circumstances of this case, I think they are very different from those I have just mentioned, and that there is no relevant ground stated for granting an interdict.

LORD DUNDAS—I agree. I do not think this case involves anything like a question of principle. I consider that each case of this kind must be decided upon its own merits. It would not be easy, and in my opinion it would be very inadvisable, to attempt to lay down a general rule as to what may or may not be done in this direction by a tenant. I am content to say that I think the act which is complained of in this case was not unreasonable or unlawful, and should not be interfered with.

The Court sustained the appeal and refused the interdict craved.

Counsel for the Pursuer (Respondent)—Dean of Faculty (Dickson, K.C.)—W. Watson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders (Appellants)—Chisholm, K.C.—Paton. Agent—J. Gordon Mason, S.S.C.

Wednesday, December 16.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

TURNBULL'S TRUSTEES *v.* INLAND REVENUE.

Revenue — Stamp Duty — "Settlement" — Alteration of Security by Deed but No New Provision—Stamp Act 1891 (54 *and* 55 *Vict. c.* 39), *sec.* 62, *and First Schedule.*

A, by antenuptial marriage-contract, bound himself to pay his wife should she survive him an annuity of £400, and in security of this provision he bound himself, his heirs, &c., to infeft her in certain lands. The deed was adjudicated as duly stamped. Thereafter A, with consent of his wife, sold part of the security subjects, and as new security for the annuity conveyed other subjects to trustees.

Held that this trust deed was not a "settlement" within the meaning of First Schedule to the Stamp Act 1891, and accordingly was not chargeable with settlement duty.

The Stamp Act 1891 (54 and 55 Vict. cap. 39), First Schedule, imposes, *inter alia*, the following stamp duties;—

"*Conveyance or Transfer* of any kind not hereinbefore described . £0 10 0
And see section 62.

. . . .

"*Deed* of any kind whatsoever not described in this schedule . £0 10 0

"*Settlement.*—Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bona fide* pecuniary consideration, whereby any definite and certain principal sum of money whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever:—

For every £100, and also for any fractional part of £100, of the amount or value of the property settled or agreed to be settled £0 5 0

. . . .

"And see sections 104, 105, and 106."

Section 62 enacts—"Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property: Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings."

James John Oliver, solicitor, Hawick, and Thomas Henry Armstrong, solicitor, Hawick, assumed trustees acting under a deed of trust, dated 30th May and 1st and 2nd June 1908, granted by the deceased David Turnbull, sometime of Fenwick and Rodono, being dissatisfied with a determination of the Commissioners of the Inland Revenue finding the said trust deed chargeable with stamp as a settlement took an appeal by way of stated case.

The material facts stated in the case were:—By contract of marriage, dated 15th June, and registered 4th August, both in the year 1875, between David Turnbull and his father William Turnbull on the one part, and Christian Oliver on the other part, David Turnbull and his father, in contemplation of the marriage of the said David Turnbull and Christian Oliver, bound themselves, conjunctly and severally, and their heirs, executors, and representatives, *inter alia*, to content and pay to the said Christian Oliver, in case she should survive the said David Turnbull, a free yearly liferent annuity of £400, and in security of the same they bound themselves and their respective heirs and successors to infeft and seize the said Christian Oliver in certain lands. It was also provided that if any of the lands which formed the security of the annuity and other obligations should be sold in order to pay off a bond of £75,000 with which they were already burdened, or other charges postponed to the said annuity and obligations, the annuity and obligations should be restricted to the remainder of the said lands. This deed was adjudicated as duly stamped. By deed, dated 26th May 1897, and registered in the Divisions of the General Register of Sasines for Roxburgh and Selkirk for publication, and also in the Books of Council and Session for preservation, on 5th June 1897, the said David Turnbull assigned and disponed the lands which formed the security of the annuity and other obligations provided for by the above marriage-contract, and also certain policies of assurance, to trustees for the purpose,

