect the estate and rents thereof with provisions to their wives and children; and although they were not, during the subsistence of the trust, themselves to uplift the remainder of the rents of the estate, these rents when uplifted by the trustees were to be applied primarily in paying to them certain fixed portions thereof by way of an annuity or annual allowance, and not until these allowances were paid was any part of the rents to be applied in paying off the truster's debts or other obligations. In short, these allowances were payments out of the rents of an estate which belonged, not to the truster, but to the annuitants themselves in virtue of the deed of entail, and were not, in my opinion, gifts to the annuitants by the will of the truster, charged upon or made payable out of his real estate, and as such subject to legacy-duty. The case appears to me to be ruled by the decision of Lord Lyndhurst in the case of *Shirley* v. *E. Ferrers* (1842), 1 Philip, p. 167, where, under circumstances analogous to those in this case, the Lord Chancellor said:—'The effect of the will is to give the petitioner a life estate, subject to certain charges, and coupled with a direction to the trustees to apply a limited portion of the rents to her maintenance and education until she attains the age of twenty-one or marry. The direction merely does what the Court would have done without it. The petitioner would have been entitled at all events to maintenance out of the rents and profits of the real estates. It is true the trustees have a discretion to allow a portion of the rents not exceeding a certain amount for that purpose, but still the estate out of which the allowance is to come is her estate. Nothing but what is a charge upon the estate of another person will come within the statute. It is very important that as far as possible we should avoid refinements in the construction of this Act. I am of opinion that no legacy-duty is payable.' In the present case the estate, which belonged to the annuitants in virtue of the marriage contract and deed of entail, was charged by the will of the entailer (in virtue of his reserved powers) with debts and charges payable to third parties; but the effect of the will was to secure to the annuitants a limited portion

of the rents of their own estate during the subsistence of these burdens. And the mere fact that the truster designated that portion of the rents as an 'annuity,' does not, in my opinion, affect its true character as being the annual produce of an estate which belonged to the truster's son and grandson, temporarily restricted in amount untill the estate should be disburdened of debt. The discretionary allowances to be paid to a minor heir of entail succeeding after the trust purposes had been fulfilled would have been precisely in the position of those in the case of *Shirley;* and I can see no difference in principle between these and the fixed allowances as to which the present question has arisen. Such annuities or allowances would doubtless now be liable in succession duty; but as those on which legacy-duty is now claimed came into operation before the passing of the Succession Duties Act, and as they are not, in my opinion, liable in legacy-duty, the defenders are entitled to be assoilzied, with expenses."

The pursuer reclaimed.

Authorities—*Melville* v. *Preston*, Feb. 8, 1838, 16 S. 457, 1 Ross' Leading Cases, 458; *Macmillan* v. *Campbell*, March 4, 1831, 9 S. 551; *Shirley* v. *Earl Ferrers*, 1 Phillips' Chanc. Ca. 167.

At advising—

Lord Justice-Clerk—[*After stating the facts*]—I entirely agree with the conclusion at which the Lord Ordinary has arrived, and I have not found the case to be attended with any difficulty. The Lord Ordinary has very clearly explained his views, and I have little to add by way of illustration.

The right which George Paterson the younger, the institute under the entail, had to the rents of the entailed estate did not flow from the title of the trustees, but from his right of property in the lands of which they were the fruits. The superadded trust right conferred nothing on him, but only operated a burden or restriction on his enjoyment of the rents for a limited time and for a temporary purpose. The conveyance in the deed of entail was granted, in part at least, in implement of the onerous provisions in the entailer's contract of marriage; and even if the trust conveyance executed at the time had been of the unrestricted fee of the estate, for payment of debts and provisions, it would have been only a security, and the income of the lands would not the less have been the property of the heir in possession, subject to the burden of the trustees' title, and the right or power of administration conferred for the purposes of the trust. But the trust right in the present case is of a very limited and special nature. It proceeds no doubt on a formal conveyance of the fee of the granter's whole property, but this right is carefully restricted to the very limited uses for which the grant is made. It is truly a right applicable solely to certain surplus rents of the estate, in so far as these might remain free after providing for the primary enjoyment of the heir in possession. Their title to administer is subordinate to the radical right of the heir in possession to possess, and the very first purpose of the trust is to defray the expense of the completion of the title of the heir of entail. Then follow four other directions under which the estate is to be administered for the benefit of the heir in possession, the first provision being a direction to pay a certain specific portion of the rents annually to the heir; and this constitutes the alleged gift by will or testamentary writing on which the pursuer founds. When these objects are satisfied, then, and then only, emerge the separate powers of the trustees. Whatever income remains over after these directions are fulfilled is to be applied by them to purposes other than the benefit of the heir in possession—that is to say, in liquidating obligations for debt and provisions incumbent on the entailer; and to make it quite clear that the title of the trustees was in no degree suspensive of the radical fee of the estate vested in the heir of entail, the trust deed contains a declaration that the trust conveyance shall not in any manner of way affect the fee and property of the lands and estate, which shall notwithstanding hereof continue unalterably settled and secured on the said George Paterson and the heirs called by the deed of entail.

