Friday, February 1.

FIRST DIVISION.

[Lord Pearson, Ordinary.

BALFOUR-MELVILLE *v.* MYLNE.

Entail—Provisions to Younger Children—Provisions Granted under Powers in Deed of Entail—Deductions from Free Rental—Burdens Imposed under Acts subsequent to Deed of Entail.

By a deed of entail executed in 1808 power was given to the heir of entail in possession to grant certain provisions to younger children to an amount not exceeding four years' free rent of the estate, under deduction of "feu-duties and all other legal and annual burdens excepting liferents to widows or widowers, and any debts contracted for improvements and buildings under the Act 10 Geo. III. c. 51." There was no power to burden the fee of the estate under any circumstances. *Held* (*aff.* judgment of Lord Pearson, Ordinary) that in ascertaining the free rental for such provisions, the interest on bonds and dispositions in security, granted under the powers conferred by legislation subsequent to 1808, and the amount of certain rent-charges and bonds of annual-rent charged on the estate, did not fall to be deducted.

James Heriot Balfour-Melville, W.S., Edinburgh, heir of entail in possession of the estate of Strathkinness, presented a petition for authority to restrict younger children's provisions and widow's annuity, and to disentail.

The deed of entail under which Strathkinness was held was dated 22nd April, and recorded in the Register of Tailzies 7th July 1808. It contained the following clauses relating to provisions for younger children:—"Moreover, reserving always to the said heirs of entail who shall succeed to the said lands, teinds, and others, full power and liberty to provide their lawful children (other than the heir succeeding to the said lands, teinds, and others) in such portions and provisions as they shall think fit, not exceeding, in case there shall be one child other than the heir succeeding to the said lands, teinds and others, two years' free rent of the same; in case there shall be two children other than such heir, three years' free rent of the same; and in case there shall be three or more children other than such heir, four years' free rent of the same, after deducting always feu-duties, and all other legal and annual burdens, excepting liferents to widows or widowers, and any debts contracted for improvements and buildings under the Act of Parliament Tenth, George the Third. cap. 51: . . . And further declaring that any bond or other security to be granted by the said heirs of entail for children's provisions shall bear a special clause, and they are hereby declared to be so qualified that no apprising, adjudication, or other legal diligence shall be led or deduced thereupon against the fee or property of the said lands, teinds, and others, or any part thereof, for payment of such children's provisions, interest thereon, or penalties corresponding thereto, nor shall it be in the power of the said heirs of entail to sell any part of the said lands for payment thereof, but the current rents of the said lands, teinds, and others, so far only as free and unaffected at the time shall be subjected and liable to legal execution for payment of the said children's provisions, and shall be appropriated by the next heir of entail succeeding thereto accordingly, who shall be and is hereby prohibited and debarred from applying or appropriating the said free rents to any other purpose until such provisions shall be satisfied and paid, reserving only to him or herself such a proportion of the said free rents in the meantime as shall be necessary for his or her subsistence, not exceeding one-half of the said free rents for the time while the said provisions or any part thereof remain unpaid." Power was also reserved to the heirs of entail to grant annuities to their wives and husbands, and the wives and husbands of their presumptive and apparent heirs, not exceeding one-fifth of the free yearly rent, after deducting "feu-duties and all legal public burdens," declaring that if more than one such annuity subsisted at the same time, the second, third, and the fourth and all subsequent annuities, should be reduced to one-tenth, one-twentieth, and one-fortieth respectively of the free rent. There was also a declaration in this part of the deed to the effect that at least one-half of the yearly rental should always remain to the heir of entail in possession, which is quoted in the opinion of the Lord Ordinary, *infra*.

There was no provision in the deed of entail authorising any heir to burden the fee of the estate for any purposes whatever. The children's provisions which it was sought to restrict were contained in a bond of provision dated 9th January 1895, whereby the late James Balfour-Melville, the petitioner's father, at that time heir of entail in possession of Strathkinness, bound himself and the heirs of entail succeeding, to provide a sum of £10,000 for his younger children, six in number, in certain specified proportions.