inter alia, of selling the trust estate in whole or in part, of applying the free proceeds in payment of certain burdens secured thereon, and of reconveying the residue thereof to the disponer. Part of the lands forming a portion of the trust estate was sold, and the said David Turnbull requested Mrs Christian Oliver or Turnbull to release the lands sold from the security for the annuity constituted by the said marriage-contract. This she agreed to do on the condition of proper security being given for the said annuity; and she with her husband's consent, and with the consent of the remaining trustees under the marriage-contract, on the narrative that her husband was about to grant a trust deed, and that the said annuity would be thereby sufficiently secured, granted a discharge declaring the lands sold to be disburdened of the said annuity, reserving the personal obligation for payment of the said annuity. Thereafter David Turnbull granted the trust deed. By it, on the narrative of his obligation under his marriage-contract to secure the annuity of £400 to his wife, and of her having granted a discharge disburdening the lands sold from the security for the annuity in return for the security to be granted by this deed, he conveyed to trustees (1) certain lands other than the lands sold, (2) four policies of insurance upon his own life for sums amounting *in cumulo* to £4950, with bonus additions, and (3) the balance of the price of the original security lands to the extent of £2582, being the sum that would be necessary to enable the trustees, if they saw fit, to have the four policies converted into fully paid-up policies, for, *inter alia*, the following purposes—"(*Second*) At the discretion of the said trustees under these presents—(*primo*) for payment to the said North British and Mercantile Insurance Company and Royal Insurance Company respectively of said sum of Two thousand five hundred and eighty-two pounds, or of such smaller sum as may at any future time be necessary for the conversion into fully paid-up policies, payable on the death of me, the said David Turnbull, of the four policies of assurance hereinbefore assigned; or (*secundo*) for the investment of said sum of Two thousand five hundred and eighty-two pounds and the application of the income arising therefrom and of so much of the capital thereof as may be required to supplement said income in payment of the premiums necessary for keeping the said policies in force: (*Third*) For payment of the remainder of the income from the trust estate to me the said David Turnbull during all the days of my life: (*Fourth*) From and after the death of me, the said David Turnbull, for payment out of the free income of the trust-estate or out of the capital thereof, if the income be insufficient, to the said Mrs Christian Oliver or Turnbull, if and so long as she shall survive me, of the foresaid free yearly liferent annuity of four hundred pounds provided to her by the said contract of marriage: and (*Fifth*) Subject to the foregoing purposes of trust the said trust estate shall be held by the trustees under these presents for behoof of me, the said David Turnbull, my heirs, executors, and assignees whomsoever."

The adjudication of this trust deed was the subject-matter of the case.

The trust deed had been presented to the Commissioners of Inland Revenue, who had been required to express their opinion as to the stamp duty with which it was chargeable. The Commissioners were of opinion that the instrument was chargeable (1) under the heading Settlement in the Schedule to the Stamp Act 1891, to the settlement duty of £20, 5s on the sum of £8022, 5s.; the sum of £8022, 5s. was made up as follows:—Four policies of insurance for sums amounting *in cumulo* to £4950, bonus additions to policies to date of instrument £490, 8s., and the residue of the prices of the lands of Rashiegrain and others to the extent of £2582; and (2) to the duty of 10s. in respect of the conveyance of the heritable property to the trustees. They accordingly assessed upon the instrument the *ad valorem* settlement duty of £20, 5s. and the fixed conveyance duty of 10s., together £20, 15s., and the instrument being already stamped with the duty of 10s. they required payment of the sum of £20s. 5s. and of the penalty of £10, and also of £9, 18s. 1d. of interest on the duty by way of further penalty, as provided by the Stamp Act 1891, section 15. Whereupon the said Messrs Geo. & Jas. Oliver paid to the cashier of stamp duties at Edinburgh the said sums of £20, 5s. and £19, 18s. 1d. for stamp duty and penalties, and the instrument was thereupon stamped with the stamps denoting the said duty and penalties assessed as aforesaid, and also with the particular stamp provided by the said Commissioners to denote and signify that the full amount of stamp duty with which the instrument was by law chargeable had been paid. But the said James John Oliver and Thomas Henry Armstrong declared themselves dissatisfied with the assessment of the said Commissioners on, *inter alia*, the following ground — "(1) The instrument in their view is not a settlement. . . ."

The *question of law* for the opinion of the Court was—"Whether the said instrument, in the circumstances above set forth, is liable to be assessed and charged with the said *ad valorem* settlement stamp duty of £20, 5s., and conveyance duty of 10s., together £20, 15s., or if not liable to be assessed and charged with both or either of these duties, with what other duty is it liable to be assessed and charged?"

Argued for the appellants—The instrument in question was not a settlement in any ordinary sense of the word, and no particular definition was assigned to the word "settlement" in the Act. No new obligation was undertaken by this deed. The deed only substituted for the old security a new security for the performance of the original obligation.