Looking at the object and substance of this trust right, it seems to me that as far as the heir in possession is concerned it is not a deed of gift, but one solely of restriction. It gave him nothing; it only limited the right which he had under the deed of entail, and his infeftment in terms of it. It is true the payment which the trustees are directed to make out of the rents is called an annuity, but they were the fruits of his own estate, and the direction constituted no charge whatever on the land, but simply limited the operation of a right which had been conferred without restriction, and for an onerous cause.

I am therefore of opinion that this payment was in no respect charged on the entailed estate in the sense of the statute founded on. It was not a gift in any sense. The case seems to me to be clearer than that of *Shirley*, referred to by the Lord Ordinary, for the right to these rents was vested in the heir of entail in direct enjoyment under the conveyance, and the trustees were merely hands or administrators to pay them over to the specified extent.

Lord Ormidale—I have arrived at the same conclusion.

It could not well have been intended that annuities bequeathed to certain persons in succession in terms of deeds of settlement, and payable out of the rents of landed estates the fee of which was under the same deeds destined to the same persons, should be treated as gifts liable in legacy-duty under the 4th section of the 45th Geo. III. cap 28, for that would be tantamount to holding that legacy-duty is exigible on sums of money payable to persons out of the rents of their own property. And yet such in reality, as it appears to me, does the contention of the pursuer in the present case amount to. That this is so I apprehend to be clear, unless the estates, left by George Paterson the elder under his deed of entail, are to be held and dealt with as different from the estates left by him under his trust deed executed of the same date. But that cannot be so held, for the estates are the same, and while they are by the deed of entail left irrevocably to George Paterson, the granter's eldest son, they are merely disponed by trust deed to trustees to be held by them temporarily, and for the limited purposes of paying debts and certain provisions to younger

children, and ultimately when these debts and provisions were satisfied, in order that the eldest son and his son in succession should have the enjoyment of them free and unencumbered under the deed of entail.

In short, the trust is, and was intended to be, nothing more than a burden on the entailed estates. That this is so appears to me to be clear from the whole terms and tenure of the deed of entail and trust-deed, and especially the precept of sasine in the latter deed, which is to the effect that infeftment in the lands in favour of the trustees "shall be and subsist as a security only for payment of the provisions to my children, and debts and obligations resting and owing by me, and of any legacies and annuities granted or to be granted by me, and for fulfilment of the other purposes hereinbefore declared, and that the same shall not in any manner of way affect the fee and property of my said lands and estate, which notwithstanding hereof shall continue unalterably settled and secured upon the said George Paterson and the heirs of tailzie called by the foresaid deed of entail."

The estates therefore dealt with by the trust-deed and the deed of entail were not only the same, but they were by both deeds left and destined by George Paterson the elder to and for behoof of the same parties in succession, viz., his eldest son George Paterson the younger, and upon his death to his eldest son. To hold that these parties were liable in legacy-duty on their annuities payable out of the trust-estates in question would, as I have already said, be tantamount to making them pay legacy-duty on their own property, a result not only incongruous in itself, but inconsistent with the principle of decision of Lord Chancellor Lyndhurst in the case of *Shirley* v. *Earl Ferrers*, referred to by the Lord Ordinary in the note to his interlocutor, where it was ruled that "nothing but what is a charge upon the estate of another person will come within the statute."

I am therefore of opinion with your Lordship that the interlocutor of the Lord Ordinary is right.

Lord Gifford—I am of opinion that the Lord Ordinary's interlocutor is right and should be adhered to.

