Tuesday, March 13.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

[Lord Pearson, Ordinary.

H. M. ADVOCATE *v.* SIR MARK J. M'TAGGART STEWART AND SPOUSE.

Succession — Destination — Marriage-Contract—Jus Crediti—Fund Destined in Marriage-Contract to Spouse's Nearest Lawful Heirs — Question whether Fund Carried by a Will or by the Contract.

Where in a marriage-contract, which on failure of issue destines the fee of the funds contributed by one spouse to that spouse's nearest lawful heirs, it is intended that such destination should be indefeasible, the intention must be expressed in clear and unambiguous terms and will not be inferred from such a fact as the parents, from whom the funds were coming, being parties to the contract.

Revenue—Estate Duty—Settlement Estate Duty—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 2 (1) (*b*), 21 (1), *and* 23 (14)—*Trust Constituted Prior to Act—Fund to be Held by Trustees till Death of Party and then to be Invested in Estate to be Entailed — Death of Party Subsequent to Act.*

A testator died in 1867. His trustees, who paid inventory duty, were directed to hold the residue of his estate till the death of A, when it was to be invested in land which was to be entailed. A died in 1902.

Held that estate duty and settlement estate duty were payable on the value of the residue of the testator's estate—*per* Lord President on the ground that within the meaning of section 2 (1) (*b*) of the Finance Act 1894, the residue was property in which a person other than the deceased, *i.e.*, the trustees, had an interest which ceased on the death of the deceased, and duty was payable to the extent to which a benefit accrued from the cessor of that interest; *per* Lord Pearson, Ordinary, on the ground that the residue constituted entailed property, which by section 23 (14) was not settled property within the meaning of the Act, and so was excluded from the exemption granted by section 21 (1) to property settled by a person dying before the Act on which inventory duty had been paid.

Revenue — Estate Duty — Propulsion of Estate—Deed of Gift—Use of the Property Subsequent to Propulsion and Gift—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2 (1) (*b*) *and* (*c*)—*Finance Act* 1900 (63 *Vict. cap.* 7), *sec.* 11.

A lady, heiress of entail in possession, some years previous to her death, granted a deed of propulsion of the estate in favour of the next heir, her daughter, and also granted in the daughter's favour and that of the daughter's husband, a deed of gift of her whole personal property including the furniture of the mansion-house of the entailed estate. The deeds were duly completed and possession was taken, but the lady continued to live with her daughter in the mansion-house, where she occupied a bedroom and had the use of the public rooms.

Held (*rev.* Lord Ordinary (Pearson), who subsequently in the Division *dissented*) that the propulsion and deed of gift were effectual to exclude a claim for estate duty on the value of the entailed estate and the personal property on the lady's death, her occupation subsequent to the cession having been not an incident of proprietorship but the privilege of a guest.

Revenue — Estate Duty — Propulsion of Estate—Use of Part of Estate Subsequent to Propulsion — Estate Surrendered Indivisible.

Held by Lord Pearson, Ordinary, that where there has been a deed of propulsion of an estate, the estate surrendered is, so far as regards estate duty, indivisible and if a benefit in any part is retained, the whole claim for exemption from estate duty fails.

Revenue — Estate Duty — Deed of Gift — Separable Entities Gifted—Property not in View of Parties—Accumulations by Trustees Unlawful under Thellusson Act (39 *and* 40 *Geo. III, cap.* 98)—*Failure to Formally Notify Deed of Gift to Trustees.*

Testamentary trustees continued to make accumulations in accordance with the trust after such accumulations were unlawful under the Thellusson Act, and this was not discovered by anyone till the death of a lady to whom such unlawful accumulations fell. The lady had some years prior to her death granted a deed of gift of her whole personal property in favour of her daughter and her daughter's husband. The husband was the leading trustee and the law-agents who managed the trust had prepared the deed of gift, but no formal intimation of the deed of gift had been made to the trustees.

The Court, while holding the deed of gift effectual to exclude a claim for estate duty on the rest of the property, *held* that estate duty was payable on the value of the unlawful accumulations.

The Finance Act 1894 (57 and 58 Vict. cap. 30), in Part 1, which includes sections 1–24, deals with estate duty, and by sec. 1 imposes such duty upon the principal value of all the property, real or personal, settled or not settled, which passes on the death of a person dying after the commencement of the Act. Sec. 2 (1) provides—"Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such

interest, but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole. (*c*) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act 1881, as amended by section 11 of the Customs and Inland Revenue Act 1889, if these sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a volunteer were omitted therefrom . . ."

Section 38 (2) of the Customs and Inland Revenue Act 1881 (44 Vict. cap. 12), as amended by section 11 of the Customs and Inland Revenue Act 1889 (52 Vict. cap. 7), and the above-quoted section of the Finance Act 1894, reads in sub-sec. (2)—"The real and personal or moveable property to be included in an account shall be property of the following descriptions, viz.—(*a*) Any property taken as a *donatio mortis causa* made by any person dying after the first day of August 1894, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. (*b*) . . . (*c*) . . ."

Section 21 (1) of the said Finance Act 1894 enacts—"Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act in respect of which property any duty mentioned in paragraphs one and two of the first schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act 1881" (in this case inventory duty) "has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property."

Section 23—"In the application of this part of this Act to Scotland, unless the context otherwise requires . . . (14) The expression 'settled property' shall not include property held under entail. . . ."

The Finance Act 1900 (63 Vict. cap. 7), sec. 11, enacts—"(1) In the case of every person dying after the 31st March 1900, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was *bona fide* made or effected twelve months before the death of the deceased, and *bona fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise. (2) This section shall, *inter alia*, apply in Scotland to the conveyance or discharge of any liferent in favour of the fiar, or to the propulsion of the fee under any simple or tailzied destination."

On 13th March 1905 the Lord Advocate, on behalf of the Commissioners of Inland Revenue, raised an action against Sir Mark J. M'Taggart Stewart, Bart., and his wife, Lady Marianne Susanna Ommaney or M'Taggart Stewart, to recover certain death duties alleged to be due (1) on a certain sum of money stated to have formed part of the property, and to have been carried by the will, of Mrs Church, aunt of Lady M'Taggart Stewart; and (2) on certain property alleged to have passed to the defenders on the death of Mrs Ommaney M'Taggart, Lady M'Taggart Stewart's mother.