The entailed estate was burdened with, *inter alia*, three bonds and dispositions in security for £12,204, £200, and £700, granted respectively in 1885, 1885, and 1888 by John M. Balfour-Melville, a former heir of entail in possession, under authority obtained by applications to the Court under the Rutherfurd Act. The estate was also burdened with certain rent-charges and bonds of annual-rent, the amount payable under which was £813 per annum, the former consisting of absolute orders issued by the Scottish Drainage and Improvement Company under statutory authority, and the latter of bonds granted under powers obtained by application to the Court.

The petitioner proposed to deduct from the rental, in estimating the amount available for the younger children's provi-

sions, the sum of £427, 12s. 10d., being interest on the bonds and dispositions in security mentioned above, and the sum of £813, the amount of the rent-charges and bonds of annual-rent. On this footing the amount available, being four years' free rental of the estate, was £3672, 3s. 4d., while if the above deductions were not allowed it was £8635, 5s. 9d.

Answers were lodged for James Mylne, W.S., judicial factor on the estate of the late James Balfour-Melville, and for two of the younger children, objecting to the deductions from the rental proposed by the petitioner.

Answers were also lodged for Mrs Duncan, widow of a former heir of entail, whose annuity, amounting to £500, it was proposed to restrict. On the question raised by her parties ultimately came to an agreement.

On 26th October 1899 the Lord Ordinary (PEARSON) remitted to Mr William D. Lowe, W.S., to inquire into the facts set forth in the petition, and whether the procedure had been regular and proper, and in conformity with the provisions of the statutes and relative Acts of Sederunt, and to report.

Mr Lowe lodged a report, in which he narrated the foregoing facts, and reserved for the Lord Ordinary's consideration the question whether the interest on the bonds, and the rent-charges, &c., as stated above, should be deducted from the rental. With regard to the rent-charges he reported as follows:—"The question thus raised affects also the claim made by the petitioner for deduction of rent-charges amounting to £813, 2s. 9d., and regarding this deduction the reporter begs to inform your Lordship that the same question was raised with reference to this same estate in an application dated 5th July 1884, presented by the late proprietor (Mr John M. Balfour Melville) for authority to charge the estate with the children's provisions granted by the previous proprietor (Mr John Whyte Melville). In that petition the only deductions claimed from the rental (apart from 'public' burdens) were certain rent-charges amounting to £493. The reporter is informed that no formal answers were lodged to the petition, but it appears from the report of the man of business (the late Mr John Galletly) that representations were made to him on behalf of the younger children, to the effect, *inter alia*, that the rent-charges were not a good deduction. An excerpt from Mr Galletly's report is lodged in process. Mr Galletly reported that the rent-charges then sought to be deducted did not represent improvements made under the Montgomery Act (although the improvements themselves were, in his opinion, of the nature of improvements which would have been allowed under that Act), and that, as they were not charged under it upon the estate, they were not excluded as deductions by the deed of entail, and he indicated his opinion that the correct course to follow would be to allow the deduction of interest upon the value of the rent-charges as at the date of the previous proprietors' death. The report was disposed of on 13th March 1885 by Lord Kinnear, who after hearing counsel for the then petitioner, decided 'that the rent-charges do not fall to be deducted.' A copy of the interlocutor, which was acquiesced in by the then petitioner, and by the three next heirs (of whom the present petitioner was one), is produced. The rent-charges now sought to be deducted are expenditure on Montgomery improvements of the same nature as those which were the subject of Lord Kinnear's judgment in 1885, and indeed are partly composed of the same charges." . . .

On 13th December 1900 the Lord Ordinary pronounced an interlocutor, whereby he found, *inter alia*, that no part of the said sums of £427, 12s. 10d. and £813, 2s. 9d. fell to be deducted from the rental of the estate in ascertaining the amount of the children's provisions.

Opinion.—"In this petition for disentail it is necessary to ascertain the amount to be charged on the estate in respect of certain family provisions.

"The petition was remitted in ordinary course to Mr Lowe, W.S., and in an interim report he now asks for direction on two matters.

