residue. But this question need not enter into the decision of the case. It is enough to say that these claimants who claim through Mrs Brown neither take directly under the destination of the settlement nor on the ground of implied conditional institution.

The remaining question is, Is the division of the residue to be a division *per capita* or *per stirpes?* On that question I agree with the Sheriff-Substitute and with the reasons assigned by him for his judgment.

LORD RUTHERFURD CLARK, LORD YOUNG, and the LORD JUSTICE-CLERK concurred.

The Court pronounced this judgment:—

"Recal the third finding in the interlocutor of the Sheriff-Substitute of 29th September 1891; *quoad ultra* adhere to the said interlocutor, and dismiss the appeal: Further, and of consent of all parties, rank and prefer the claimants Jane Lawrie or Whitworth, Sophia Lawrie or Clark, Mary Lawrie or Pithie, Agnes Lawrie or Johnstone, Henry Lawrie, and Margaret Lawrie or Webster to one-sixth each of the sum of £59, 9s. 7d. contained in deposit-receipt, and forming part of the fund *in medio* specified in condescendence thereof, and decern: Find the appellants liable in expenses to the claimants John Low Brebner, the North of Scotland Bank, Limited, William H. Lundie, and Mary A. Lundie or Ledward; of which remit the account when lodged to the Auditor to tax and report, together with the expenses found due in the Inferior Court."

Counsel for Mrs Whitworth—The Lord Advocate—Kemp. Agents—Douglas & Miller, W.S.

Counsel for Alexander Brown and Others—H. Johnston—C. N. Johnston. Agents—Hagart & Burn Murdoch, W.S.

Counsel for Respondents—Asher, Q.C.—W. C. Smith. Agent—Alexander Morison, S.S.C.

Friday, February 5.

FIRST DIVISION.

Exchequer Cause—
Lord Wellwood, Ordinary.

THE LORD ADVOCATE *v.* MACFARLANE AND OTHERS (DUNLOP'S TRUSTEES).

Revenue — Legacy-Duty — Moveable Estate Directed to be Invested in Land—Entail—"Estate of Inheritance in Possession in the Real Estate"—Act 36 Geo. III. c. 52, secs. 12 and 19.

The Act 36 Geo. III. c. 52, sec. 12, provides—"That the duty payable on a legacy or residue or part of residue of any personal estate given to . . . different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue or part of residue so given, as in the case of a legacy to one person; and where any legacy or residue or part of residue shall be given to . . . different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who under or in consequence of any such bequest shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest in the same manner as if the annual produce thereof had been given by way of annuity."

Section 19 provides—"That any sum of money or personal estate directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided, nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase."

A testator directed his trustees during the six years succeeding his death to realise and invest his moveable estate in land, and to entail the same at the end of that period on W. H. D. and a certain series of heirs. The testator declared "that after the said period of six years have expired, the institute or the heir of entail in possession or entitled at the time to possess the lands and estates to be purchased as aforesaid under the destination hereinafter written, shall be entitled to demand and receive the interest and proceeds of the entire residue and reversion of my said estates, heritable and moveable, hereby conveyed, but under deduction always

of such expenses and charges as may be incurred by my said trustees in the management and execution of the trust, until the said lands or estates are purchased and entailed, and the whole purposes of the trust fulfilled." A large portion of the moveable estate was not invested in land.

On the expiry of the six years, W. H. D., the person who would have been institute if the entail had been executed, having by private arrangement obtained the consent of the three next heirs and their curators, acquired in fee-simple, under petition to the Court, the whole real and personal property of the testator, under reservation of certain sums for Government duties and other purposes.

In an action by the Inland Revenue against the trustees for payment of legacy-duty on the moveable estate acquired in fee-simple by W. H. D., the defenders maintained that legacy-duty was only chargeable calculated by way of annuity, or that a deduction must be made in respect of sums paid or secured by W. H. D. in return for the consents to disentail.

Held that as W. H. D. had become entitled absolutely to the clear residue of the personal estate, duty was chargeable on the capital thereof at the rate of 5 per cent., without deducting the compensation paid to the consenting heirs.

Alexander Dunlop of Carnduff and Doonside died on 30th September 1883 leaving a trust-disposition and settlement dated 28th July 1875 and two holograph testamentary writings, by which he assigned and disponed his whole estates, heritable and moveable, to trustees in trust for certain purposes.

By the fifth purpose of his trust-disposition and settlement he directed his trustees to retain and accumulate for six years after his death the whole rents, interests, profits, and proceeds of the residue, and to apply them in the way therein specified.

By the sixth purpose he directed them during the six years to sell and realise the residue of his moveable estate, and certain parts of his heritable estate, and to "look out for and purchase with the proceeds of the said residue and reversion such lands or landed estate or estates in Scotland as they may consider proper, and shall entail the same and my other landed estates as after mentioned."