Mrs Sarah M'Taggart or Church, who, surviving her husband and her father, died on 14th October 1877 without issue, but leaving a will, was the younger daughter of the late Sir John M'Taggart, Bart., of Ardwell. Her marriage contract, to which her parents were parties, "on the third part," after mentioning the intended marriage, narrated—"In contemplation of which marriage it has been agreed that, before the solemnisation thereof, the said Sarah M'Taggart should settle her property and affairs in manner after mentioned, and that the said James Church" (the husband) "and the said Sir John M'Taggart and Lady Susan M'Taggart" (the mother) "should respectively come under the obligations hereinafter contained in her favour . . ." In it she conveyed to trustees her whole *acquisita* and *acquirenda*, and "without prejudice to the said generality the sum of £10,000, hereinafter guaranteed by her said father and mother . . . or any larger sum of money to which she may become entitled by or through the marriage settlement of her said father and mother . . . or by or through the last will and testament, or disposition and settlement, *mortis causa*, of her said father and mother, or either of them, or by or through the death of both or either of her said father and mother," in trust for her own liferent, exclusive of the *jus mariti* and right of administration of any husband, and after her death "in trust for behoof of her children or issue to be born of the marriage

between the said James Church and Sarah M'Taggart in fee . . . and failing issue of the said marriage, or lawful descendant thereof, then for behoof of the nearest lawful heirs of the said Sarah M'Taggart as at the time of her death in fee." The contract contained declarations as to the payment of the liferent and the fee, as to apportionment, and with regard to a child predeceasing the time of vesting, "and failing any child or lawful descendant of such child of the said intended marriage at the death of the said Sarah M'Taggart, or at any time thereafter before the said trust property shall have become vested, the same shall belong and be made over to the nearest lawful heirs of the said Sarah M'Taggart as at the time of her death, with power nevertheless to the said Sarah M'Taggart, if she shall think fit, of her own free will, by a writing under her hand, subscribed by her in presence of and attested by two credible witnesses, to confer" a liferent in whole or part upon the husband if he survived. Sir John M'Taggart and Lady Susan M'Taggart undertook, under their own marriage contract or otherwise, to make good on the death of the longer survivor of them, to Mrs Church or her trustees, at least the £10,000.

Sir John M'Taggart dying on 13th August 1867 left a trust-disposition and settlement, the seventh purpose of which was—"I direct and appoint my trustees to realise and convert into money the whole trust property hereby assigned and conveyed to them which may remain after fulfilling the purposes above mentioned; and . . . I direct and appoint my trustees to lay out and invest the whole residue of my trust funds so to be realised, with the accruing interest or dividends arising therefrom, periodically, as the same shall accumulate, on security of heritable property or estates in Scotland, or in the Government stock or the funds of Great Britain, and that during the lifetime, after my decease, of the said Mrs Susanna M'Taggart or Ommanney, who is named to succeed me as the first heir of entail to my estate of Ardwell; and at her decease I direct and appoint my trustees to apply the whole trust funds then remaining, with the interest or dividends arising therefrom, in paying off or reducing *pro tanto* the debts or incumbrances which at my decease may affect my said entailed estate of Ardwell and others; and in case any surplus shall remain after paying off all said debts or incumbrances, I direct and appoint my trustees, as soon as they conveniently can, to expend such surplus in the purchase of lands and heritages in Wigtownshire or in the stewartry of Kirkcudbright, and to settle and secure the lands and heritages so to be purchased by a deed or deeds of strict entail upon the same series of heirs, and under the same conditions, provisions, limitations, restrictions, clauses irritant and resolutive, and other clauses, as are contained in the deed of entail of the estate of Ardwell and others already executed by me. . . ."

The accumulation hereby directed, so far as subsequent to 13th August 1888, was struck at by the Thellusson Act (39 and 40 Geo. III, c. 98).

Mrs Susanna M'Taggart or Ommanney, subsequently called Ommanney M'Taggart, was the elder daughter of Sir John M'Taggart, and the only child other than Mrs Church who survived him. On his death she succeeded to the entailed estate of Ardwell. The defender, Lady M'Taggart Stewart, was her only child. Mrs Ommanney M'Taggart, who died on 28th September 1902, executed in favour of the defenders, on 27th August 1894, a deed of gift of her whole personal property, and on 23rd May 1895 a deed of propulsion of the fee of the entailed estate of Ardwell in favour of her daughter, the next heir, which was duly recorded. As to the effect given to these two deeds by the parties thereto, a joint minute was lodged in which it was admitted—"1. Upon the execution by her of the *deed of gift* dated 27th August 1894, the whole funds and investments belonging to Mrs Ommanney M'Taggart (except a sum of about £100 which was at her credit with her brokers, and a few pounds which were at her credit at her bankers) were transferred to the defenders and the transfers duly registered, and the defenders thereafter drew the whole interest and dividends upon the said securities and applied them for their own use and behoof, and thereafter dealt with them as their joint absolute property down to the year 1899, when the shares, etc., remaining in their joint names were transferred to the name of Sir Mark and now stood in his name. The whole dead and live stock and other fungibles and furniture were taken possession of by the defenders, and were thereafter treated by the defenders and recognised by Mrs Ommanney M'Taggart as belonging absolutely to the former, who sold and dealt with the stock, etc., without reference to Mrs Ommanney M'Taggart. 2. The jewellery was handed over by Mrs Ommanney M'Taggart to the defender Lady Stewart, and was never thereafter used by Mrs Ommanney M'Taggart. 3. The value of the funds, exclusive of furniture and farm stock, etc., received by Sir Mark and Lady Stewart under the said deed of gift amounted to £36,500, the furniture was of the value of £2500, and the dead and live stock was of the value of £500. 4. Prior to the execution by Mrs Ommanney M'Taggart of the *deed of propulsion* dated 23rd May 1895 the defenders for some years lived a part of every year with Mrs M'Taggart at Ardwell, and Mrs M'Taggart went with the defenders to London and elsewhere, and stayed at Southwick a part of every year. 5. Up to the date of the deed of propulsion Mrs Ommanney M'Taggart paid the whole wages both of the indoor and outdoor servants upon the estate of Ardwell, and paid the whole household and estate expenses, and generally managed the estate through her factor and received the rents. From and after the date of the deed of propulsion the defender Lady M'Taggart Stewart received the whole rents of the estate, took over the whole

