at the first stage must be rigidly confined to proof of the writing of the letter, of the reading of the letter to a third party, and of damage sustained by the pursuer.

The jury returned a verdict for the pursuer on the first issue—damages £50, and by direction of the Court a verdict for the defender on the second issue.

Upon the motion of the pursuer to apply the verdict and find him entitled to expenses, the defender objected, and moved that neither party be found entitled to expenses. The defender had been entirely successful on the second issue which was the more important one—*Shepherd* v. *Elliot*, March 20, 1896, 23 R. 695; *Harnett* v. *Wise*, L.R., 5 Ex. D. 307.

The pursuer referred to *Balfour* v. *Wallace*, December 3, 1853, 16 D. 110, and *Rogers* v. *Dick*, February 4, 1864, 2 Macph. 591; and submitted that there was no good ground for departing from the ordinary rule that expenses follow the event. The jury had awarded a substantial sum as damages.

LORD PRESIDENT—I see no way out of giving the pursuer his expenses.

LORD ADAM concurred.

LORD M'LAREN—When in an action of libel or slander a pursuer takes several distinct issues and no justification is pleaded, a question as to expenses will arise if he fails on one of the issues and succeeds on the other issues in the case. But I think it is a settled practice that where a defender justifies the libel and fails, that establishes the right of the pursuer to bring the action, and entitles him to his expenses if the counter-issue fails.

LORD KINNEAR concurred.

The Court applied the verdict and found the pursuer entitled to expenses.

Counsel for the Pursuer—Salvesen—Constable. Agents—Wallace & Pennell, W.S.

Counsel for the Defender—Jameson, Q.C.—Watt. Agents—Clark & Mocdonald, S.S.C.

Friday, January 20.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LORD ADVOCATE *v.* STEWART'S TRUSTEES.

Revenue—Settlement Estate-Duty—"Settled Property"—Liferenter with Limited Power of Disposal—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 5 *and* 22.

A truster directed his trustees to hold certain bequests for his daughters in liferent for their alimentary use allenarly, and for their issue in fee, with a clause of survivorship to the effect that the shares of those dying without issue, or whose issue did not live to take under the destination, should accresce to the survivors. The daughters, however, were given a power of appointment among their own issue, and an absolute power to test in the event of their having no issue, or of the issue not surviving to take. *Held* that (notwithstanding the daughters' limited power of appointment and power to test) the property thus bequeathed was "settled property" within the meaning of sec. 5 of the Finance Act, and was accordingly liable to settlement estate-duty.

Section 5 of the Finance Act 1894 enacts that "(1) Where property in respect of which estate-duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property, (*a*) a further estate-duty (called settlement estate-duty) shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased, but (*b*) during the continuance of the settlement the settlement estate-duty shall not be payable more than once."

By section 22 it is enacted that "(1) (*h*) The expression 'settled property' means property comprised in a settlement. (*i*) The expression 'settlement' means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of section 2 of the Settled Land Act 1882. (2) (*a*) A person shall be deemed competent to dispose of property if he has such an estate or interest therein, or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both." . . .

Section 2, sub-section 1, of the Settled Land Act 1882 (45 and 46 Vict. cap. 38) enacts that—"Any deed, will, agreement for a settlement, or other agreement, . . . or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after the commencement of this Act, under or by virtue of which instrument or instruments any land or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession, creates, or is for the purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

Section 14 of the Finance Act 1898 (61 and 62 Vict. cap. 10) enacts that in the case of a death occurring after the commencement of the Act (1st July 1898) "Where settlement estate-duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has

not arisen and cannot arise, the said duty paid in respect of such property shall be repaid."

Mr James Reid Stewart, ironmaster, Glasgow, died in August 1896, leaving a trust-disposition and settlement dated 16th May 1895.

