Argued for trustees—The testator was a domiciled foreigner; the beneficiaries were domiciled foreigners. The testator had made provision in the deed that the fund might be brought to the country where he and the beneficiaries were domiciled. In these circumstances there was no general rule and no authority that would make this fund liable in succession-duty in this country.

The Lord Ordinary, after hearing counsel, pronounced this interlocutor:—". . . Finds that the claim of the minuter, Her Majesty's Advocate, on behalf of the Commissioners of Inland Revenue, for succession-duty, as stated in the minute No. 13 of process, is well founded, and appoints payment of the amount thereof, without interest, to be made out of the fund *in medio* accordingly: Finds the minuter entitled to expenses as the same shall be taxed," &c.

"*Opinion.*—I am of opinion that I ought to sustain the claim of the Crown for succession-duty upon the children's interest under the settlement or bond of provision. It is objected that the maker of the bond of provision died domiciled in Canada, and that his personal estate ought not to be subjected to taxation except in the territory and according to the laws of the colony in which he was a citizen. This no doubt would be a complete answer to a claim for legacy-duty, according to the rule which was laid down by the House of Lords in the *Advocate-General* v. *Thompson*, 14 Bell's App., that the incidence of legacy-duty is governed by the testator's domicile. It is, however, to be observed that in Lord Lyndhurst's opinion a tax upon succession imposed in general terms will *prima facie* be held to take effect upon all property transferable by way of succession, and situated within the territory. It is just because the personal estate of a deceased person is held to be situated within the territory of the domicile that it is exempted from legacy-duty in cases where the testator has a foreign domicile—I mean foreign in relation to the legislative authority by which the tax is imposed. The rule as to domicile established by the case referred to is, I think, an apparent exception to, but a real illustration of, the more general rule that a tax on property, or on the transfer of property, takes effect upon estate within the country in which the Acts of the Legislature have operation, without reference to the nationality of the owner of the property. Accordingly it has never been doubted that the Succession-Duty Act applies to all heritable or immoveable estate within the United Kingdom, irrespective of the domicile of the person whose death occasions the succession, devolution, or increase of interest which is to be assessed to duty. Similarly it has been held that where a succession accrues within the meaning of the Act through the exercise of a power of appointment over moveable property situated in the United Kingdom, duty is payable to the Crown without reference to the domicile of the granter of the power or the granter of the deed of appointment.

"In the present case the succession arises under a deed of provision *inter vivos* executed by a gentleman domiciled in Canada, by which he transferred a part of his interest in an English trust-estate to his children, reserving his own life interest. I do not think that the rule *mobilia sequuntur personam* is applicable to such a case. The fund in question was not the property of the maker of the provision at the time of his death, because he had transferred it by irrevocable gift to his children. It was not necessary that the fund should be ingathered by executors responsible to the Courts of the domicile as in the case of a legacy, because it was already vested in trustees for the granter and his assignees. If the trustees had refused to pay to the children they would be liable to be sued in the Courts of England or Scotland as holders of English estate or Scotch estate, for in this question it is immaterial whether England or Scotland is the *situs*. It appears to me that all the reasons which render heritable estate and estate disposed of under a power assessable to succession-duty within the *locus rei sitæ* apply also to succession arising through the operation of a deed *inter vivos*, and I am therefore of opinion, though perhaps not entirely on the grounds stated in the cases cited, that the claim of the Crown is well founded, and that provision must be made in this process for payment of succession-duty out of the fund *in medio*."

Counsel for Trustees—Mitchell. Agent—F. J. Martin, W.S.

Counsel for Inland Revenue—Lorimer. Agent—D. Crole, Solicitor of Inland Revenue.

Friday, November 24.

FIRST DIVISION.

[Lord Lee, Ordinary.

BEATTIE *v.* GILROY.

Architect — Contractor — Surveyor — Surveyor's Fee.

In an action by a surveyor against a contractor for joiner work on a building for payment of his fee as measurer, on the grounds (1) that he had acted on the employment of the contractor, and (2) that it was the universal practice for the contractor to pay the measurer's fee—*held* that the contractor was not liable.

Observations by the Lord President on the relation of the surveyor to the employer, architect, and contractor.

This was an action at the instance of William Hamilton Beattie, ordained surveyor in Edinburgh, and also sole partner of George Beattie & Son, architects, against George Gilroy, carpenter and joiner, Edinburgh, concluding for payment of £74, 7s. 6d., being the amount of the fee which the pursuer alleged was due to him for measuring certain work executed by the defender.