management of the household and of the estate, paying the whole wages and upkeep, with the exception of Mrs Ommanney M'Taggart's maid, whose wages she paid herself. 6. Mrs Ommanney M'Taggart after the date of the deed of propulsion resided at Ardwell House. After 1901, when she suffered an accident, she occupied one special room in the house, and was attended to by the defenders and their family. 7. Mrs M'Taggart, in conversation with members of the family, referred on more than one occasion after the date of the deed of propulsion to her position as having parted with all that she possessed except the dividend on a sum of £1000 of Government stock, which was held by her marriage-contract trustees, and to her being no longer the mistress of the house. After the date of the deed of propulsion she lived and continued to live in family with the defenders. The deed of propulsion was recorded on 28th May 1895. Shortly after the date of the deed of propulsion the defenders assumed the name 'M'Taggart' as part of their surnames in accordance with the conditions of the deed of entail. 8. The mansion-house of Ardwell before referred to is situated in the eight merk land of Ardwell, which is one of the subjects included in the deed of entail referred to on record. 9. The defender Sir Mark M'Taggart Stewart was at the date of the said deed of gift the leading and managing trustee under the trust-disposition and settlement of Sir John M'Taggart, and codicils thereto, referred to on record. Messrs Tods, Murray, & Jamieson, W.S., Edinburgh, were at that time, and still are, solicitors for the trustees and also for the defenders, and prepared the said deed of gift in their favour, and immediately after it was signed were, and still are, custodiers of it. The only other trustee at the date of the said deed of gift and up to the present time was, and is, Mr Charles A. Maclean, writer, Wigtown."

The pursuer pleaded—"(1) The unlawful accumulations of income being intestate succession of the said Sir John M'Taggart, one-half whereof devolved on Mrs Church as an heir *in mobilibus*, and was *in bonis* of her at her death, and disposed of by her will, inventory duty and temporary estate duty and legacy duty are due in respect of her share, and the defenders are liable therefor as intromitters with or possessors of the funds, or as persons having or taking the burden of the execution of her will or the administration of her estate. . . . (3) On a sound construction of section 2 (1) (*b*) of the Finance Act 1894, and of section 11 of the Finance Act 1900, the estate of Ardwell should be deemed to have passed on Mrs Ommanney M'Taggart's death, notwithstanding her deed of propulsion; and Lady M'Taggart Stewart, the heiress of entail in possession, is accountable for the duty leviable in respect of the property so passing. (4) Should the sum of £20,000 applied to the extinction of the debt on Ardwell be regarded as not liable to estate duty as part of the residue and accumulations passing on Mrs Ommanney M'Taggart's death, then, in ascertaining the principal value of Ardwell for the purposes of estate duty, no allowance or deduction should be made, under section 7 of the Finance Act 1894, on account of the debt paid off. (5) The residue and lawful accumulations having on Mrs Ommanney M'Taggart's death passed in the sense of section 1 of the Finance Act 1894 are chargeable with estate duty, and the defender Lady M'Taggart Stewart is liable therefor in terms of section 8 (4) of the said Act. (6) In so far as the residue and legal accumulations have been or have yet to be applied to the purchase of lands to be entailed, settlement estate duty as well as estate duty is chargeable under section 23 (16) of the Finance Act 1894, and ought to be accounted for and paid by Lady M'Taggart Stewart, the heiress of entail in possession of Ardwell. . . . (8) Under section 2 (1) (*c*) of the Finance Act 1894 the furniture and plenishing in the mansion-house of Ardwell, and the unlawful accumulations of income, including Mrs Church's share, if it belonged to Mrs Ommanney M'Taggart, must be deemed to have passed on Mrs Ommanney M'Taggart's death, and estate duty in respect thereof ought to be accounted for and paid by the defenders."

The defenders were prepared to admit that succession duty under the Succession Duty Act 1853 (16 and 17 Vict. cap. 51) was payable in respect of Mrs Church's share of the unlawful accumulations, and in respect of the entailed estate, but otherwise maintained that the pursuer's averments were irrelevant and insufficient, and the claim for estate duty on the value of the entailed estate and of the furniture and plenishing excluded by the deeds of propulsion and gift and the possession following thereon.

On 3rd January 1906 the Lord Ordinary (PEARSON) pronounced this interlocutor—"Finds (1) that the direction in the will of the late Sir John M'Taggart to accumulate the income of the residue of his estate ceased to be operative as at 13th August 1888, and that the accumulations made after that date, amounting to £49,000 or thereby, became intestate succession of Sir John M'Taggart; that his heirs *in mobilibus ab intestato* were his two daughters Mrs Church and Mrs Ommanney M'Taggart; that Mrs Church's half of the said accumulation, amounting to £24,500 or thereby, fell under the conveyance of *acquirenda* in her antenuptial contract of marriage, whereby the trustees therein named were directed to hold the trust funds, failing issue of the marriage or lawful descendant thereof, for behoof of the nearest lawful heirs of Mrs Church as at the time of her death in fee: Finds that on a sound construction of the said contract of marriage, the said sum of £24,500 or thereby was, in the event which happened, *in bonis* of Mrs Church at her death in 1877, and was carried by her will; and finds that the same is subject to inventory duty, temporary estate duty, and legacy duty accordingly: Finds (2) that the residue of Sir John M'Taggart's estate and the accumulation thereof prior to 13th August 1888 were property passing on the death of Mrs

Ommanney M'Taggart on 25th September 1902, within the meaning of the Finance Act 1894; and that having regard to section 23, sub-section 14, of said Act, the saving clause contained in section 21, sub-section 1, thereof, does not apply to the sum of £29,626 or thereby, which his trustees have expended in the purchase of lands to be entailed as directed, nor to the balance of the trust funds now held by them for the purpose of carrying out the said direction: Finds that the said property is subject to estate duty and settlement estate duty accordingly; reserving the question raised in the pursuer's fourth plea-in-law as to the sum of £20,000 applied in extinction of debt on the entailed estate: Finds (3) that notwithstanding the granting by Mrs Ommanney M'Taggart of the deed of propulsion of the entailed lands of Ardwell and others, dated 23rd and recorded 28th May 1895, the provisions of the Finance Act 1894, section 2, sub-section 1, head B, and of the Finance Act 1900, section 11, apply so as to make the entailed lands of Ardwell and others subject to estate duty, as property passing on the death of Mrs Ommanney M'Taggart, in respect that *bona fide* possession and enjoyment of the said property was not assumed thereunder immediately upon the surrender, divesting, and disposition thereof, contained in the said deed of propulsion, and thenceforward retained to the entire exclusion of the granter, or of any benefit to her: And finds, further, that settlement estate duty is also payable in respect of the said entailed estate: Finds (4) that notwithstanding the granting by Mrs Ommanney M'Taggart of the deed of gift, dated 27th August 1894, the provisions of the Finance Act 1894, section 2, sub-section 1, head C, apply so as to make the furnishing and plenishing in the mansion-house of Ardwell, and Mrs Ommanney M'Taggart's share of the accumulations of the income arising from the residue of Sir John M'Taggart's trust estate from and after 13th August 1888, subject to estate duty as property passing on the death of Mrs Ommanney M'Taggart, in respect that *bona fide* possession and enjoyment of the said property was not assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to her: And with these findings appoints the cause to be enrolled for further procedure, and grants leave to reclaim."