By the 8th clause it was provided—"I direct my trustees to hold and apply, pay, and convey to and for behoof of my son Stanley Reid Stewart, and of each of my daughters, Mrs Helen Reid Stewart or Lewis, wife of the said Arthur Hornby Lewis, Mrs Bessie Reid Stewart or Whitelaw, wife of the said Græme Alexander Lockhart Whitelaw, and Jane Evelyn Seton Reid Stewart, a sum of £50,000 in liferent for the respective alimentary uses allenarly of such son and daughters respectively, and to and for behoof of their respective issue in fee, payable the said fee to and among such issue, in such shares, at such times, and subject to such conditions and restrictions as to liferent and otherwise, all as my said son and daughters may respectively appoint by any writing under their respective hands, and failing such writing, then the said fee shall be payable equally to and among their respective issue *per stirpes*, and that upon the death of their father or mother, as the case may be, and on their respectively attaining twenty-five years of age, if sons, or their attaining that age or being married, if daughters, whichever of these events shall first happen: Declaring (first) that in the event of any of the said liferenter or liferentrices dying without leaving issue, or of any of them leaving issue, but of such issue not surviving to take under the foregoing destination, then the sums which would have been liferented by such liferenter or liferentrices, as the case may be, shall fall and accresce equally to and among the survivors and survivor of my said children, along with the issue of any of them who may have deceased leaving issue, such issue always taking the share which their deceased parent would have taken on survivance, and such accretion being subject to the same liferent, and also to the same destination, power of appointment, and other provisions or declarations as are hereinbefore contained with regard to the original liferent provisions in favour of my said son and daughters respectively; and (second) that between the expiration of the liferent in favour of my said son and daughters and the period of payment and conveyance to their respective issue, my trustees shall be entitled to apply the whole or such portion as they may think proper of the income effeiring to the shares of such issue respectively towards their suitable maintenance, education, and upbringing."

With regard to the residue of the estate it was provided that the trustees should "hold and apply, pay, and convey the same to and for behoof of my said daughters equally among them in liferent for their respective alimentary uses allenarly, and to and for behoof of their respective issues *per stirpes* in fee." There followed provisions in practically identical language with that used with regard to the legacies of £50,000; and it was further provided—"And further, and notwithstanding anything hereinbefore contained, I provide that in the event of any of my daughters dying without leaving issue, or of any of them dying leaving issue, but of such issue not surviving to take in terms of the destination hereinbefore contained, it shall be competent to her to test upon the said sum of £50,000 and any accretions thereto, and also upon the share of residue (whether original or as augmented by accretion) that may have been liferented by her, and that in favour of such person or persons, or for such uses and purposes, and in such way and manner all as she may think proper; and further, and also notwithstanding anything hereinbefore contained, I provide as follows, viz.—(first) In the event of any of my said daughters predeceasing me survived by her husband, but without leaving issue, I direct my trustees to allow to such husband from and after the date of my decease the liferent alimentary use and enjoyment of whatever original share of my estate would at the date of my decease have fallen to my said daughter in liferent in the event of her surviving me, such liferent to be limited and restricted to one half in the event of his entering into a subsequent marriage; (second) in the event of any of my daughters who may survive me, dying intestate, and without leaving issue, but survived by her husband, I direct my trustees to continue to such husband the liferent alimentary use and enjoyment of whatever original share of my estate may have been liferented by his wife, such liferent to be limited and restricted to one-half in the event of his entering into a subsequent marriage; and (third) in the event of any of my daughters either predeceasing me or surviving me and dying leaving issue, and survived by her husband, I direct my trustees to allow to such husband the liferent alimentary use and enjoyment of one-half of whatever original share of my estate may have been liferented by his wife."

The testator was survived by his son and daughters, who had all attained majority. The daughters were married.

An action was raised on behalf of the Commissioners of Inland Revenue against Mr Stewart's trustees to ordain them to deliver an account of the property settled by his trust-disposition and settlement, and to pay settlement estate-duty upon the legacies of £50,000 left to the testator's children, and upon the residue of his estate.

The defenders pleaded—"(3) The said legacies and residue not being settled property in the sense of the Finance Acts, no settlement estate-duty is due in respect thereof, and the defenders should therefore be assoilzied. (4) *Separatim*—The testator's daughters Mrs Lewis and Mrs Whitelaw being without issue, and having an absolute power of disposal of the fee of the legacies and residue liferented by them, the destination to them is not a settlement

in terms of the Finance Acts, and the claim falls to be reduced accordingly.

The Lord Ordinary (STORMONTH DARLING) on 28th October 1898 pronounced an interlocutor ordaining the defenders to lodge the account called for in the summons, and granting leave to reclaim.