Argued for the respondents—This deed was a settlement, and chargeable with settlement duty in respect of the universal

words of the schedule "settled in any manner whatsoever." Here there was a conveyance to trustees of policies not included in the marriage settlement for the purpose of paying the income to the grantor after satisfying the annuity. This constituted a new security for the widow's annuity, and in so doing subjected to fetters as trust property that which had before been unburdened. This was sufficient to make the deed a settlement. (*Viscount Messareene* v. *Commissioners of Inland Revenue*, [1900] 2 I.R. 138, was referred to.)

LORD PRESIDENT—This case seems to me plain. Mr and Mrs Turnbull by antenuptial contract of marriage had come under certain mutual obligations, and, in particular, Mr Turnbull had bound himself to pay to Mrs Turnbull, in case of her surviving him, a free yearly liferent annuity of £400, and certain securities were conveyed to trustees for that annuity. Part of the security consisted in lands. Mr Turnbull afterwards became desirous to sell these lands. He, of course, could not have done so to advantage without freeing the lands from the eventual burden of the annuity, and therefore he applied to Mrs Turnbull, who consented to this being done, provided she had other security of equal value given instead of the lands which were being taken away. Accordingly, she consented to the lands being released from the security, and on the other hand Mr Turnbull executed a new deed by which he conveyed some other property, namely, first of all some other lands, secondly, certain policies of assurance which had been effected upon his own life, and thirdly, a sum of money which was sufficient either to pay the premiums of the policies of assurance as they fell due in the future, or in the option of the trustees, by one payment to convert these policies into fully paid-up policies. The trust purposes proceeded to state that the trustees were to hold these for payment of the old annuity of £400 which had been conditioned to Mrs Turnbull in the antenuptial marriage contract, and that after these trust purposes were fully satisfied the trustees should then be obliged to denude in favour of Mr Turnbull himself and his heirs, executors, and assignees.

This deed, of course, was a conveyance, and as such nobody doubts it had to be stamped with a conveyance stamp, but the idea of the Inland Revenue authorities is that it was not only a conveyance but that it was a settlement. It is really almost difficult to express the argument which is put forward with that view, because the simple answer is that nothing was settled. Nobody supposes it is a settlement for a man to say that his own money is to be held by trustees in payment to himself, and there was no settlement on Mrs Turnbull, because she got no more than what she already had, namely, the annuity of £400 a year secured by her marriage-contract. I think the contention is a bad contention, and that the determination of the Commissioners was quite wrong and ought to be reversed.

LORD M'LAREN—I think it unnecessary for the present case to consider the question whether the conveyance to trustees by a husband of certain property in security of an undertaking to pay an annuity to a wife, and under a reservation that the income of the property conveyed was in so far as not required for payment of the annuity to revert to the husband, is a settlement for the purposes of the Stamp Act. What we have to consider here is the lesser question whether, on the assumption that there was a settlement by contract of marriage, the substitution of one description of security for another constitutes a new settlement on which "settlement stamp duty" is payable. I think that is a hopeless contention. By the deed under consideration no change whatever was made upon the trusts of the contract of marriage in favour of Mrs Turnbull. That was a matrimonial provision, and being secured by an antenuptial contract of marriage I need not say that it was not in the power of the spouses even with the consent of the trustees to put an end to it and to substitute a new settlement. They were not so foolish as to attempt anything of the kind. What they did was that in consideration of the wife having released her security over certain lands, Mr Turnbull conveyed certain policies of assurance for certain purposes, with only one of which we are concerned, namely, that "from and after the death of me, the said David Turnbull, for payment out of the free income of the trust estate or out of the capital thereof if the income be insufficient, to the said Mrs Christian Oliver or Turnbull, if and so long as she shall survive me." Payment of what? Not of a new annuity, but "of the foresaid free yearly liferent annuity of £400 provided to her by the said contract of marriage." Nothing can more clearly show that, as far as this question is concerned, the purposes of the marriage-contract were unaltered; and while I think it is plain enough that the ordinary conveyance duty is payable in respect of the subjects in security, yet, seeing that in point of fact no new settlement was made but only new security given in terms of an existing settlement, the property is not subject to settlement stamp duty.