The trustees were empowered to delay the realisation and purchase if they thought it expedient, subject, however, to the following declaration — "Declaring, however, that after the said period of six years have expired, the institute or heir of entail in possession or entitled at the time to possess the lands and estates to be purchased as aforesaid under the destination hereinafter written, shall be entitled to demand and receive the interests and proceeds of the entire residue and reversion of my said estates, heritable and moveable, hereby conveyed, but under deduction always of such expenses and charges as may be incurred by my said trustees in the management and execution of the trust until the said lands or estates are purchased and entailed, and the whole purposes of the trust fulfilled."

By the seventh purpose the trustees were directed, as soon as convenient after the said period of six years, to execute a deed or deeds of strict entail of the lands and estates directed to be purchased, and also of the lands and estates belonging to the truster at the time of his death, to and in favour of William Hamilton Dunlop, solicitor, Ayr, and the heirs-male of his body, and the heirs-male of their bodies, whom failing the heirs-female of the body of William Hamilton Dunlop, whom failing to other substitutes therein named.

The period of six years expired on 30th September 1889. The trustees had during it applied a portion of the residue in purchasing an estate in accordance with the testator's wishes. There was, however, further personal estate to the amount of £350,000 which had not been so applied, and on 11th January 1890 William Hamilton Dunlop, who would have been the heir of entail in possession had the testator's directions been carried out as to the investment of the residue and the execution of the entail, presented a petition to the Court of Session under the Entail Acts for authority to acquire in fee-simple the whole heritable and personal estates vested in the trustees with the exception of £20,000 set apart to meet certain annuities provided under the disposition and settlement, and the sums required for Government duties, expenses, and other liabilities of the trust.

In order to obtain the authority of the Court Mr Dunlop required the consents of the three next heirs. These heirs, who were his sons, were in pupillarity, and a curator *ad litem* was appointed to each of them. By arrangement with the curators *ad litem*, into which the Court was not asked to inquire, the value of their expectancies or interests in the whole estate was fixed to be £89,145, £10,000, and £1350 respectively, of which sums £72,700, £8160, and £1100 represented the value of their expectancies and interests in the personal estate.

The sums of £10,000 and £1350, representing the compensation to the second and third heirs, were vested in trustees for their behoof, to be held until they attained majority, and then paid over to them. In the case of the first heir, however, a special arrangement was come to with his curator *ad litem* by which William Hamilton Dunlop, in lieu of making payment of the sum of £89,145, vested a sum of £153,073 in trustees, part of which sum was to be paid to the first heir at certain dates, and the remainder was to be liferented by William Hamilton Dunlop and paid over to the first heir on his death.

On 22nd November 1890 the Lord Ordinary authorised and decerned the trustees to dispone, assign, and make over to William Hamilton Dunlop in fee-simple the whole heritable and moveable estate of the trust, with the exception of (1) the sum of

£20,000 to secure the annuities provided under the trust-disposition and deed of settlement, and (2) the sum of £20,000 to pay the Government duties and the expenses and other liabilities of the trust.

The Lord Advocate, on behalf of the Inland Revenue, thereafter raised an action in the Court of Session against the trustees for payment of £17,500 in name of legacy-duty on the capital of the personal estate which they held, and which fell to be paid over to William Hamilton Dunlop, together with interest at the rate of 4 per cent. from the date of the Lord Ordinary's interlocutor.

Section 12 of the Act 36 Geo. III. c. 52, provides—"That the duty payable on a legacy or residue or part of residue of any personal estate given to . . . different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue or part of residue so given, as in the case of a legacy to one person; and where any legacy or residue or part of residue shall be given to . . . different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who under or in consequence of any such bequest shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest in the same manner as if the annual produce thereof had been given by way of annuity."

The pursuer averred—"(Cond. 11) By 55 Geo. III. c. 184, Schedule, Part 3, provision is made for the payment of duty on legacies and upon the clear residue and every part of the clear residue of the personal estate of every person deceased, and the rates of duty to be raised and levied are thereby regulated. Section 19 of the Act 36 Geo. III. cap. 52, enacts—'That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate for so much thereof as shall have been so applied: Provided, nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.' (Cond. 12) By section 6 of 36 Geo. III. cap. 52, it is provided that duties shall be paid by executors or administrators on retaining or paying legacies or residues, and that if executors or administrators retain legacies or residues without paying duty, or on payment of legacies or residues deduct but do not pay duty, it shall be a debt from them to the Crown. In terms of section 9 of 31 and 32 Vict. cap. 124, interest on arrears of legacy-duty is payable at the rate of 4 per cent. per annum."