In the end of 1875 the firm of George Beattie & Son was employed by Mr Donald Macgregor, proprietor of the Royal Hotel, Edinburgh, as architects for various additions to the hotel buildings which he wished to have made. The defender gave in an estimate for the carpenter and joiner work requiring to be executed in connection with these operations, which was accepted, and he proceeded to execute the work. The work was duly completed, and in January 1879 the defender rendered his account to George Beattie & Son,

as architects for the proprietor, Mr Macgregor, in order that it might be certified as correct.

The pursuer as surveyor then proceeded to measure the contract and extra work which the defender had executed, and for which his firm of George Beattie & Son were architects, but owing to business engagements he was not able to complete his measurement until August 1880, and it was not until the 24th of January 1881 that George Beattie & Son, in their capacity of architects to Mr Macgregor, certified the defender's account. This account included a fee to Mr Beattie as measurer. On 18th May 1881 the defender received payment of his account from Mr Macgregor, less the surveyor's fee, which Mr Macgregor refused to pay.

Beattie then raised this action against Gilroy, founding on special employment by the defender, and also on the universal practice of the trade, which he alleged to be that the amount of the surveyor's fee should be by him obtained from the proprietor and paid to the measurer. The defender denied both special employment and the alleged custom of trade, and maintained that any claim the pursuer had was against Mr Macgregor, on whose employment he had acted as measurer.

The Lord Ordinary (Lee), after a proof, on 28th June 1882 pronounced the following interlocutor:—"Finds it not proved that the work charged for in the account libelled was done upon the employment of the defender: Assoilzies the defender from the conclusions of the action, and decerns."

The pursuer reclaimed.

At advising—

Lord President—This action is laid on the employment of the pursuer as surveyor by the defender to measure certain work which was to be done for Mr Macgregor, and if that cannot be made out there is an end of the case.

Now, it cannot be contended that there was any direct employment either in writing or by verbal agreement; there is no trace of such in the evidence. The only ground of employment is, that it is the natural and legal inference to be drawn from the relations of the two parties as measurer and contractor, and that raises a question of law which if any doubts on the subject had been felt upon it in the course of business would be one of some difficulty. But it is a question of law which was never heard of until this case was brought into Court. I cannot see that there are any specialties in this case, except that the surveyor who was employed to measure the work done was also the architect employed by the proprietor. The question therefore admits of being decided as a pure legal question. It is usual for such a contract as this to be in either of two forms—either that a certain amount of work shall be done by the contractor for a slump sum, or that the work shall be charged for at rates stated in the schedule; but even when the contract price is a slump sum the position of matters still is, that if any additions or deductions require to be made, these shall be measured and paid for according to the schedule price; and in large jobs there are always additions or deductions at the end, and therefore something requires to be done to make out the precise amount. The contractor in either case would hardly be so blind as not to keep a record of the work done, and I can hardly conceive such an omission. Thus he is able whenever the work is completed to render his account for payment of the contract price, and also for such additional work as may have been done at the schedule price, or where there is no contract price, stating the whole account according to the measurement and schedule prices, and there can be no objection to his rendering his account and demanding payment of it. Then if the employer is not satisfied with the amount he is entitled to challenge it, as every man who has an account rendered to him is entitled to do. In any event, I do not see how the employer could state his objections without employing someone to see that the work was done, to measure it, and to ascertain whether it was according to the contract, and thus the employer gets a man of skill to say whether he should pay the account or object to it. The employment of that man of skill, who was in this case a surveyor, is by the proprietor on whose ground the work has been done, to enable him to judge of the correctness of the work. It is difficult to see how from the relations of the parties it can be contended that the contractor is to employ a person to check his account which he has stated in terms of his contract. He has stated his account in conformity with the contract, and is entitled to come to the Court and demand payment. Certainly he would be rash to do so before his employer had time to state any objections he might have to it, but the contractor would have a perfect right to do so, although he might find himself in an awkward position with regard to expenses. Nevertheless his right to sue is undoubted. From the relation of parties here the contractor cannot be called the employer of the measurer. In the ordinary case the architect, as the representative of the proprietor, selects a measurer, and therefore the selection of the measurer is by the employer or proprietor. In the present case the architect employed himself as surveyor. There was nothing wrong in this; it is not the common practice, but there is nothing wrong so long as the man acts honestly, as I have no doubt Mr Beattie did. But it will not affect the liability of the contractor, or the relation of the measurer and the contractor, that the architect puts himself in the position of the measurer. The object of the work being measured is to satisfy the employer, and there is no other purpose for which it is done. Some confusion is caused by the question as to the practice, general or universal, of including the measurer's fee in the contractor's account. As finally adjusted, the certificate of the architect is put on the account, including the measurer's fee, and the whole account is put into the hands of the contractor to recover payment from the employer. The effect of this is, that the contractor having received payment of his account and of the measurer's fee is under an obligation to pay it over to the measurer, and that is quite fair and proper. But if the employer objects to the amount of the fee the contractor has no title or interest to insist on payment of that. If the employer says, "I see the measurer's fee is included in your account, and as I think it is overcharged, I will not pay it until I have investigated its correctness," would the contractor have a title to sue for the whole account including the fee? I think he would have no right as credi-