Opinion.—"Sir John M'Taggart of Ardwell died on 13th August 1867, survived by two daughters, Susanna (Mrs Ommanney M'Taggart) and Sarah (Mrs Church). Sir John left a will, dated in 1865, in which he directed his trustees to accumulate the income of the residue of his estate during the life of Mrs Ommanney M'Taggart, his eldest daughter. Upon her death they were directed to apply the accumulations in the first place in paying off debt secured on his entailed estate of Ardwell; and any surplus was to be expended in the purchase of lands in Wigtownshire or the Stewartry, to be entailed on the same series of heirs.

"Mrs Ommanney M'Taggart died on 28th September 1902, having survived her father for thirty-five years. The trustees had continued to make the accumulations during her lifetime, and it does not appear to have occurred to anyone that the direction to accumulate ceased to have effect on the expiry of twenty-one years after the testator's death, namely, at 13th August 1888. The accumulations made from and after that date became intestate succession of Sir John M'Taggart, and his heirs *in mobilibus ab intestato* as at the date of his death were his two daughters above named.

"The first question in the case has to do with Mrs Church's half of these 'unlawful' accumulations. Mrs Church died on 14th October 1877, having survived both her father and her husband. There was no issue of her marriage, and she left a will disposing of her whole estate. Although Mrs Church died before any of these accumulations accrued, it is not disputed that one-half of them, amounting to about £24,500, devolved on her and fell within the conveyance of *acquirenda* in her antenuptial contract of marriage. The contention for the Crown is that there having been no issue of the marriage, the purposes of the marriage contract failed, and that these accumulations were *in bonis* of Mrs Church at her death, and passed under her will. On this footing a claim is made for inventory duty, temporary estate duty, and legacy duty on the sum above mentioned. The defenders reply that the purposes of the marriage contract did not fail, that there having been no issue the marriage trustees held the fund 'for behoof of the nearest lawful heirs of Mrs Church as at the time of her death in fee'; and that it fell to Mrs Ommanney M'Taggart, her sister, as her nearest lawful heir.

"The solution of the question depends on the true construction of the contract of marriage. Do the considerations of this contract, regarded as a whole, extend to and include the nearest lawful heirs of Mrs Church, failing issue of the marriage and their lawful descendants? In my opinion they do not, though I admit the question is one of some difficulty. The defenders point out that the wife's parents were parties to the contract, and that as the deed bears, it had been agreed in contemplation of the marriage that the wife 'should settle her property and affairs in manner after mentioned,' and that her parents should come under the obligations therein contained in her favour. Then, besides the general conveyance to trustees by the wife of her *acquisita* and *acquirenda*, she specially conveyed a sum of £10,000 guaranteed by her father and mother; and the whole property was to be held by trustees for the wife's liferent use only, exclusive of the rights of Mr Church and of any future husband; and after her death for the children or issue of the marriage in fee, and failing issue of the marriage or lawful descendant thereof, for behoof of the nearest lawful heirs of the wife as at the time of her death in fee. It is said that Sir John M'Taggart had an interest to stipulate, and

did stipulate, as matter of contract, that her money (including the above-mentioned sum of £10,000 which he undertook to apportion to Mrs Church) should be kept in the family, and that Mrs Church should have no power to will it away. It is further pointed out that power is reserved to Mrs Church by a formal writing duly tested to confer the liferent of the trust property or part thereof upon her husband if he should survive her; and it is asked why this clause should have been inserted if she had already the right to dispose of the trust funds absolutely after her death. I think this argument is founded on a misconception arising from the collocation of this clause and the position it holds in the deed; for I hold it to be clear that it is an over-riding clause empowering her to confer a liferent on her husband after her death, even against the children or heirs of the marriage. But for this clause the right of the children or issue of the marriage would have been paramount, and would upon the death of the wife have excluded all right on the part of the surviving husband; there being an express direction to the trustees to pay to the children or issue on the death of the wife. This being so, I do not find in this deed any sufficient ground for holding that the destination to Mrs Church's nearest lawful heirs is contractual. *Prima facie*, and according to the ordinary conveyancing practice of Scotland, I think it is not so, and it would in my opinion require more explicit language in the contract to take it out of the ordinary rule, which I take to be that such a destination following upon the provision for the heirs of the marriage confers no *jus crediti*, and is defeasible; see the opinions in *Ramsay*, 10 Macph. 120; *Murray's Trustees*, 3 Fr. 820. Nor do I think that the cases cited for the defenders advance the argument in any material degree, namely, *Romanes*, 3 Macph. 348; *Mackay*, 11 R. (H.L.) 10; and *Macdonald*, 20 R. (H.L.) 89; and (as to the meaning of nearest heirs) *Blair*, 12 D. 97; *Haldane's Trustees*, 17 R. 385; *Gregory's Trustees*, 16 R. (H.L.) 10. They all seem to me quite distinguishable from the case in hand. I therefore sustain the claim of the Crown on this head, subject to the ascertainment of the amount of the duty.