He pleaded—"(1) The clear residue of the testator's personal estate administered by the defenders as trustees, and held by them for the said William Hamilton Dunlop, or paid by them to him, is liable to duty under the Legacy Duty Acts. (2) The said William Hamilton Dunlop having acquired in fee-simple a right to the said residue, and thus become entitled to an estate of inheritance in possession, legacy-duty is chargeable on the capital of the residue under section 19 of the Act 36 Geo. III. cap. 52."

The trustees maintained that they were only liable in payment of £8736, 8s. 8d. of legacy-duty, calculated by way of annuity as on a liferent of the personal estate, and on January 14th 1890 they paid £2223, 8s. 10d. as an instalment of this duty. Alternatively, they maintained that if duty had to be paid on the capital in respect of William Hamilton Dunlop having become entitled to the fee-simple of the personal estate, in ascertaining that amount the sums paid to the three next heirs as the value of their contingent and defeasible expectancies or interests must be deducted.

They pleaded—"(3) Upon a just construction of section 19 of the Act 36 Geo. III. cap. 52, and the Legacy and Succession Duty Statutes, duty is only chargeable calculated by way of annuity. (4) In any event, and if duty is chargeable upon the capital, the sums paid as compensation by the said William Hamilton Dunlop to the three next heirs fall to be deducted, so that the duty payable by him may be charged upon the beneficial interest actually acquired by him by the transactions before mentioned. (5) The three next heirs never having had, and never having become entitled to an estate of inheritance in possession in the 'real estate' in question, the sums paid to them for their consents to the disentail are not liable in legacy-duty."

On 4th December 1891 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Finds that Mr William Hamilton Dunlop having become entitled absolutely to the clear residue of the personal estate of the deceased Alexander Dunlop, duty is chargeable on the capital thereof at the rate of 5 per cent.: Therefore repels the defences, and appoints the cause to be enrolled in order that the balance due to the pursuer on that footing may be adjusted, reserving all question of expenses; and grants leave to reclaim.

"*Opinion.*—[*After stating the facts above narrated*]—The question which I have to

decide is, on what footing is legacy-duty to be paid on the estate so far as personal thus acquired in fee-simple by Mr William Hamilton Dunlop? The defenders maintain that legacy-duty is only chargeable calculated by way of annuity; and alternatively that a deduction falls to be made in respect of sums paid or secured by Mr William Hamilton Dunlop in order to obtain consents to disentail the money. The Crown maintains that duty is chargeable on the capital of the whole clear residue. The solution of this question depends upon section 19 of the Act 36 Geo. III. cap. 52.

"The case is a novel one so far as regards legal decision. Counsel for the Crown stated that such a claim had been more than once made and admitted, and that it had never been made and refused. The only weight which I attach to this statement is that it is an answer to the statement on the other side that the claim is unprecedented.

"Section 19 of 36 Geo. III. cap. 52, is somewhat ambiguously expressed, and in language more intelligible to English than to Scottish lawyers; but the following is, I think, the true construction. The leading provision is that personal estate directed to be applied in the purchase of real estate shall pay duty as personal estate, that is out of capital. This is the keynote to the section, and but for one exceptional case no more need have been said.

"The clause then proceeds to say that if the bequest is given to be enjoyed by different persons in succession, each person entitled in succession shall pay duty 'in the same manner as if the same had not been directed to be applied in the purchase of real estate.' To ascertain the meaning and effect of these words, it is necessary to examine section 12 of the Act. From that section it appears (1) that if the persons entitled in succession to the enjoyment of a legacy fall to be charged at the same rate, legacy-duty shall be paid out of the capital of the legacy as in the case of a legacy of one person. So far there is no exception to the leading direction of section 19; but then (2) section 12 provides—and this is the only real exception—that if the persons entitled in succession fall to be charged with different rates of duty in respect of their respective life or other temporary interests, each person so entitled shall be charged by way of annuity. The only reason for making this distinction is, it will be seen, the impossibility of charging one rate of duty at the outset in such a case.

"I now come to the part of the clause 19 on which the present question specially depends. It runs as follows:—'Provided, nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.'

"This paragraph applies, I think, to a case in which one of several persons entitled to enjoy a limited interest in the bequest in succession (different rates being applicable) has, before the money has been applied in the purchase of real estate, become entitled through some change of circumstances to 'an estate of inheritance in possession in the real estate to be purchased therewith.' The words which I have just quoted require construction. 'An estate of inheritance in possession' is not a term familiar to Scottish lawyers; but occurring as it does in a statute of the United Kingdom, it must be interpreted by this Court. The term is satisfied, I think, by interpreting it as an absolute interest, or an estate in fee-simple in possession with absolute power of disposal, which would descend to the heirs of the person in possession for the time in the event of his dying intestate.