"The first question raised is, what deductions are to be made in ascertaining the free rental upon which certain provisions to the younger children of the preceding heir are to be calculated.

"These provisions were not granted under the powers of the Entail Acts, but under powers contained in the deed of entail executed in 1808. By that deed it is provided that the rental for ascertaining the amount of younger children's provisions is to be 'the free rent, after deducting always feu-duties and all other legal and annual burdens excepting liferents to widows or widowers, and any debts contracted for improvements and buildings under the Act 10 George III. cap. 51.' The rental for calculating widows' annuities is to be the free yearly rent 'after deducting feu-duties and all legal public burdens.'

"Now the sums in dispute, which the petitioner maintains to be proper deductions from the rental in ascertaining the children's provisions, are (1) a sum of £427, 12s. 10d. of interest on debts charged upon the estate, and (2) a sum of £813, 2s. 9d., being the amount payable under certain rent-charges.

"I proceed to deal with these in order, premising that, whatever light may be thrown upon the matters in dispute by subsequent legislation as interpreted by decisions, the questions here are primarily questions of construction of the deed of entail of 1808.

"The debts whose interest is sought to be deducted are three in number. The first is a bond and disposition in security for £12,204, 9s. 3d., which was charged on the estate by the late John M. Balfour-Melville under the authority of the Court in 1885, being the sum required for paying off the younger children's provisions granted by Mr John Whyte-Melville, his predecessor. The other two debts are

bonds and dispositions in security for £700 and £200 respectively.

"The petitioner contends that the yearly interest of these debts falls within the expression 'feu-duties and all other legal and annual burdens' which are to be deducted in ascertaining the free rent, and that these words ought to receive a wide construction because of the exceptions which immediately follow, namely, 'Excepting liferents to widows or widowers.' It is urged that this shows that but for these words excepting them, such liferents would have been included within the expression 'All other legal and annual burdens,' and that the expression is therefore not used in its ordinary restricted sense.

"I think that the case of *Paterson*, 1849, 11 D. 1420, is a guide in construing clauses of this nature. I do not say that the decision on one clause will rule the construction of a different clause. But the clauses are near enough to make that decision illustrative of the present question. It was there held that upon a clause for ascertaining the free rent, 'after deducting feu-duties and other legal annual burdens,' annuities granted by the entailer, and the interest of entailers' debts which were charged on the fee, were not deductable in calculating a younger child's provision. I would specially refer to the opinions of Lord Mackenzie and Lord Fullerton as to the principles on which such a clause should be construed. These seem to me entirely to favour the respondents' view.

"The rent-charges sought to be deducted consist partly of absolute orders issued by the Scottish Drainage and Improvement Company under the Improvement Acts and partly of bonds of annual-rent. Of the latter, one (amounting to £307, 1s. 8d.) is stated to have been laid on under section 21 of the Rutherfurd Act in respect of Montgomery improvements.

"It is contended that this question as to deducting rent-charges has already been decided adversely to the petitioner in a previous petition, namely, the petition which was presented in 1884 to charge the sum of £12,204, 9s. 3d. of younger children's provisions already mentioned; and that it was so decided in reference to several of the very rent-charges now in question, which were current at the date of that petition. This appears to be so, for by interlocutor of 13th March 1885 in that petition, Lord Kinnear, on a report from Mr Galletly, S.S.C., found that the rent-charges mentioned in the report did not fall to be deducted from the gross rental in ascertaining the free rent available for children's provisions. The younger children had not lodged answers to the petition, but their agents had brought this with other matters before the reporter, and it is fully dealt with in the report.

"If the question be still open, I may say that I arrive at the same conclusion, though the question is not free from difficulty. On the clause itself the petitioner argued that the words of exception only extend to the liferents of widows or widowers, and do not cover the 'debts contracted for improvements,' which accordingly are to be deducted. There is something to be said for this view, particularly having regard to the fact that such improvements are presumed to enhance the rental, and that if the charge is not deducted, the younger children obtain a double advantage. But, on the whole, I think the true reading of the clause is that the words of exception cover all that follows.