Opinion.—"The Commissioners of Inland Revenue here demand that settlement estate-duty under the Finance Act of 1894 shall be paid by the defenders on four legacies of £50,000 each, left by the will of the late Mr James Reid Stewart to his trustees for behoof of his son and three daughters in liferent and of their respective issue in fee, and also on the residue of his estate similarly left for behoof of his said three daughters in liferent and their respective issue in fee.

"The material clauses of the will are the 8th and the last. Their effect as regards the son is, that while the trustees are to hold the legacy of £50,000 for his alimentary liferent use allenarly, and for his issue in fee, he has a power of appointment with respect to his issue which may go so far as to restrict their interest to a liferent. Failing such appointment, the division among them is to be equal. If he has no issue, or if they do not survive to take, then the fee is to accresce to his surviving sisters or sister, and the issue of any predeceaser. The powers of disposal given to the daughters are somewhat wider, both as regards the legacies and the residue; for while the direction to the trustees to hold is the same, and the survivorship clause is the same, each of these ladies has not merely a power of appointment among her own issue, but she has an absolute power to test, in the event either of her having no issue, or of such issue not surviving to take.

"Settlement estate-duty is imposed by section 5 of the Finance Act. It is there called 'a further estate-duty' and (to quote the only words of the section which affect this question) it arises 'where property in respect of which estate-duty is leviable is settled by the will of the deceased'; and then it is to be levied on the principal value of the settled property. The whole question therefore comes to be, whether these legacies and shares of residue are, under Mr Reid Stewart's will, 'settled property' within the meaning of the Act.

"There is a definition of 'settled property' in section 22 as being 'property comprised in a settlement.' For the definition of 'settlement' we are referred to the Settled Land Act of 1882, section 2, and the combined effect of the whole is that settlement estate-duty must be held to be leviable on property comprised in any will by virtue of which any property, whether real or personal, 'stands for the time being limited to or in trust for any persons by way of succession.'

"Now, it seems to me impossible to say that the provisions of Mr Stewart's will do not answer that description. As regards his son, there cannot, I think, be any doubt that the legacy of £50,000 stands for the time being in trust for the son in liferent, and for his issue or his sisters (as the case may be) in fee, nor is this result at all affected by his having a power of appointment among his issue. Even as regards the daughters, the same thing must be said, because although their conditional power to test makes it more uncertain who the ultimate fiars may be, still the property stands 'for the time being' in trust for themselves and their actual or possible issue by way of succession. The argument for the defenders is really founded on considerations of hardship. They say that the only ratio of settlement estate-duty is that it affords some compensation to the Crown where property is settled, *e.g.*, by being left in liferent and fee, for not being able to claim estate-duty on the property so left when the liferenter comes to die. Accordingly, they say you must construe section 5 with reference to section 2, and whenever you find that the Crown would hereafter be entitled to claim ordinary estate-duty at the death of the liferenter on the ground that he had some power to affect the fee, and was therefore 'competent to dispose of it,' it would be inequitable now to charge settlement estate-duty at the death of the person creating the liferent. In other words, they say that settlement estate-duty can never be due on property that is only contingently settled.

"If considerations of equity were appropriate to the construction of a revenue statute, there would be much force in this view, and the Legislature itself seems to have become partially converted to it last session, for by section 14 of the Finance Act of 1898 there is a provision that settlement estate-duty paid in respect of property contingently settled shall be repaid, if it be afterwards shown that the contingency has not arisen, and cannot arise. I do not refer to that Act as affecting the present case, because it only applies to deaths occurring after 1st July last. But it shows that Parliament awoke to the hardship of first charging settlement estate-duty on property contingently settled, and then charging ordinary estate-duty when the contingency failed. On the other hand, its remedy for that hardship was not to refrain from charging settlement estate-duty in the first instance, but to order repayment on the failure of the contingency.

"I arrive at this result independently of the judgment of the English Divisional Court in *Attorney-General* v. *Fairley*, [1897] 1 Q.B. 698. But undoubtedly this is a stronger case for holding the duty to be exigible than that was. I shall order an account, and grant leave to reclaim."