"Another matter to be explained in this passage is, what is the meaning of the tatute when it speaks of a person becoming entitled to 'an estate of inheritance in possession in the real estate to be purchased' when in the case provided for the money has not been applied to that purpose? There is no real difficulty, because though it is elliptically expressed, the meaning of the passage evidently is that if the person who would have been entitled to possession of the real estate if it had been purchased becomes entitled absolutely to the *corpus* of the bequest before land is purchased (which is just the case provided for in section 27 of the Rutherfurd Entail Act of 1848) duty shall be paid on the money directed to be applied in the purchase of real estate just as if it had been personal estate not so destined.

"This being in my view the interpretation of section 19, the question which I have to decide is, whether Mr William Hamilton Dunlop has become 'entitled to an estate of inheritance in possession' within the meaning of the statute.

"There is no doubt that he has acquired under the authority of the Court the fee-simple of the whole free residue of the trust-estate. But it is maintained that the absolute right so acquired was purchased by him, and that he did not become entitled to it by operation of the will, but by his own act. The statute does not say that the legatee must become entitled under the will in order to bring the fund within the provision. It is not necessary, however, to consider whether, in order to bring a case within the statute, it must be shown that the party became entitled under the will to 'an estate of inheritance in possession,' because in a legal sense Mr W. H. Dunlop did become entitled to it under the will. His right under the will was on the expiry of six years to take the real estate if purchased as institute heir of entail, and, until the purchase of real estate, to receive

payment of the interest of the fund. As institute he had a potentiality of acquiring the estate in fee-simple if real estate were purchased; or if the land were not purchased, to acquire the money in fee-simple on taking the steps and obtaining the consents, if any, required by the Entail Acts. That power was an inherent part of his interest under the will; and therefore when he exercised that power and acquired the money in fee-simple he may fairly be said to have become entitled to that absolute right under the will. I may refer to the cases of *De Virte* v. *Wilson*, 5 R. 328; *MacDonald* v. *MacDonald*, 6 R. 521, and 7 R. (H. of L.) 41; *The Attorney-General* v. *Lord Lilford*, L.R., 2 Eng. and Ir. App. 63. The following passage in Lord Colonsay's opinion in the case last named, though spoken with reference to the provisions of another statute, describes this inherent right so aptly that I venture to quote it—'It appears to me that the interest which Lord Lilford took was an interest, though only of a tenant in tail, which had in it a certain potentiality which ripened into a power to dispose of the estate . . . It was part of the quality of the succession, and he having exercised that power, or being competent to exercise that power, it must be considered that he was in the predicament which the statute contemplates.'

"This being the nature of the institute's right, I do not think that the Crown is concerned with the arrangements by which Mr Dunlop became entitled to the money in fee-simple. Suppose that Mr W. H. Dunlop had been, as he might have been, the only heir of entail in existence. In that case the entail being dated after 1848 he would have been entitled to disentail without any consents at all. Again, assuming that consents were required, they might be given without any money down, or, as in the present case, they might be given without the Court being called upon to decide as to the adequacy of the compensation given. I am unable to hold that in each case the Crown is bound to inquire what the arrangement was, and whether it was justified by actuarial calculations and other considerations. The Crown is entitled in one way or another to legacy-duty on the whole of the free residue of the personal estate of Alexander Dunlop if it is not invested in the purchase of land, and if the money is acquired absolutely before it is so laid out. Now, in the present case if it is held that Mr Dunlop has himself acquired the whole free residue absolutely, it is clear that duty must be paid out of capital. If, again, he has had to pay part of it to the next heirs for their consents the result is practically the same, because unless the whole duty is satisfied out of the £20,000 reserved by the trustees, the portion of the fund paid as compensation and taken free from the restrictions of the will would escape legacy-duty altogether. In one way or another Mr W. H. Dunlop by himself, or he and the next heirs who would have been entitled in succession to the real estate to be purchased, have become entitled absolutely to the whole personal estate directed to be laid out on the purchase of land and entailed. In my opinion, the fund so acquired is chargeable with duty as if there had been no direction to purchase real estate with it. The direction of the statute as to the duties payable by different persons in succession where the rate is not the same are no longer applicable, and the event I think has occurred which is contemplated by the last clause of section 19. It would perhaps be hard, assuming that the institute was compelled to pay away a large part of the estate in order to obtain consents, if the burden of the whole of the legacy-duty were to fall upon him. But this was a matter for arrangement, and should have formed a part of any agreement come to between Mr W. H. Dunlop and the next heirs and their curators.

"I omitted to mention the defender's argument that Mr W. H. Dunlop's right having been originally limited, duty must be charged on that footing. There is no warrant for this contention either in the statute or the decisions.