"Then on the general question of deducting rent-charges, the petitioner appeals to the cases of *Lord Saltoun* (1887, 24 S.L.R. 352) and *Lord Queensberry* (reported in a note to Lord Saltoun's case). But the former case turned on the construction of the Aberdeen Act, which contains a much more ample deduction clause; while the latter case involved the construction of a clause in the deed of entail which was in different terms from the present one, and which was construed as including every burden which diminished the yearly rent to the heir of entail in possession. That may be highly equitable, but I do not see my way to reach that conclusion on the construction of this entail.

"It was argued with some force that this construction ought to be adopted, seeing that by the entail the heir in possession is secured in one half of the free rental in all events; and figures were submitted to show that if my view receives effect the petitioner will be left with no free rent at all, or at most, with greatly less than half. I was impressed by this argument, and would gladly adopt it, so as to make the burdens which really diminish the free rental fall rateably on those interested, but I do not find sufficient ground for it in the deed of entail. The heir's interest in the rents is alluded to twice in the deed. The first mention of it is contained in the clause giving power to grant liferent annuities, which declares that in case the annuities allowed, and the yearly interest that may be payable on provisions to younger children, should together exceed the half of the yearly rent, 'each of the three higher annuities above mentioned shall suffer a deduction proportional to their several amounts, so as that one half of the free yearly rents of the said lands, teinds, and others shall always remain to the heir of entail in possession for the time.' The clause as to interest on children's provisions is to the effect that they 'are to bear interest only after the granter's death.' It will be observed that it is not the children's provisions, nor even the interest thereof, but the annuities which are to abate in order to secure the heir in his rights. The second allusion to the heir's interest in the rental occurs in the clause as to the payment of children's provisions, and is to the effect that the current rents, so far as free and unaffected at the time shall be appropriated by the next heir accordingly, 'who shall be and is hereby debarred from applying or appropriating the said free rents to any other purpose until such provisions shall be satisfied and paid, reserving only to him or

herself such a proportion of the said free rents in the meantime as shall be necessary for his or her subsistence, not exceeding one half of the said free rents for the time.' This does not lead to the conclusion that the heir was to be assured in the enjoyment of one half of the free rents in a question as to younger children's provisions.

"On the question of how annual burdens should be treated, which could not have been imposed by the powers of the entail, but have been authorised by subsequent legislation, the petitioner founds on the case of *Brodie* (1868, 6 Macph. 92). But the question did not turn upon the construction of the entail, but upon the terms of the Aberdeen Act. The decision was, that where an Aberdeen provision was charged on the fee, it lost its character as a provision and became a debt, and that not the capital but only the annual interest was to be taken into account in calculating the free rental. It does not appear to me that a decision upon the Aberdeen Act has any bearing on the present dispute.

"On these grounds I hold that neither the rent charges nor the interest of debt are to be deducted in ascertaining the free rental for fixing children's provisions."

The petitioner reclaimed, and argued—Admitting that the deductions claimed arose from charges which could not have existed under the deed of entail, that did not decide the question, because the deed must be read in the light of subsequent statutes, under which these charges were "legal and annual burdens" on the estate —*Brodie* v. *Brodie*, December 6, 1867, 6 Macph. 92. Such charges would form deductions in estimating children's provisions under the Aberdeen Act — *Lord Saltoun, Petitioner*, January 18, 1887, 24 S.L.R. 312; *Marquis of Queensberry, Petitioner*, August 12, 1873, reported as a note to *Lord Saltoun; Grierson, Petitioner*, June 16, 1887, 25 S.L.R. 549. The case of *Paterson* v. *Paterson*, July 17, 1849, 11 D. 1420, on which the Lord Ordinary largely relied, was distinguishable. The phrase used there, "legal annual burdens," *prima facie* meant burdens arising *ex lege;* in the present case "legal and annual burdens" meant burdens arising *ex lege*, and other annual burdens affecting the estate.