The question is, Whether certain so-called annuities payable under the trust-disposition and settlement of George Paterson the elder of Castle Huntly to his son George Paterson the younger, and to his grandson George Paterson the third of Castle Huntly, all now deceased, are subject to legacy-duty under the statutes which were in force when George Paterson the elder died in 1817, or when George Paterson the younger died in 1846. George Paterson the third did not die till 1867, but by that time the Succession Duty Act (16 and 17 Vict. cap. 51) had been passed, and as this Act imposes duty called succession duty on heritable as well as on moveable succession, no question has arisen as to the succession which emerged in 1867 upon the death of George Paterson the third. The only points raised in the present action are whether legacy-duty is exigible upon the annuities which George Paterson the younger and George Paterson the third enjoyed during their respective lives under the trust-deed of George Paterson the elder, and as heirs of entail for the time of the entailed estates of Castle Huntly?

In 1817, when George Paterson the elder died, and in 1846, when George Paterson the younger died, no legacy-duty was exigible from heritable succession, however large the amount of the succession might be. Legacy-duty as at those dates only became due on moveable succession or on sums charged on or payable out of lands, and the question in the present case really resolves into this, Whether the annuities enjoyed by George Paterson the younger and by George Paterson the third were in the sense of the statutes then in force moveable succession or legacies or annuities from land subject to legacy-duty? or whether they were heritable succession belonging to the heirs of entail in the estates of Castle Huntly, and really as much payable out of the accruing rents of these estates yearly as if the successive heirs of entail had entered to possession as such, and had uplifted and enjoyed the rents simply as heirs of entail for the time under the tailzied investiture?

If the annuities, as they are called in the trust-deed, were really and in substance only a restricted and limited part of the rents of the tailzied lands, then it is plain no legacy-duty can be exigible, for at the dates in question no heir of entail or heir whatsoever paid any legacy-duty in respect of his succession to heritable estate, whether entailed or not. If, on the other hand, the annuities in question were payable as simple legacies or annuities charged upon the trust-estate of a testator, and made a burden upon lands which did not belong in any sense to the annuitant, then under the Legacy-Duty Acts legacy-duty would be exigible. I think, therefore, the question at issue may be stated thus—was the succession which George Paterson the younger and George Paterson the third enjoyed heritable or moveable?

Now, in considering this question it is a startling circumstance, to begin with, that although George Paterson the younger and George Paterson the third have enjoyed their so-called annuities from 1820 to 1867, a united period of forty-seven years, no claim for legacy-duty was made by the Crown authorities till the raising of the present action in October 1878, and the present summons actually concludes for fifty-seven years' interest on the first sum of legacy-duty, which is alleged to have fallen due and become payable so long ago as Whitsunday 1821. I am not referring to this unexampled and unexplained delay as founding any plea of prescription or abandonment as against the Crown, for no such plea is raised or stated upon record, but the fact that legacy-duty, which we know the Crown authorities carefully and peremptorily levy, has not been asked for nearly sixty-years, creates a *prima facie* presumption, in the absence of any explanation, that the duty was not considered to be really due till some new light has broken upon the revenue authorities in 1878.

Be this as it may, however, I am willing to take the question as if it had arisen in 1821, and to consider whether the so-called annuities, first of £1700 a year, and then of £2100 a-year, paid to George Paterson the younger, and then after his death the annuity of £1000 a-year payable to George Paterson the third, were in the sense of

the statute then in force legacies or annuities subject to legacy-duty. I am very clearly of opinion that they were not.

The only statutory provisions imposing legacy-duty with which we have to do in the present action are those contained in the Statutes 36 George III. cap. 52 and 45 George III. cap. 28. A subsequent Statute passed in 1868, the 31 and 32 Vict. cap. 124, provides for interest accruing on arrears of legacy-duty, but whether this statute has a retrospect or not it is unnecessary to consider, as in my view the question of interest does not arise.

Now, there is no doubt that under these statutes in force in 1817 when George Paterson the elder died, and in 1846 when George Paterson the younger died, every legacy or testamentary gift, whether of a present sum of money or of an annuity, is subject to legacy-duty, and that whether it is payable out of the personal estate of the testator or whether it is charged upon, or as the statute expresses it "directed to be satisfied out of any monies to arise by the sale of any real estate of the testator;" and if the annuities in question are really legacies left by Mr Paterson the elder, even though they be payable out of his —that is, Mr Paterson the elder's—real estate, then legacy-duty would be payable. But it is necessary to inquire whether this is really so. Of course nothing turns upon the mere use of the word annuity, or upon the direction that the testamentary trustees of Mr Paterson the elder are to pay it. In all such cases the substance of the matter must be inquired into and got at. The Court must ascertain and see the real nature of the transaction, and must satisfy itself whence the annuity is to be paid and what is its true character, and if it turns out that the son and grandson to whom the so-called annuities are to be paid are really the heirs of entail in the entailed estate settled and entailed by the deceased, and that the annuities are really nothing else than a limited portion of the rents of the entailed estate—limited only while the trust subsists—then it will be evident that you can no more exact legacy-duty from these heirs of entail on their limited portion of their rental than you could under the old law exact legacy-duty from a son who, whether by conveyance or *ab intestato*, succeeded his father in a landed estate.