"It may be questioned whether Mr W. H. Dunlop ever was in the position of having other than an absolute right to the *corpus* of the bequest, because practically as soon as the succession opened to him, and before the trustees had purchased, or indeed were bound to purchase lands to be entailed (because they had a wide discretion as to this), he had taken steps to acquire the fund in fee-simple. But apart from this, and apart from the unqualified terms of section 19, the whole spirit of the Act is to exact the full duty as on a legacy to one person, whenever on the expiry or failure of liferent or other temporary interests the personal estate bequeathed becomes the absolute property of one or more of the beneficiaries. If sections 12 to 18 are attentively read this becomes apparent. For instance, section 12, to which I have already alluded, after dealing with temporary interests enjoyed in succession, provides—'And all and every person and persons who shall become absolutely entitled to any such legacy or residue or part of residue so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession.' A similar provision is to be found in section 14 in regard to plate and furniture; in section 16 in regard to legacies in joint-tenancy where one of the joint-tenants by survivorship becomes entitled to a larger interest; in section 17 as to legacies subject to contingencies; and in section 18 in regard to legacies of a limited interest subject to a general power of appointment.

"As to the defender's plea of all parties not called, section 6 of the statute is a complete answer. I may add that the

defenders have vigorously maintained all defences open to Mr W. H. Dunlop.

"I am therefore of opinion that duty must be paid on the capital of the clear residue under deduction of any instalments which may have already been paid. As parties do not seem to be agreed as to the precise amount of the clear residue, the figures must be adjusted before I give decree."

The defenders reclaimed and argued—(1) The duty payable was only by way of annuity. This was not disputed as regarded the heritable estate, and the same rule applied to the moveable estate. The trustees were within the exception in sec. 19—"unless the same shall be so given as to be enjoyed by different persons in succession"—and in that case the second clause of sec. 12 directly applied, and duty was payable by way of annuity. Further, the proviso in sec. 19 was not applicable to the present case. William Hamilton Dunlop was not here entitled to "an estate of inheritance in possession in the real estate." He only took a limited right in the money directed to be laid out in the purchase of land. In *De Lancey's* case—L.R., 4 Exch. 345, *aff.* 5 Exch. 102, and *De Lancey* v. *The Queen*, L.R., 6 Exch. 286, *aff.* 7 Exch. 140—the destination was different. All that was there decided was that Edward De Lancey, the heir, took the estate as heir in heritage owing to the will having impressed a heritable character upon it, but paid legacy-duty, as his predecessor might have bequeathed it away as personal estate. Nor could the words "shall become entitled" be held to include acquisition outside the will and independently of it. There might no doubt be cases where by a change of circumstances the right given by the settlement might be amplified into one of absolute fee, and duty would then be rightly payable on the whole sum. Here, however, it was different. Dunlop only took a limited right under the settlement till he disentailed onerously, and could only pay on that right. That he had disentailed was of no moment. If this disentail had taken place before the Entail Act of 1875, when consents were voluntary, he would have had to bargain for them, and could not be said to have "become entitled" in the sense required by the proviso. The only difference since 1875 was simply one in calculating the amount of compensation. *Lilford's* case (*The Attorney-General* v. *Lord Lilford*, L.R., 2 Eng. and Ir. App. 63) was different, as there the heir in possession did not require to come to the Court to acquire in fee-simple. He could by a simple deed bar the entail. The Legislature did not contemplate more than the purification of contingencies under the will, and did not refer to the effect of law, or of provisions otherwise than by the will—Hanson on the Succession-Duty Acts, 3rd ed., p. 70; *Attorney-General* v. *Bacchus*, 9 Pri. 30, and 11 Pri. 547; *Attorney-General* v. *Burnie*, 3 Young & Jarvis 531. Further, the power of disentailing was not *in intuitu* of the Legislature in 1796, and it would be against the rule of construing taxing Acts strictly to bring William Hamilton Dunlop by a mere catch within sec. 19. (2) But even if legacy-duty was payable on the capital of the residue, that could only be under deduction of the compensation paid to the next three heirs, otherwise the price paid by the disentailer would be treated as a benefit to him. He could, however, be only charged with duty for what he got. The argument that others might escape payment of duty was of no moment in the construction of taxing statutes. These fell to be strictly construed, and equitable considerations given effect to especially *quoad* statutes passed after the taxing ones—Wilberforce on Statues, 248; Lord Cairns *in re* Partington, 4 L.R. (H. of L.) 122. But even as regards these other persons, the sole question in this case was whether they took under the will or not, as they could only be called upon to pay duty on what they took under it. Their right in that view was not one co-existent and co-extensive with that of the institute, but a mere right of expectancy, and they might never take anything under the will.