"The second question for decision arises on the claim of the Crown for estate duty under the Finance Act 1894, in respect of the passing of the residue of Sir John M'Taggart's estate, and the lawful accumulations thereof, upon the death of Mrs Ommanney M'Taggart in 1902. Of course the residue passed on Sir John's death in 1867 to his testamentary trustees, in whose hands also the accumulations accrued during the twenty-one years after his death. But it appears to me that this does not solve the question for decision, which is, whether the property passed on Mrs Ommanney M'Taggart's death in 1902, within the meaning of the Finance Act 1894, section 1. It is true that under that Act, when property has once passed under a settlement, duty is not again payable until it passes out of settlement into the person of one competent to dispose of it. But I do not think that the operation of the statute is necessarily excluded by the consideration that if it had been enacted earlier, estate duty would have been payable in respect of this property at an earlier stage. I think that depends not upon what might have happened, but upon whether the statute itself recognises the circumstances which exist in this case as conferring an exemption from duties which would otherwise have been payable according to its terms. The question really turns upon whether section 21, sub-section 1, applies to this case, and in my opinion it does not. It is true that Sir John's trustees paid inventory duty on the residue of his estate shortly after his death. But the saving or exemption in section 21, sub-section 1, is enacted only in respect of settled property. Now, in the clause applying the Act to Scotland (section 23, sub-section 14), it is enacted that 'the expression settled property shall not include property held under entail'; and so far as regards that part of the fund in question which was held by the trustees for the purpose of purchasing land to be entailed, it must, I think, be regarded as property held under entail (see the opinions in *Lord Advocate* v. *Stewart*, 4 Fr. (H.L.) 11, as to the meaning of sub-sections 14 and 16). I hold, therefore, that to that extent section 21 does not apply, and that the claim of the Crown must be sustained. This, however, leaves over for separate treatment the sum of £20,000, which, in pursuance of the primary purpose of the trust, was applied out of residue in paying off the debt upon Ardwell. It has not been made clear to me on what ground this sum is to be held as subject to estate duty. But, as is indicated on record, there may be a question as to whether it is deductible in valuing the lands of Ardwell for the purposes of estate duty—(plea 4 for the pursuer). This question was not developed in the argument, and I presume that it was intended to be reserved for the adjustment of the account.

"The third group of questions relate to the effect of certain transactions which took place in 1894 and 1895 between Mrs Ommanney M'Taggart on the one hand and the defenders (her son-in-law and daughter) on the other. These took shape in three deeds. The first was a deed of gift by Mrs Ommanney M'Taggart in favour of the defenders, dated 27th August 1894, bearing to be granted for certain good causes and considerations, and out of love, favour, and affection. By this deed she conveyed and made over to the defenders her whole personal and moveable estate and effects then belonging or addebted to her, including sums of money, bonds, shares, and other investments, and her furniture and plenishing in Ardwell house, and the live and dead stock and crops at Ardwell and on the home farm. The second deed was a minute of lease dated 3rd October 1894, by which she let to the defenders the mansion-house of Ardwell, and the stables and offices, gardens and policies, at a rent of £100 a year, the lease to be for a year from

Whitsunday 1894, and thereafter to be determinable by either party on six months' notice. The third deed, which superseded the lease, was a deed of propulsion of the entailed lands and estate of Ardwell, by which, on the narrative that she was heiress of entail in possession of that estate and that her daughter, the defender Lady M'Taggart Stewart, was the heiress next entitled to succeed, she disponed the estate to her daughter and the heirs-male of her body and to the other heirs called in the deed of entail. This deed of propulsion was dated 23rd and recorded on 28th May 1895.

I consider first whether estate duty is due on the passing of the entailed estate of Ardwell to Lady M'Taggart Stewart upon the death of her mother in 1902, or whether the deed of propulsion affords a good answer to the claim. This is a case of property in which the deceased had an interest ceasing on her death; but by section 2 (sub-section 1, *b*) of the Finance Act 1894 such property is to be regarded as passing on the death, within the meaning of section 1. Then the case of such property having been surrendered during life by the deceased to any person entitled to an estate or interest in remainder or reversion in such property, is dealt with by section 11 of the Finance Act 1900. That section enacts . . . [*quotes sub-section* (1) *of section, supra*] . . . The section further provides that it shall apply in Scotland to the propulsion of the fee under an entail. Now, the minute of admissions shows that Mrs Ommanney M'Taggart had previously been in use for some years to have the defenders living with her during a part of every year at Ardwell house, and that she was in use to go with them to London and Southwick; and that after the deed of propulsion in 1895 she lived on at Ardwell in family with the defenders, paying her own maid, and (after 1901, when she suffered an accident) occupying one special room in the house and being attended to by the defenders and their family. It is admitted, on the other hand, that while Mrs Ommanney M'Taggart had been in use to receive the rents, pay all wages, and generally to manage the estate through a factor down to the date of the deed of propulsion, after that date this was all done by Lady M'Taggart Stewart, with the exception above mentioned. Now, it may well be said, upon these facts, that in a very real sense *bona fide* possession and enjoyment of the property was assumed by Lady M'Taggart Stewart immediately upon the propulsion, and thenceforth retained by her. But that is not enough to bring the case under the exempting provisions of the section. The possession and enjoyment of the property must have been immediately assumed and thenceforward retained 'to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise.' Now, upon the admissions, I cannot affirm that that was the position here. It is said that Mrs M'Taggart was virtually or practically excluded, and that any benefit remaining to her was so small as to be negligible. Having regard to the minute of admissions, I do not think it was so small as was represented in argument; but anyhow, the words of the section appear to me to have been carefully selected so as to avoid all questions of degree, and to bring the matter to the stringent but simple test of 'entire exclusion.' It is further argued that the property or interest surrendered by the deed of propulsion should not be regarded in the question of liability to duty as one and indivisible; and the duty should only attach to so much of it as was enjoyed by her, either alone or jointly with others. This view, it is said, would exclude from liability to duty the whole estate except her own room, or except the mansion-house, or except the eight merk land of Ardwell, which is the parcel of ground on which the mansion is situated. I think that the statute regards the thing surrendered as indivisible, and that if any benefit is retained or enjoyed in point of fact the whole claim for exemption falls.

"The remaining questions have to do with the claim for estate duty in respect of the furniture and plenishing in the mansion-house of Ardwell, and in respect of Mrs Ommanney M'Taggart's half of the 'unlawful' accumulations of income. These bring in for consideration a statutory provision (Finance Act 1894, section 2, sub-section 1, *c*), which, while it applies to a different subject-matter, is substantially the same in intention and effect as that which I have just considered. It is a typical example of the difficulties which follow on legislation by reference, for it involves the combination of two clauses in the Inland Revenue Acts of 1881 and 1889, and the introduction into the combined clause of several important drafting amendments. The result is a clause which does not appear in any statute, but which will be found in the 5th edition of Hanson's Death Duties, p. 110; and the effect of it is to include as liable to estate duty 'property taken under any gift whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.' Now, it is admitted by the defenders that both the furniture and plenishing in Ardwell House and Mrs Ommanney M'Taggart's half of the 'unlawful' accumulations passed to them under the deed of gift which was dated 27th August 1894. As to the furniture, the argument is substantially the same as that which I have just dealt with as regards the entailed estate itself. There is a total gift of the furniture, and there is not in point of fact an assumption and retention by the donee of the possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to her. As to the accumulations, they were accruing year by year in the hands of the trustees, and although they were 'unlawful' this did not occur to anyone until after Mrs Ommanney M'Taggart's death. For that very reason none of the parties supposed that they