Argued for the respondents — Neither deduction should be allowed. Cases on the Aberdeen Act had really no bearing on a case which must turn on the construction of a particular clause. *Paterson* v. *Paterson, ut supra*, was a direct authority on a clause practically identical with the present. The *ratio* of that decision—that the entailer could not have contemplated deductions which would never arise under the provisions of the deed of entail, and were only possible under supervenient legislation, was applicable to the present case.

At advising—

Lord President — The only question submitted for our decision is, whether two sums of £427, 12s. 10d. and £813, 2s. 9d. fall to be deducted from the rental of the estate of Strathkinness in ascertaining the amount of the children's provisions.

The sum of £427, 12s. 10d. is made up of three sums—(1) £396, 12s. 10d., being interest on £12,204, 9s. 3d. contained in a bond and disposition in security granted by John M. Balfour Melville, a previous heir of entail, in favour of the Scottish Union and National Insurance Company; (2) £6, 10s., being interest on £200, contained in a bond and disposition in security granted by the said John M. Balfour Melville in favour of James Robert Lloyd; and (3) £24, 10s., being interest on £700, contained in a bond and disposition in security granted by the said John M. Balfour Melville in favour of Miss Elizabeth Henrietta Charlotte Jackson.

The £12,204, 9s. 3d. was the amount required to pay younger children's provisions granted by the heir of entail in possession of the estate prior to John M. Balfour Melville, and it was charged upon the estate by him under authority obtained from the Court in 1885. The other sums of £700 and £200 were charged upon the estate by John M. Balfour Melville in 1885 and 1888 respectively under the authority of the Court, granted in an application under the Rutherfurd Act.

The question whether the interest payable under these three bonds should be allowed as a deduction from the rental in ascertaining children's provisions does not depend upon any of the Entail Acts, but upon the terms of the entail under which the estate is held. That entail was executed in 1808, when the Montgomery Act was the only statute which allowed the rents of entailed estates to be burdened with debt. The deductions allowed by the entail for the purposes of the present question, are "feu duties and all other legal and annual burdens, excepting liferents to widows or widowers, and any debts contracted for improvements and buildings under the Act 10 Geo. III. c. 51."

The clause of the entail relating to children's provisions declares that any bond or other security to be granted by the heirs of entail therefor shall be so qualified that no apprising, adjudication, or other real diligence shall be led or deduced upon the fee or property of the estate for payment of such provisions, but that the current rents, so far only as free and unaffected at the time, shall be liable to legal execution for payment of the provisions, and shall be appropriated by the next heir of entail succeeding thereto accordingly, who is thereby prohibited and debarred from applying the free rents to any other purpose until the provisions shall be satisfied and paid, reserving only to himself such proportion of the free rents in the meantime as may be necessary for his subsistence, not exceeding one-half of these free rents.

It is clear that if the question had arisen prior to the passing of the more recent Entail Acts, interest on capital debt charged upon the fee of the estate for the purpose of raising children's provisions could not have been deducted in calculating the free rental upon which later provisions for

children were to be fixed, unless such interest fell within the words "feu duties and other legal and annual burdens" in the clause already mentioned, and it appears to me that it could not reasonably be held to do so. I should have thought this too clear for argument had it not been for the words "excepting liferents to widows or widowers," upon which it is maintained by the petitioner that the prior words must be held to have a larger comprehension than they would *prima facie* express, otherwise liferents to widows or widowers would not form exceptions from them. It is, on the other hand, contended that the express exception of "liferents to widows or widowers" in the clause rather suggests that the entailer intended that the rental which should form the basis for ascertaining the children's provisions should not be different from that upon which widow's jointures were to be ascertained, and that the only deductions in either case should be "feu duties and all legal public burdens," as expressed with reference to liferents to wives and husbands. Giving all due weight to the terms of the exception, I do not think it is sufficient to entitle the petitioner to claim the deduction in question. The actual decision in the case of *Paterson*, 11 D. 1420, mentioned by the Lord Ordinary, is not a direct authority in the present case, seeing that the language of the clause to which that case related was different from that of the clause under which the present question arises, the words being "legal annual burdens" in *Paterson's* case, and "legal and annual burdens" in the present case, and it does not seem to me that these expressions are identical, the latter having *prima facie* the larger signification, inasmuch as it might be held to include annual burdens which were not legal in the sense that they did not arise *ex lege*. But the reasoning of the Judges has a very important bearing. Thus Lord Mackenzie said—"Is interest a legal annual burden on land? It is not a legal burden, and it is not a burden on the land at all unless the personal obligation to pay it is not implemented."