Now, a very short examination of the deeds is sufficient to show that this last is the real and true position of George Paterson the younger and of George Paterson the third. They are simply successive heirs of entail in the entailed estate of Castle Huntly. Indeed they are successive tailzied fiars in that estate, but their right to the full rents of the estate is restricted until certain debts are paid off, and certain other purposes of the entailer are accomplished. If these two gentlemen, George Paterson the younger and George Paterson the third, had enjoyed as successive heirs of entail the full rents of the estate of Castle Huntly, I do not think that the Crown or its advisers would have ventured to maintain that in respect of these rents, and under the old law, they would have been liable in legacy-duty. But if this would be so, it is difficult to understand how they can be liable in legacy-duty merely because their rents are reduced or restricted. If legacy-duty would not be exigible upon the whole rents, how can it be exigible from a mere part thereof.

The trust-deed of George Paterson the elder is dated 27th July 1812, being the same date as that of the deed of entail whereby he settled the estates of Castle Huntly. In reality the deed of entail and the trust-settlement must be read together as one deed, and as forming jointly the testamentary arrangements made by George Paterson the elder, but if any distinction is to be taken, it is manifest that the deed of entail whereby Mr Paterson settled in perpetuity the large and important entailed estate of Castle Huntly, worth £7000 or £8000 a-year, is the most important of the two deeds. His personal estate did not exceed £10,000, his debts amounted to upwards of £30,000, so that in truth, his personal funds being far more than exhausted by his debts, the estate of Castle Huntly formed his whole succession. Now this estate he settled by a deed of strict entail on his eldest son and the other sons of his body and on the respective heirs oft heir bodies, and the only purpose of his trust-deed was to burden this tailzied succession with the payment of his debts, with provisions for his younger children, and with certain other subordinate purposes mentioned in the trust. Accordingly it it impossible to read the deed of entail and the trust deed together without seeing that the trust deed with its various purposes is purely and simply a burden upon the entail and nothing else. The heirs of entail are restricted to the sums or annuities provided instead of getting the full rents, simply and solely that there may be something over—something saved every year in order to pay off debts, and in order to pay the bonds and provisions which the truster had incurred in favour of his younger children, of whom it appears there were a considerable number. The whole meaning of the arrangement is transparent. The entailer said—my sons and grandsons, heirs of entail, are not to get possession of the entailed estates until my debts and the provisions I have made for my younger children, and for others, are all paid off, and then they shall enter to their full rights as heirs of entail. But while this is the plain inference, the entailer has not left it as mere matter of inference only, for the trust-deed expressly provides that it is granted under "this special declaration, that the said sasine and infeftment to be granted to my said trustees shall be and subsist as a security only for payment of the provisions to my children and debts and obligations resting and owing by me and of any legacies or annuities granted or to be granted by me, and for fulfilment of the other purposes herein before declared, but that the same shall not in any manner of way affect the fee and property of my said lands and estate, which notwithstanding hereof shall continue unalterably settled and secured upon the said George Paterson and the heirs of tailzie called by the foresaid deed of entail under the conditions, provisions, prohibitions, limitations, and clauses irritant and resolutive therein contained, who shall in their order he entitled to make up titles to the same, and to grant tacks thereof, and settle localities upon their wives and husbands, and provisions to their younger children, under the conditions and in terms of the said deed of entail."