were included in the deed of gift, and they were in fact retained by the trustees until after Mrs M'Taggart's death, when they were handed over to the defenders. Certainly this is very far from the 'possession and enjoyment assumed by the donee immediately upon the gift,' which is necessary to satisfy the requirements of the statute. All that can be said is, that the terms of the gift were wide enough to cover this fund; and that although apparently no formal intimation of the deed of gift was made to Sir John M'Taggart's trustees, yet (as set forth in the minute of admissions) the defender Sir Mark Stewart was at the date of the deed of gift the leading and managing trustee under Sir John's will, and his solicitors were the trustees' solicitors and also custodiers of the deed of gift which had been prepared in their office. Even, however, if this be held as equivalent to intimation and to a transfer of possession of the subject of the gift, it cannot possibly be represented as amounting to the 'enjoyment' of it, which is one of the requirements of the statute. I therefore sustain the claim of the Crown on this head also."

The defenders reclaimed, and argued– (1) *Mrs Church's Share of Unlawful Accumulations.*—The marriage contract of Mrs Church was a document containing a contract between the spouses and the wife's parents who were parties thereto. Her share of the "unlawful" accumulations passed to her sister under the destination therein to nearest lawful heirs. That the deed was contractual was shown by its terms and the carefully selected series of heirs. There was also the extraneous obligation by the parents to pay £10,000 on the condition of the daughter's surrender of her expectations which were to be settled under the destination aforesaid. The power to liferent her husband in the trust estate was unnecessary if the destination to nearest lawful heirs was revocable. The cases of *Blair* v. *Blair*, November 16, 1849, 12 D. 97; *Haldane's Trustees* v. *Sharp's Trustees*, January 30, 1890, 17 R. 385, 27 S.L.R. 303; and *Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787, showed that nearest lawful heirs here meant heirs *in mobilibus*, viz., Mrs M'Taggart; and the cases of *Lyon* v. *Lyon's Trustees*, March 12, 1901, 3 F. 653, 38 S.L.R. 568 (*disting.* the case of *Watt* v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267); *Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120, 9 S.L.R. 106; and *Murray' Trustees* v. *Murray*, May 31, 1901, 3 F. 820, 38 S.L.R. 598, showed that a destination in a marriage-contract to persons neither ascendants nor descendants was not necessarily testamentary and revocable but might be binding. The contractual specialties in the present case withdrew it from the general rule laid down in the case of *Macdonald* v. *Hall*, July 24, 1893, 20 R. (H.L.) 88, 31 S.L.R. 279. The "unlawful" accumulations therefore passed under the marriage-contract destination and succession duty only was due. (2) *Residue and Lawful Accumulations.*—As to the claim by the Crown for estate duty on the residue and lawful accumulations under Sir John M'Taggart's settlement which it was contended passed at the death of Mrs Ommanney M'Taggart in 1902, the corresponding duty had already been paid in 1867, and consequently, under section 21 (1) of the Finance Act 1904, there was no liability for estate duty. Granted that the Act of 1894 by section 23 (14) enacted that "the expression settled property shall not include property held under entail," it did not apply, since the property here in question might never have been entailed, since the heirs on whom it was to have been entailed might have died before the time for entailing had come and so defeated the trust purposes. In view of the case of the *Lord Advocate* v. *Stewart*, May 15, 1902, 4 F. (H.L.) 11, 39 S.L.R. 617 (*sub voce Lord Advocate* v. *Sprot's Trustees*) there could be no such constructive entail. Here no one could have carried out a disentail, which was the true test, and there was no beneficial enjoyment in the last owner which was necessary to passing under the Act. The fund was simply contingently settled estate and duty was not exigible under the Act of 1894. (3) *Entailed Estate and Moveables Gifted.*—As to the effect of the deed of gift and the propulsion of the fee of the entailed estate, these absolutely divested the donor and granter thereof; possession was taken of the moveables physically, and by transference of the stocks and shares, and of the estate by infeftment. The property would have been open to the diligence of the donees' creditors, and the donor was entirely excluded in the sense of the Finance Act 1894. Her continued residence in the mansion-house was merely that of a guest, and the statutory requirement as to exclusion was fulfilled. (4) *Unlawful Accumulations.*—As to the "unlawful" accumulations, they were carried by the deed of gift. That deed was in favour of Sir Mark Stewart, one of the trustees of the deceased Sir John M'Taggart, to whom consequently no formal notice was necessary. It was also known to the trustees' agents, for they prepared and preserved the deed. Such knowledge gave the deed the force of an intimated assignation—*Jameson* v. *Sharp*, March 18, 1887, 14 R. 643, 24 S.L.R. 453 (*sub voce Mantach* (*Davidson's Trustee*) v. *Sharp and Others*); *Browne's Trustee* v. *Anderson*, December 7, 1901, 4 F. 305, 39 S.L.R. 226; and *Paul* v. *Boyd's Trustees*, May 22, 1835, 13 S. 818—and divested the donor. Duty was not therefore exigible.

Argued for the respondents and pursuers —(1) *Mrs Church's Share of Unlawful Accumulations.*—The share of "unlawful" accumulations falling to Mrs Church passed by her will. The case of *Murray* v. *Murray's Trustees*, *ut supra*, established the rule, that destinations in a marriage contract to others than ascendants and descendants on the dissolution of the marriage without issue were testamentary and revocable, and the present case fell within that rule. This general rule was also contained in *Macdonald* v. *Hall*, *ut supra*, per Lord Watson.