tor so far as the fee goes, but only in the case of there having been an arrangement between him and the surveyor that he should do so. In the present case Mr Macgregor, for reasons which have not been explained, but which are not necessary for the disposal of the case, chose to object to the charge of £74, and I am clearly of opinion that the contractor could not have brought an action against him for the amount. In taking payment of his account he deducted the £74, and took payment of the balance, which was all he had a title to demand. It has been said that Gilroy was betraying the pursuer's interests in taking payment of his account behind the pursuer's back, but I do not think that there is any ground for saying that. Mr Gilroy had been lying out of his money for a considerable time, and that was due to the delay of the pursuer—he was the cause of it. It might be represented that Gilroy should have consulted Beattie when Macgregor refused to pay the fee charged by him as measurer, and that he did not; but that is mere observation, and there is nothing to create legal liability. I have no hesitation in saying that the interlocutor of the Lord Ordinary is right, and that there was no employment of the pursuer by the defender.

Lords Mure and Shand concurred.

Lord Deas was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Pearson—Macfarlane. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defender (Respondent)—Trayner—Keir. Agents—Romanes & Simson, W.S.

Saturday, November 25.

SECOND DIVISION.

DOUGALLS, PETITIONERS.

Succession—Presumption of Life Limitation (Scotland) Act 1881 (44 *and* 45 *Vict. c.* 47), *sec.* 1—*Competency—Application for Expenses of Petition out of the Estate of Absentee.*

In a petition, under section 1 of the Presumption of Life Limitation (Scotland) Act 1881, for sequestration of the estate of an absentee, and appointment of a judicial factor thereon, the expenses of the application cannot competently be allowed out of the capital of the estate.

This was a petition by the wife and child of a person said to have been absent from Scotland for upwards of seven years, and not to have been heard of, to have estate to which he had succeeded during his absence sequestrated and a judicial factor appointed thereon.

The Presumption of Life Limitation (Scotland) Act 1881 provides by section 1—"In the case of any person who has been absent from Scotland, or who has disappeared for a period of seven years or upwards, and who has not been heard of for seven years, and who at the time of his leaving or disappearance was possessed of or entitled to heritable or moveable estate in Scotland, or who has become entitled to such estate in Scotland, it shall be competent to any person entitled to succeed to an absent person in such estate to present a petition to the Court setting forth the said facts, and after proof of the said facts, and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise as the Court may direct, the Court may grant authority to the petitioner to uplift and enjoy the yearly income of the heritable or moveable estate of such absent person, as the case may be, and to grant all requisite discharges for the same, as if the said absent person were dead; or the Court may sequestrate the estate and appoint a judicial factor thereon, with the usual powers, and with authority to pay over the free yearly income of the estate to the petitioner, whose discharge shall be as valid and effectual as if granted by the absent person."

The petitioners stated that A. K. Dougall, the absentee, left Scotland in 1870, and that a number of letters were received from him between that year and the year 1874, when a letter was received from him which formed the last tidings of him which they had received. The petitioners stated that since that time several letters had been written to him without any answer being received, and that inquiries had been made as to his whereabouts from former employers and others without any tidings being obtained.

The petitioners further stated that the absentee's father having died in 1879 the absentee became entitled to a sum of about £700 as legitim from his estate. They craved the Court, under the second branch of section 1 of the Act, "to sequestrate the said estate of the said Alexander Kinmonth Dougall, and appoint such person as to your Lordships shall seem proper to be judicial factor thereon, with the usual powers, and with authority to pay over the free yearly income of the said estate to the petitioners, including the interest accrued on the said estate from the said 5th day of March 1882, and also to pay the expenses of this application and procedure to follow hereon out of the said estate, he finding caution before extract."

Argued for them—The expenses of the application ought to be paid out of the capital of the estate, because it would require the yearly income for two or perhaps three years to cover the expenses of the application; during that period the petitioners, who had no means of their own, who were dependent for support on the wife's relations, and who were legally entitled to aliment from the absentee or his estate, would derive no benefit and receive no support therefrom. The procedure was really an equivalent for an action of aliment, in which the petitioners would have received expenses besides an award of aliment.

The Court, after hearing counsel, held that there was no power under the Act founded on to grant the prayer of the petition as regarded the taking of the expenses of the application out of the capital of the estate, the section applicable to the circumstances merely giving power to deal with the income of the estate.

Counsel for Petitioners—MacWatt. Agent—W. Steele, S.S.C.