The defenders reclaimed, and argued—In the event of the daughters dying without issue they had a power to test, while if they left issue they had power of appointment, limited to the class, but unlimited in every particular. Accordingly as liferenters with this power of disposal at their deaths they could not be said to fall under the provision of the Act, for the settlement ended with their deaths, and the new taker would

then take under a new settlement. The daughters having this power to test or appoint as the case might be, were 'persons competent to dispose of property' in the sense of sec. 22, sub.-sec. 2, of the Act. Accordingly the Crown would have a claim for ordinary estate-duty at the death of the liferenters, and it would not be equitable for them to have a further claim for settlement estate-duty now. It made no matter whether they exercised the power or not so long as they had it. The definition in the Settled Land Act did not cover the present case — *In re Pocock* [1896], 1 Ch. 302. But in any view this was property contingently settled, and did not fall within the meaning of the Act. The question for whom the trustees held could not be settled till the occurrence of the event which determined who would be the fiars.

Argued for respondent—The daughters had not a power of disponing absolutely, but only a very limited power of disposal. M'Laren on Wills, ii. pp, 1092-93. The case clearly fell within the definition in the Settled Land Act, for the property was at this moment "limited to, or in trust for" these liferenters and their children in fee. The reclaimers had made no attempt to meet the case of *Attorney-General* v. *Fairley*.

At advising.

LORD PRESIDENT—I entirely agree with the Lord Ordinary in his decision and in his clear explanation of the case. In my opinion this property stands for the time in trust for certain persons by way of succession. I may add that the provisions of Mr Stewart's settlement negatives the theory that the holder of the power founded on by the defenders could dispose of the property as that person thought fit, in the sense of section 22, sub-section 2.

LORD ADAM—I concur. I am perfectly satisfied with the statement of the case by the Lord Ordinary.

LORD M'LAREN—The language of the Act imposing estate-duty, like that of previous Succession Duty Acts, is of a somewhat general and comprehensive character. It is not in any sense technical with reference to the peculiarities of the legal systems of England and Scotland. These Acts are designedly so expressed, as has been remarked in previous cases of succession-duty, in order that the duties may not be evaded. or the estate escape taxation by reason of the employment of some new or unaccustomed form of conveyancing.

Now, it seems to me that "interests in succession" is an expression of such a general character as to include every device known to conveyancers by which the enjoyment of estate under the same deed or will may be had by different persons succeeding to the estate in their order. These words would therefore be applicable just as much to successive interests where the first taker has only a liferent, as to the case of successive interests in fee which might be either under an entail or under a simple destination. It is said that the operation of this provision of additional duty has been found to be attended with hardship, for which the Legislature has partly provided by a more recent Act. But admittedly the later Act has no application to the present case, because it only empowers the Exchequer to give relief by repayment in a certain state of facts, which has not as yet arisen. I agree with your Lordship that additional estate-duty is exigible.

LORD KINNEAR—I also agree with your Lordship for the reasons stated by the Lord Ordinary, in all of which I concur.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders—Ure, Q.C.—A. O. M. Mackenzie. Agents—Drummond & Reid, S.S.C.

Saturday, January 21.

FIRST DIVISION.

POLICE COMMISSIONERS OF AIRDRIE, PETITIONERS.

Police — Police Commissioners — Power to Sell Lands — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 55 (5).

The Burgh Police (Scotland) Act 1892, sec. 55, sub-sec. (5), empowers the commissioners of a burgh to "sell . . . such lands or premises as may have become unfit or otherwise unnecessary for the purposes of this Act."

Authority *granted* to the police commissioners of a burgh to sell a powder-magazine, which their predecessors had been allowed to erect by an unrepealed section of a private Police Act, and which consequently was not held by them for the purposes of the Burgh Police Act 1892.

In 1850 the Magistrates and Council of the burgh of Airdrie acquired and entered into possession of a piece of ground on which they erected a powder magazine for the use of the burgh. They did this in virtue of power conferred upon them for that special purpose by sec. 59 of the Airdrie Police and Municipal Act 1849 (12 and 13 Vict. c. lxxxix). The powder magazine became vested in the Police Commissioners of Airdrie in terms of sec. 20 of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55).

On 7th December 1898 the said Commissioners applied to the Court for authority to sell the powder magazine. The ground of their application was that in recent years public works and dwelling-houses had been erected in the vicinity of the magazine, which had consequently become