There was nothing in the parents being parties to this deed; it was to be interpreted according to the cases, or if it had been intended that this destination, contrary to rule, was to be irrevocable, that should have been expressed without ambiguity. The duties sued for were therefore due. (2) *Residue and Lawful Accumulations.*—As to the residue of Sir John M'Taggart's estate and the "lawful" accumulations thereon, that passed in the sense of sec. 1 of the Finance Act 1894 on Mrs Ommanney M'Taggart's death—Soward's Estate Duty, 4th ed. 105; till then it could not be known who should take it. Settled estate was such as was in trust for any person by way of succession; therefore this was not such settled estate as came under the exemption granted by sec. 5 (2) or sec. 21 (1) of the Finance Act 1894, and the definitions in sec. 22, sub-sec. 1, (H) and (I), could not be applied. In any event there was a "cesser of an interest" in the sense of sec. 2 (1) (*b*) of the statute—*Attorney-General* v. *Beech*, [1899] A.C. 53, and *Earl Cowley* v. *The Commissioners of Inland Revenue*, [1899] A.C. 198, *per* Lord Macnaghten, 211. The three requisites to "passing" were (1) the existence of the property at date of death; (2) a change of hands; (3) that the change should be at a point of time determined by the death, whether the person deceased had an interest or not; and these requisites were present here. The exemption granted by sec. 21 (1) to property settled prior to 1894 which had paid a duty, did not apply, for this was entailed property which was excluded by sec. 23 (14). It had been argued not that it was not entailed but merely that it could not be disentailed. (3) *Entailed Estate and Moveables Gifted.*—The deed of propulsion of the estate and the deed of gift had not been followed by the entire exclusion of the granter from all enjoyment in the sense required by sec. 11 (1) and (2) of the Finance Act 1900, so as to relieve from liability for estate duty. (4) *Unlawful Accumulations.*—The constructive intimation of the transference of the "unlawful" accumulations to Sir Mark Stewart as a trustee was of no effect, since he was without knowledge that they came under the deed of gift at all.

At advising—

LORD PRESIDENT—I do not consider it necessary to recapitulate the facts of this case, as they are most accurately and succinctly given in the note of the Lord Ordinary. On the first question I agree with the result at which he has arrived and the grounds on which he has put his judgment. The argument of the reclaimer was based entirely on the fact that the father Sir John M'Taggart was a party to Mrs Church's marriage contract. I do not think that meant more than this, that he was content to become bound to ensure a certain provision to Mrs Church, which provision should be destined in the way in which the law of Scotland holds the destination granted shall be construed. It is a natural and indeed an every day occurrence for a parent to be a party to his child's marriage contract, but I have never heard it before suggested that that fact altered what are otherwise well understood rules of construction, and accordingly if it was wished to make a destination to heirs whomsoever of the spouse from whose side of the family the money came, not defeasible but a true *jus crediti*, I think that would have to be expressed in clear and unambiguous language. On this point therefore I am of opinion that the Crown should prevail.

On the second point also I agree with the result which the Lord Ordinary has reached, but I propose to rest my judgment on a different ground. For an explanation of the functions of the first and second sections of the Finance Act I refer to the judgment of Lord Macnaghten in the House of Lords in the case of *Lord Cowley*. Now, it appears to me that the residue and the lawful accumulations did not "pass" on the death of Mrs Ommanney M'Taggart. They had passed on the death of Sir John, but that is of no moment, because Sir John died before the passing of the Finance Act. All that happened on the death of Mrs Ommanney M'Taggart was that the direction then came into effect for the trustees to pay. But then, although they did not pass, I am of opinion that in view of the second section they were "deemed to pass," because in terms of that Act (*b*) they were property in which a person other than the deceased (*i.e.*, the trustees) had an interest which ceased on the death of the deceased, and duty falls to be paid on the extent to which a benefit accrues from the cessor of that interest, *i.e.*, upon the whole amount which then becomes a benefit to the heir of entail. The question of exemption under section 21 (1) does not arise in this view, and it is obviously no answer to say that if the Finance Act had been in force at Sir John's death settlement duty would have been paid and no more would have been exigible at Mrs Ommanney M'Taggart's death. I think therefore that on this point the Crown must prevail.

Upon the third point I am unable to agree with the result at which the Lord Ordinary has arrived. The question is a question of fact which I am bound to dispose of as a jury upon an issue of fact. Now, the facts here are not left to be drawn by inference from testimony; they are settled by a joint minute of admissions. This seems to me to exclude all inference except such as falls to be drawn from the terms of the admissions themselves. What then do we find? First, we find that seven years before her death Mrs Ommanney M'Taggart, so far as conveyance is concerned, made a complete transference of her property. The conveyance was completed in every way it could be—infeftment was taken on the heritable property—in the case of incorporeal moveables which required written transference, such written transference was effected by transfers of stocks and shares, and in the case of corporeal moveables, physical possession was taken of the furniture. No one doubts that supposing, for instance, in 1900 Lady M'Taggart

Stewart had become bankrupt, her creditors could have sold the stocks and shares and the furniture and attached the rents of Ardwell. As to all this the Lord Ordinary takes the same view, but his Lordship points out that the statute demands something more, viz., that the possession and enjoyment of the thing transferred must be assumed by the transferree and retained by him "to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise"; and he holds that the fact that Mrs Ommanney M'Taggart continued to occupy a bedroom in Ardwell and to have the use with the rest of the house party of the public rooms shows that she was not entirely excluded from any benefit. In his judgment on this point the Lord Ordinary treats the matter as if it was one of degree, and says that by using the general words "benefit" and "otherwise" the statute says that greater or less degree is not to make a difference. In this view I agree. If it once comes to a question of degree I think the Lord Ordinary's view of the statute is right. But before it comes to a question of degree there is I think something else to be noticed. I hold it clear that the benefit from which the cedent must be excluded must be a benefit which was part of his property before the cession. Any other reading would I think drive the clause mad, because it would mean that if the cedent was after the cession even allowed again to set foot on the ceded property, the whole transaction for the purpose of duty is held as non-existent. It therefore in the end comes to be a question of fact whether the occupation of the bedroom and other rooms of the house which Mrs Ommanney M'Taggart had after the cession is in truth the same as that she had before. It seems to me that the admissions in the joint-minute show conclusively it was not. Before the cession her occupation was one of the incidents of her proprietorship; after, it was only the privilege of a guest. To say in general terms, as was said in the argument for the Crown, that she "got the good of the estate" as much after the cession as before seems to me to beg the question. Very likely her actual enjoyment of life was not made less because she no longer pocketed the rents or sat at the head of the table. I do not think one can analyse existence in such a fashion. Two of the prime necessities—air and sunshine—never depended on her proprietary rights. The question seems to me always to revert to a simple question of fact, namely, after the cession was she the old proprietrix retaining a benefit of her old estate, or was she a guest getting as a guest what the new proprietrix chose to give her. As a juryman reading the minute of admissions I pronounce unhesitatingly for the latter view. On this point I am therefore of the opinion that judgment should go against the Crown.