As to the interest on the sums of £700, and £200, it is enough to say that these sums could not have been charged on the estate under the law existing at the date of the entail (1808), and that I do not think that the clause of exemption could upon any reasonable construction, be extended so as to include interest on capital sums charged on the estate under the authority of subsequent Acts.

The view that the provisions cannot be larger than those authorised by the entail is confirmed by the declaration contained in the bond of provision granted by James Balfour Melville, the last heir, under which the present question arises, that the provisions, so far as obligatory on the heirs of entail, should be effectual only so far as consistent with the terms and conditions of the entail, and that if they should be found disconform thereto, they should be and were thereby restricted so as to be precisely consistent with the powers thereby bestowed upon the heirs of entail. The petitioner's counsel maintained that this provision only applied to the number of years to be taken into account, or the resulting amount, not to the mode of ascertaining the first factor of the calculation, but it does not appear to me to be so limited.

With respect to the claim to deduct the rent-charges amounting to £813, I may say in the first place that the same question was raised with reference to the same estate in 1884, and that on 13th March 1885 Lord Kinnear, after hearing counsel for the petitioner, decided "that the rent-charges did not fall to be deducted." The rent-charges with respect to which this decision was pronounced are of the same character as those now in question, and it appears that some of the charges with respect to which the claim for deduction is now made actually formed the subject of Lord Kinnear's judgment. Even if that judgment should not be held to constitute *res judicata*, it is an authority of much weight.

But apart from any question of *res judicata* or authority, I consider that the decision then arrived at was correct, because I do not think that the rent-charges fall under the clause specifying the deductions which are alone to be allowed.

The petitioner's main argument upon that clause was that the only exception from "feu-duties and all other legal and annual burdens" introduced by the word "excepting" is "liferents to widows and widowers," and that the words which follow, viz., "and any debts contracted for improvements and buildings under the Act 10 Geo. III., cap. 51" are not governed by "excepting," so that they do not form exceptions from the permitted deductions, but are themselves permitted deductions. This does not, however, appear to me to be the true construction of the clause—on the contrary, I think that all the things mentioned after the word "excepting" form exceptions from the permitted deductions, and therefore cannot be allowed as deductions. I concur in the Lord Ordinary's criticism of the authorities relied on by the petitioner on this part of the case, and also on the reasoning upon which he arrives at the conclusion that the heir of entail in possession is not by the terms of the deed of entail assured in the enjoyment of one half of the free rents in a question relative to younger children's provisions.

Upon the whole matter, I am of opinion that his Lordship's interlocutor should be adhered to.

Lord Adam and Lord Kinnear concurred.

Lord M'Laren, not having been present at the hearing, gave no opinion.

The Court adhered.

Counsel for the Petitioner—Jameson, K.C.—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents James Mylne and Others—Guthrie, K.C.—Cullen. Agents—Balfour & Scott, W.S.

Counsel for other Respondents—Craigie — Younger — W. Wallace. Agents — Duncan Smith & M'Laren, S.S.C.—Robert Fleming, S.S.C.—Dundas & Wilson, C.S.

Friday, February 1.

FIRST DIVISION.

[Exchequer.

LORD ADVOCATE *v.* SPROT'S TRUSTEES.

Revenue—Entailed Estate—Entailed Money—Estate-Duty—Settlement Estate-Duty—Entail—Finance Act 1894 (57 *and* 58 *Vict. c.* 30), *sec.* 23, *sub-sec.* 16, *and sec.* 5.