Argued for the respondent—(1) Duty here fell to be paid out of the capital and not by way of annuity. By sec. 19 any sum of money directed to be applied in the purchase of real estate paid duty as personal estate. This provision applied directly, and the duty was under the first clause of sec. 12 payable out of capital. The only case in which it was otherwise was that under the second clause, where the parties within the tailzied succession were chargeable at different rates. That was the case referred to in sec. 19, "unless the same shall be so given as to be enjoyed by different persons in succession," and did not apply here. But further, William Hamilton Dunlop was directly within the terms of the proviso. He was here absolute fiar, and had consequently "become entitled to an estate of inheritance in possession in the real estate to be purchased." It was immaterial whether he became so entitled under the will alone, or whether it was as a result and from the operation of the will. In *De Lancey's* case the heir was held liable in legacy-duty though he did not take in virtue of the will. He had further all along had a potentiality of turning his limited right under the will into an absolute one, as the rights of the Entail Act of 1882 were inherent qualities of his interest under the will—*Attorney-General* v. *Lord Lilford supra*. (2) Neither could deduction be made of the sums paid by the institute as compensation to the next three heirs. The whole fund was here paid away by decree of the Court to William Hamilton Dunlop as absolute fiar and in right of it, and the Crown was not called upon to inquire into what was subsequently done with it. But even apart from the strict legal theory of all being paid to one person, the popular theory of a partition brought about the same result, for in neither case the duties were, by sec. 6 of the Act, payable by the executors and administrators out of the estate in their hands, and so the question of the other

heirs' liability did not arise. Further, the defenders could not plead injustice or hardship. The contract was an onerous but not a disadvantageous one, as the heir in possession got what would have fallen to others after the three next heirs, and in calculating the compensation for the three next heirs the amount required for Government duties had no doubt been considered.

At advising—

LORD PRESIDENT—By the trust-disposition and settlement of Alexander Dunlop of Carnduff and Doonside, his trustees were directed to lay out in the purchase of land the residue of his estate, which amounted to £350,000. The Crown claim legacy-duty on this money, founding primarily upon the substantive and leading sentence of section 19 of the Act 36 Geo. III. c. 52—"And be it further enacted that any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate." It is obvious, and is admitted, that those words taken by themselves in terms apply to the money in question; and accordingly the trustees in resisting the claim of the Crown seek to draw themselves within the exception which qualifies the general rule and immediately follows it—"unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty," "as if the annual produce thereof had been given by way of annuity" (sec. 12). This exception, however, on which the defenders found as limiting the claim of the Crown to duty on the right valued as an annuity of William Hamilton Dunlop (upon whom as institute they were directed to entail the lands to be purchased) is itself qualified by the following proviso—"Provided nevertheless that in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with as much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to have been paid by such person or persons if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons and raised and paid out of the fund remaining to be applied in such purchase." The argument therefore stands thus—If William Hamilton Dunlop is in the position described in the proviso, then, whether he would otherwise have come under the exception or not, he is excluded by the proviso from the operation of the exception, and legacy-duty must be paid. Although therefore the Crown rely on the leading words of the section to which I have first referred, the debate before us has mainly been on the question whether, in the sense of the statute, Mr W. H. Dunlop has "become entitled to an estate of inheritance in possession in the real estate to be purchased" with the residue of the trust-estate.

Now, Mr W. H. Dunlop has obtained and holds a decree of the Court of Session, under which the defenders (the trustees) were ordained to pay and make over to him, his heirs and assignees, in fee-simple, the whole personal property and estate vested in them (with the exception of a sum to meet annuities and another sum to meet the duties in dispute.) It is said by the Crown that he is thus in the position described in the proviso.

The answer of the defenders is rested on the fact that the decree of Court gave effect to a right conferred on heirs of entail by the Entail Acts 1848-1882, and brought into operation in the present instance, through onerous transaction between Mr W. H. Dunlop and the three next heirs. Mr Dunlop was entitled to acquire the money in fee-simple upon his either producing the consents of the three next heirs or upon the Court valuing their interests, seeing the values paid to them, and then dispensing with their consents. In the present case Mr W. H. Dunlop obtained the requisite consents from the guardians of the three next heirs, and I assume that the "transaction" upon which that consent was obtained, and which is referred to in the decree in Mr Dunlop's favour, was of the nature described in the answer to condecendence 7, 8, and 9. It is, however, important to observe that the Court made no partition of the money, as would have been the case if the expectancies of the next heirs had been valued and their consents dispensed with.

The decree of the Court in Mr Dunlop's favour being thus explained, I recur to the question whether he has become entitled to an estate of inheritance in possession in the lands to be purchased. Now, the section employs English legal phraseology, but the parties were not in dispute that a right to lands in Scotland in fee-simple would fall within the words "an estate of inheritance in possession in real estate." There remain, however, the two questions—(1) whether the words of the statute apply to a right of fee-simple in money directed to be applied in the purchase of real estate, and (2) whether Mr Dunlop has "become entitled," in the sense of the statute, to the ample right which he now enjoys.