There remains, however, one other matter to dispose of which the Lord Ordinary in the view he took was not obliged to consider. I allude to the position of Mrs M'Taggart's half of the illegal accumulations. These had fallen to Mrs M'Taggart but nobody had adverted to it. They were carried by the generality of the words in the deed of gift, but then as no one had thought of it no further steps were taken to carry into effect the transference. It was argued for Lady Stewart that as Sir Mark knew of the deed of gift, and as he happened to be a trustee of Sir John, this knowledge was equivalent to a formal intimation to the trustees. I doubt if this was sufficient, but at any rate I think such an implied intimation, without anything more, falls quite short of the assumption of possession by the transferee which is necessary under the statute, and which was really and effectively done in the case of all the other property falling under the deed of gift.

LORD M'LAREN—I concur.

LORD KINNEAR—I also concur.

LORD PEARSON—I agree with your Lordships on the first point arising on the construction of the marriage contract of Mr and Mrs Church.

I also agree that duty is payable in respect of the residue and the "lawful" accumulations as on the death of Mrs Ommanney M'Taggart. I have some difficulty in adopting your Lordships' ground of judgment on that part of the case, because I think it really assumes that the fund produced by the residue and the "lawful" accumulations was settled property within the meaning of the Act, that being the most familiar case to which the enactments as to the cesser of an interest apply. This view elides the application of the provisions of sec. 23, sub-secs. 14 to 17, as to Scotch entailed estate, which seem to me to apply here. But whichever ground of judgment is adopted, the result, I take it, is the same.

On the question as to the effect of the deed of gift and the deed of propulsion I regret I am unable to concur in the judgment proposed, so far as it is adverse to the Crown. I may be excused from going into the subject at length, as I have already done so in the note to my interlocutor. But I may say that in my view the sections have been carefully framed so as to avoid as far as possible all questions of degree, and to bring the matter to the simple test of "entire exclusion." For my part I think the main difficulty in applying the statute to the case of a complex gift, such as we have here, lies in ascertaining how far the subject-matter of the gift is to be regarded as one and indivisible, when you come to apply to it the statutory words as to the possession and enjoyment of the donee and the entire exclusion of the donor. But these difficulties are here in great measure avoided by the circumstance that the claim is limited to three subjects —the entailed estate, the furniture and plenishing, and one-half of the "unlawful" accumulations. Each of these may in my opinion be regarded as a *unum quid*, and as to each the test provided by the statute

itself is of comparatively easy application. The subject of the gift is to be chargeable with duty unless the *bona fide* possession and enjoyment of it shall have been assumed by the donee, and retained by him to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. Applying these words to the admitted facts, I hold that the whole claim for duty on this head should be sustained.

The Court pronounced this interlocutor—

"Affirm findings (1) and (2) in said interlocutor; *Quoad ultra* recal finding (3), and in place thereof find that the provisions of the Finance Act 1894, section 2, sub-section 1, head *b*, and of the Finance Act 1900, section 11, do not apply so as to make the entailed lands and others subject to estate duty as property passing on the death of Mrs Ommanney M'Taggart; and find further that settlement estate duty is not payable in respect of the entailed estate, but that succession duty is payable: Recal finding (4), and in place thereof find that the provisions of the Finance Act 1894, sec. 2, sub-sec. 1, head *c*, do not apply so as to make the furnishing and plenishing in the mansion-house of Ardwell subject to estate duty as property passing on the death of Mrs Ommanney M'Taggart: Further find that Mrs Ommanney M'Taggart's share of the accumulations of the income arising from the residue of Sir John M'Taggart's trust estate from and after 13th August 1888 is subject to estate duty as property passing on her death: Find no expenses due to or by either party, either in this Court or in the Outer House, and remit to the Lord Ordinary in Exchequer Causes to proceed as may be just."

Counsel for the Reclaimers and Defenders—The Dean of Faculty (Campbell, K.C.)—Clyde, K.C.—Earl of Cassilis. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents and Pursuers—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Solicitor of Inland Revenue.

Wednesday, March 14.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GRANT *v.* CITY OF EDINBURGH AND OTHERS.

Property—Common Property—Clause Prohibiting Pro Indiviso Proprietor from Suing a Division.

A feu-charter contained a grant of a *pro indiviso* share of certain subjects with a clause prohibiting the feuar from suing a division. *Opinions* that the prohibiting clause was of no effect, at least as against a singular successor in the feu.

Property—Common Property and Common Interest—Rights of Proprietors—Square and Street Held in Common Property by Proprietors of Adjoining Houses—Conveyance of Square and Street to Improvement Trustees—Extinction of Common Interest.

In the feu-charters of the houses round a square there was conveyed to the individual proprietor by bounding titles (1) his house and (2) in common property the street and garden ground in the centre of the square. The individual proprietors sold their interests in the street and garden ground to Improvement Trustees.

Held (1) that the individual proprietors in addition to their interest as *pro indiviso* proprietors had had a common interest in the street and garden ground, but (2) that such common interest had been extinguished by the conveyances of the common property to the Improvement Trustees.

Property—Common Property—Rights of Proprietor—Servitude—Sale of Interest in Common Property with Restriction on Use—Validity of Restriction.

The individual proprietors of a subject held in common property, by separate conveyances sold their interests to trustees stipulating that the subject should not be built upon. *Held* that, at least as against a singular successor of the trustees, the restriction was of no effect inasmuch as it was not competent for a *pro indiviso* proprietor to impose a servitude *non aedificandi* on the common property, and consequently that one of the former proprietors had no title to prevent building over part of the subject.

On 5th February 1904 John Grant, bookseller, 31 George IV Bridge, Edinburgh raised an action against (1) the Provost, Magistrates, and Councillors of Edinburgh, (2) the Incorporated Edinburgh Dental Hospital and School, (3) John Falconer King, analytical chemist, Edinburgh, and (4) the Governors of George Heriot's Trust. In it he sought to have it declared, *inter alia*, "(*first*) That the pursuer, as proprietor of the subjects known as 31 and 33 George IV Bridge, Edinburgh, and the south portion of the tenement known as 35 George IV Bridge there, and the possession had by the pursuer's authors and by him under his and their titles, is entitled to erect on that area or piece of ground immediately to the south of the said subjects, situated between the southern wall thereof and the northern boundary of Chambers Street, . . . buildings rounded on an angle similar to that of the tenement now existing on the east corner of Chambers Street, within the City of Edinburgh, and according to plans and elevations submitted to and approved by the said defenders, the Lord Provost, Magistrates, and Councillors of the City of Edinburgh."

The pursuer, *inter alia*, pleaded—"(3) The opposing defenders have no right, title, or interest to oppose the declarator concluded