Money held in trust for the purchase of lands to be entailed is not "entailed estate" within the meaning of the Finance Act 1894, section 23, sub-section (16), and is not liable under that sub-section to estate-duty and settlement estate-duty.

Opinion reserved upon the question whether the existence of separate life interests in such a fund makes it a settlement of personalty, and as such liable to settlement estate-duty under section 5.

By his trust-disposition and settlement and relative codicils James Sprot of Spott, who died on 5th July 1882, directed his trustees to hold the sum of £100,000 for the purchase of lands to be entailed in favour of his nephew Edward William Sprot, and the heirs-male of his body, whom failing certain substitutes. Pending the purchase of lands he directed that the income of the said sum was to be paid by the trustees to Edward William Sprot, whom failing to the substitute of entail who would have been entitled to the rents had a deed of entail been executed. In pursuance of these directions the trustees purchased the estate of Drygrange with part of the £100,000 held by them, and by deed of entail dated 28th January and 2nd and 6th February 1888 conveyed it to Edward William Sprot and the substitutes of entail. The balance of the said sum of £100,000, amounting to about £60,000, was retained by the trustees, and the income thereof was paid to Edward William Sprot. Edward William Sprot died on 1st February 1898, and his son Edward Mark Sprot succeeded as heir of entail to the estate of Drygrange, and to the income of the entailed money held in trust. He was born before the date of the entail, and was therefore not entitled to disentail without consent.

On the death of Edward William Sprot a question arose as to liability for estate-duty and settlement-estate-duty under section 23, sub-section (16), of the Finance Act 1894 in respect of the money held in trust.

The Finance Act 1894 (57 and 58 Vict. c. 30), sec. 23, sub-sec. (16), enacts as follows:—"When an entailed estate passes on the death of the deceased to an institute or heir of entail who is not entitled to disentail such estate without either obtaining the consent of one or more subsequent heirs of entail, or having the consent of such one or more subsequent heirs of entail valued, and dispensed with, settlement estate-duty as well as estate-duty shall be paid in respect of such estate." The expression "entailed estate" is not defined in the Finance Act.

The trustees paid estate-duty and settlement estate-duty on Drygrange, and also estate-duty on the balance of moneys in their hands, but afterwards reclaimed the estate-duty so paid upon said balance. They declined to pay settlement-estate-duty in respect of said balance, and accordingly the present action was raised against them by the Lord Advocate on behalf of the Inland Revenue. The pursuer concluded for decree ordaining the trustees to deliver to the Commissioners of Inland Revenue an account of the money held in trust by them, and to pay the sum of £600, or such other sum as should be found to be due as settlement-estate-duty in respect of such money.

The trustees lodged defences, and pleaded—"(1) The balance of legacy being 'settled property' within the meaning of the Finance Act 1894, and the trust-deed having taken effect before the commencement of that Act, the defenders are not liable to settlement estate-duty. (2) The balance of legacy not being entailed estate within the meaning of the Finance Act 1894, settlement estate-duty is not due."

On 18th July 1900 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor, by which he ordained the defenders to deliver the account called for in the summons.

Opinion.—"Mr Sprot of Spott, who died in 1882, left £100,000 to be applied by his trustees in the purchase of lands, which were to be entailed on his nephew Edward William Sprot and a series of heirs. Until the purchase should be made and the entail executed, the income or rents, as the case might be, were to be paid to Edward William Sprot, whom failing to the substitutes of entail. In pursuance of these directions the trustees spent part of the sum entrusted to them in the purchase of the estate of Drygrange, and they conveyed that estate to Edward William Sprot and the substitutes of entail in 1888. Edward William Sprot died on 1st February 1898, at which date there remained unexpended a balance of about £60,000, which is still held in trust for the purchase of lands in terms of James Sprot's will.

"On the death of Edward William Sprot his son succeeded to Drygrange and to the income of the entailed money. Estate-duty and settlement-duty were paid on Drygrange in February and September 1899. Estate-duty was also paid on the unexpended balance of £60,000, but the defenders explain that they made this payment in error, and that they are re-claiming it from the Crown. The present