In the former of these questions I think we are greatly aided by the case of *De Lancey*, because although the dispute there decided was not in *pari materie* with the present, it afforded an occasion of deliberate judicial consideration of the very question of statutory construction with which I am now dealing. Now, in that case (L.R., 6 Ex. 290) Baron Martin says—"The proviso is not very intelligibly expressed, but the words 'entitled to an estate of inheritance in the land to be purchased therewith,' must mean entitled to an absolute interest in the money which was bequeathed to be laid out in the purchase of land." If that is sound, it applies in terms to the point now before us. The same view seems to have been adopted, although it is less explicitly stated, by the other Judges in

the Court of Exchequer and Court of Exchequer Chamber, and as the phraseology in question is that of English law, the construction assigned to it by eminent English Judges has a special authority. On that authority I am prepared to arrive on this point at the same conclusion as the Lord Ordinary has come to on apparently a more independent examination of the words themselves.

The defenders, however, have further argued that inasmuch as Mr Dunlop's right to have the money in fee-simple arises not directly from the will of the truster, but from the combined operation of the will, the Entail Acts, and certain proceedings and transactions of his own, he cannot be held to have "become entitled" in the sense of the statute. This argument was presented by the Dean of Faculty with great force and variety of illustration, and would limit the meaning of "become entitled" to cases where through some change of circumstances, as by the occurrence of deaths, the right yielded by the operation of the will itself has become amplified into an estate of inheritance in possession. But while such instances are in their nature separated by a perceptible difference from the case before us, I do not find that any such distinction is drawn by the enactment in question, the words of which seem completely applicable to the one as well as to the other class of cases. It is of course true that the statutory rights conferred on heirs of entail by the Scotch Entail Acts 1848-1882 cannot have been in contemplation in 1796, but that is not to the purpose if, by good fortune for the Crown, the words used at the earlier date turn out to be sufficiently comprehensive to cover these modern rights. Nor does the Act of Geo. III. contain any warrant for the suggestion that the right of the heir who "becomes entitled" must arise by virtue of the will alone applied to external circumstances. When Mr Dunlop got his decree giving him the money in fee-simple, he did so, it is true, because he had taken steps made competent to him by statute. This, however, is only another way of saying that one of the legal qualities of the bequest in his favour was that he could take it if he pleased in this form, and the fact that this right does not appear on the face of the will does not seem to me to make a substantial difference in the present argument. Accordingly, my opinion is that in the sense of the Act of 1796, Mr Dunlop has "become entitled" to the right of fee-simple expressed in the decree, and that it is in the sense of that Act an estate of inheritance in possession in the real estate to be purchased with the residue of the trust-estate.

The defenders claim alternatively to their main argument that at all events Mr Dunlop's right is limited to the residue, less the amount of what he paid as the price of the consents. I do not think that this claim can be supported as a defence to the demand of the Crown against the trustees who held (and still hold in part) personal estate directed to be applied in the purchase of real estate. The defenders have paid over the whole residue (less the sums retained to meet the present claim and annuities) to Mr Dunlop alone, and in face of the decree of Court they could not have done otherwise. The fact that in order to become entitled to the residue in fee-simple he has had to provide for the three next heirs, whose consents he obtained, is not, I think, a matter with which the Crown is concerned. It is clear that if anyone becomes entitled to such money in fee-simple the duty is to be settled for finally, and it cannot make any difference to the Crown whether in a private negotiation the heirs have stood out for a large sum, or have given their consents for nothing, if the result is that the institute gets the money in fee-simple.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM—I concur, and have nothing to add.

LORD PRESIDENT—I am authorised by Lord M'Laren to say that he concurs.

LORD KINNEAR—I am of the same opinion. I think the trustees are in the position of holding the residue of this estate for purposes which bring it within the direct operation of the first clause of the 19th section. They hold a sum of money or personal estate which is directed to be applied in the purchase of real estate, and that is to be charged with a particular duty as personal estate unless it falls within a certain exception. Now, the trustees hold this estate absolutely for one residuary legatee. The exceptions in the clause are to take effect "when money or personal estate shall be so given as to be enjoyed by different persons in succession." Now it appears to me that what that clause contemplates is not the mere form of expression, but the effective operation of a bequest, and that money or personal estate is not so given as to be enjoyed in any particular way unless it is so given as that it shall be so enjoyed in effect. It is not brought within the exception if it is so bequeathed that it may be enjoyed either by different persons in succession, or by one person alone at the pleasure of the latter. A provision which directs that the money bequeathed shall be enjoyed by different persons in substitution to one another does not appear to me to bring the bequest within that exception if the substitution has been effectually evacuated by the first taker, while the money is still in the hands of the trustees. And therefore when the trustees are found holding residue for the benefit of one particular person as his absolute right, I am of opinion that they are not in a position to put forward the exception, because they cannot say that in the sense of the clause the money, or the estate which may be purchased by it, is to be enjoyed by different persons in succession. But if that primary exception were, contrary to my opinion, applicable to the circumstances, I agree with your Lordship that the trustees are again brought