This declaration seems to put the matter past question. The heirs of entail are successively

to get the entailed estate, which was all the testator had to leave. Of course at that date no legacy-duty was exigible from heirs of entail or from heirs in heritage of any kind who simply succeeded to a landed estate. But then the trust-deed is made a burden on the entail in order that debts and provisions to younger children, and so on, provided by the testator, shall be paid, and paid out of what?—Out of the rents of the entailed estate, which but for this burden the heirs of entail successively would have enjoyed in full. There was no other source out of which these debts and provisions could be paid. But it would be manifestly absurd to make heirs in heritage—and heirs of entail are just heirs in heritage—who would have been liable in no legacy-duty whatever if their succession had been unburdened, liable to legacy-duty simply because their father and ancestor has burdened his eldest son and grandson with certain provisions which he had no other means of paying to his younger and less favoured children. A succession which if unburdened would be free of legacy-duty cannot become liable to duty simply because burdens are imposed upon it whereby it is lessened. No doubt the parties in whose favour the burdens are imposed, the creditors in the burdens, may be liable in legacy-duty because they have got sums or provisions charged upon or payable out of the testator's real estate. But this in no degree applies to the testator's son or heir at law or heir of taillie, who gets the real estate itself, though unfortunately for him burdened with provisions to third parties. It is from not attending to this obvious distinction, or rather from not attending to the real nature of the case, that the fallacy of the argument for the Inland Revenue has arisen. The Inland Revenue would never have dreamt under the old law of asking legacy-duty from an heir who had only succeeded to an heritable estate but who succeeded to it at once and without burdens or restrictions. But because the heir's estate was burdened and limited, they have got confused, and at last, after thinking of it for nearly sixty-years, they have fairly converted the heir of entail into a legatee.

Accordingly, Mr Paterson's trust deed in no degree interferes with the efficiency and full operation of the deed of entail. The heirs of entail successively completed their title to the estate as heirs of entail, and that under the deed of entail just as if there had been no trust deed at all. The successive heirs have been in possession of the mansion-house, offices, pleasure grounds and home farm of considerable extent, and of the management of the woods. They have exercised all the powers of heirs of entail by settling localities upon spouses and provisions upon younger children, and in short they have been to all intents and purposes heirs of entail in possession, excepting only that a portion of the free rents has been every year retained in order to provide for the debts incurred and provisions granted by the original entailer. But surely this is no reason for subjecting that portion of the rents which the heirs of entail have actually enjoyed to the payment of legacy-duty. Quite as reasonably might the Inland Revenue authorities demand payment of legacy-duty on the value of the mansion-house, pleasure grounds and home farm, which in terms of the trust deed the trustees who are infeft therein have permitted the successive heirs of entail to possess and enjoy.

I am quite clear therefore that no legacy-duty is due in respect of the annuities or share of rents which the heirs of entail of Castle Huntly have received and enjoyed during the subsistence of the trust and prior to the death of George Paterson the third. On the death of George Paterson the third, and under the Succession Duty Act (16 and 17 Vict. 51), succession duties may be and I suppose are leviable, but these I understand have been paid, at all events no question regarding succession duties under the recent Act arises under the present action. I think the defenders are entitled to absolvitor.

The Court adhered.

Counsel for the Lord Advocate (Reclaimer)—Solicitor General (Macdonald) — Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Defenders—(Respondents)—Pearson. Agents—J. & F. Anderson, W.S.

Saturday, May 17.

SECOND DIVISION.

[Lord Rutherfurd-Clark Ordinary.

REID'S TRUSTEES *v.* REID.

Succession—Liferent to Wife, and Conjunct Fee to Son and Wife whom he might Marry—Where Son's Wife alone Survived Liferentrix.

A trust-disposition and settlement *inter alia* provided a liferent of the residue to the truster's wife, and on her death that the fee should be paid to his son, but the latter under the fullest discretionary powers to the trustees to give or withhold it in certain circumstances. Further, in the event of the son marrying, if the trustees should not have deemed it prudent to hand over the residue absolutely to him, it was provided that they should hold it for his behoof and for that of his spouse "in conjunct liferent, and the issue of the marriage in fee, such conveyance to be made in such terms and under such conditions, provisions, and declarations as my trustees in their discretion may think proper." The son married, and on his death, soon afterwards, was survived by his mother and his wife, the latter of whom eventually survived the former. *Held* that on the death of the liferentrix she was entitled to the full liferent of the residue, and that the trustees had no right under the terms of the trust-deed "to restrict or terminate that liferent in the event of her marrying again."

This was an action of declarator raised by Walter Laing, manufacturer, Hawick, and others, trustees under the trust-disposition and settlement of Alexander Reid, against Mrs Emily Parkin Gray or Reid, widow of David Reid, the truster's son. *Inter alia* that deed provided in the sixth purpose that the trustees should pay to David Reid one-third of the moveable estate, or such other sum as could be legally claimed as legitim. This actually was paid over to David Reid subsequently to his