within the primary enactment by the proviso which is equally applicable to the circumstances. I think we must follow the construction put upon that clause by the learned judges in England in the case to which your Lordship has referred. Taking it, therefore, that a person who has become entitled to an estate of inheritance in possession of the real estate to be purchased with the money left by the testator, means or includes a person who has become absolutely entitled to the money which the testator directed to be applied in the purchase of an estate, it appears to me that the only question which remains for consideration is that to which your Lordship has adverted, and which formed the subject of the greater part of the argument before us, viz., whether an heir of entail or an institute appointed by the testamentary disposition of the deceased comes into the position of a person entitled in the sense of that clause — absolutely entitled to the money or to the estate to be bought with it, if he became entitled only in consequence of an arrangement with the three next substitute heirs of entail, by which he is enabled to obtain the land or the money in fee-simple? Now, I am quite unable to see any sufficient ground for confining the meaning of the words "becomes entitled" in the manner contended for by the defenders. I am unable to draw any distinction between the operation of a will and the legal effect which the law in force at the time when it came into operation gives to a will. It is for the law in all cases to say what is the legal effect of a disposition in a will; and the question whether a right is given in fee-simple or absolutely, or whether it is given subject to the fetters of an entail, or subject to other restricting and limiting conditions, is always a question of law as well as a question of construction. I do not know that there could be a clearer illustration than that which was given by Lord M'Laren in the course of the discussion when he pointed out that a direction to convey to certain persons in succession by a simple destination would, according to the mere form of words, be a gift to persons in succession, but the law operating upon that direction declares that it shall create an absolute right in the first institute; and accordingly when we have to inquire whether an interest bequeathed by will is absolute or not we must always consider not the mere form of expression which the will contains, but what is the legal effect and operation of dispositions conceived in that particular form. I am unable therefore to see any ground upon which we could exclude from consideration the operation of law upon the clauses contained in the will when we have to determine whether a particular person has or has not become entitled under the will to a particular right.

The Court adhered, and remitted the case back to the Lord Ordinary for further procedure.

Counsel for the Pursuer and Respondent —The Lord Advocate—Young. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for the Defenders and Appellants — D.-F. Balfour, Q.C. — Johnston — Pitman. Agent—J. & F. Anderson, W.S.

Tuesday, February 16.

FIRST DIVISION.

[Sheriff of Dumfries and Galloway.

FERGUSON'S TRUSTEES *v.* MARTIN.

Executor—Competing Claims for the Office—Nomination of Survivor to be Sole Executor by Mutual Settlement by Husband and Wife—Subsequent Nomination of Trustees by One of Parties alone—Curator Bonis in Right of his Ward—A.S., 1730.

By a mutual deed of settlement executed by a husband and wife, the survivor was nominated sole executor to the predeceaser. By subsequent deed the husband, without the wife's consent, named certain persons to act as trustees along with his wife in case of his predecease. He was survived by his wife, who was shortly thereafter placed under curatory. Competing petitions for the office of executor were presented by the wife's *curator bonis* as in her place, and by the trustees.

Held (1) that whether the provisions in the subsequent deed by the husband innovated unwarrantably in other respects upon the prior mutual settlement or not—which it was premature to consider—it was competent for him to nominate trustees to act along with his wife; (2) that their nomination as trustees implied in the circumstances that they were also to be executors; and (3) that they fell to be decerned executors-nominate to the exclusion of the wife's *curator bonis*.

The late James Christal Ferguson, shipmaster, Kirkcudbright, and Mrs Elizabeth Jane Brown Christal or Ferguson, his wife, executed an antenuptial contract of marriage dated 7th April 1860. Upon 17th January 1878 they executed a decree of revocation and mutual settlement which revoked the marriage-contract and contained, *inter alia*, the following clause—"We recal and revoke the nomination of trustees and executors and tutors and curators contained in the foresaid deed, and we nominate the survivor of us to be sole trustee and executor of the predeceaser," &c.

Upon 14th June 1890 the husband, while at sea, and without the consent of his wife, executed a codicil containing, *inter alia*, the following words—"I wish my estate to be managed by the same trustees as my brother John Christal Ferguson, dead or alive, including to my wife Mrs Elizabeth J. B. Ferguson." . . .