LORD KINNEAR—I am of the same opinion. It appears to me that Mrs Turnbull's right stands upon the settlement made in her favour by her contract of marriage. Nothing has been done to interfere with that settlement, or to add to it in any way. But it has turned out that it would not be convenient to keep certain subjects, which were put into the hands of trustees as security for the money settled upon Mrs Turnbull, in that condition, because the husband desired to sell them, and no doubt that was for the advantage of all persons interested in them; and therefore the husband and wife agreed that these properties should be sold, and that other subjects should be put into the hands of trustees as security in their place for the

wife's annuity. I agree with your Lordship that that was not a new settlement at all, but a mere substitution of one security for another, and that the claim of the Inland Revenue to have duty as for a new settlement upon every change of security is untenable. I agree with your Lordship.

LORD PEARSON—I agree.

The Court sustained the appeal; reversed the determination of the Commissioners of Inland Revenue; assessed the duty of 10s. on the instrument in question as an instrument falling under the head of "deed of any kind whatsoever not described in this schedule" to the Stamp Act 1891; and ordered the said Commissioners to repay to the appellants the sum of £25, 5s., being the excess of duty, and the sums of £10 and £9, 18s. 1d., being the penalties paid by the appellants.

Counsel for the Appellants—Murray—MacRobert. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Respondents—Umpherston—Munro. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Saturday, December 19.

SECOND DIVISION.

[Lord Johnston, Ordinary.

BROWN *v.* CARRON COMPANY.

BROWN *v.* LIVINGSTONE-LEARMONTH'S TRUSTEES.

BROWN *v.* FORBES.

Servitude—Thirlage—Prescription—Negative Prescription—Lands Astricted in Original Charter to Mill no Longer in Possession of Superior, but with Grant of Multures in its Title—Non-Enforcement of Obligation for Forty Years.

The proprietor of a barony estate, including a mill, disponed the mill with the astricted multures of the lands of the barony to A in 1609, and subsequently granted in favour of B a feu charter of the lands containing, in the *reddendo* clause, an obligation of thirlage to the mill. *Held*, in an action by a party deriving right to the mill through A against a party deriving right to the lands through B, that the obligation of thirlage could be extinguished by the negative prescription.

Evidence—Servitude—Thirlage—Prescription—Negative Prescription—Extinction of Obligation by Non-Enforcement.

In an action raised by the proprietor of a mill, the titles of which included a right to the astricted multures of certain lands against the proprietors of these lands, the defenders pleaded that the right of thirlage had been extinguished by prescription. Evidence was led that no mention of thirlage appeared in the leases of the mill for more than forty years; that from time immemorial a large part of the grain had been sold in market or to the miller; that money charges were made for the grinding of all grain other than oats; that the multures of oats were of fluctuating amount; that there was no distinction between the charges for in-town and out-town grain; that no services had been demanded though the mill had been burned down; that the proprietors and tenants of the lands and of the mill, so far back as inquiry could go, had never heard of any claim of thirlage. *Held* that the obligation of thirlage had been extinguished by the long negative prescription.

Robert Ainslie Brown, S.S.C., proprietor of the estate of Manuel, including the mill and mill lands of Manuel, raised actions against (1) Carron Company, proprietors of the lands of Craigend and others; (2) the trustees of Thomas Livingstone-Learmonth, proprietors of the lands of Parkhall and others; and (3) William Forbes of Callendar, proprietor of the lands of West Mains and others, concluding for declarator that the lands therein specified belonging to the defenders and forming part of the barony of Haining or Almond were astricted and thirled to the mill of Manuel for payment to the pursuer of the astricted multures at certain rates, and that the pursuer had good and undoubted right to the multures in all time coming.

The pursuer averred that by contract of sale and alienation in 1609 Alexander Livingstone of Haining (which then included Manuel) granted a disposition of the mill of Manuel with the astricted multures of all and sundry the lands and barony of Haining to Henry Crawford and Christian Menteith, his spouse, and the survivor of them in conjunct fee; that in virtue of a disposition granted in 1903 in favour of the pursuer by the trustees and heir-at-law of George Bayley of Manuel, and the intervening titles of the mill and lands of Manuel, the pursuer was in right and place of the said Henry Crawford and spouse, and thus infeft in the mill of Manuel and the astricted multures of the lands and barony of Haining.

The pursuer further averred that the lands belonging to the defenders formed part of the barony of Haining, and were acquired by the defenders' authors from the said Alexander Livingstone and his successors subsequently to the disposition of the mill in 1609; that a number of the charters of the lands belonging to Carron Company and to Livingstone-Learmonth's trustees, granted by the said Alexander Livingstone and his successors in favour of those defenders' authors, contained [in the *reddendo*] an obligation of astriction to the mill of Manuel.

The defenders, who did not admit that their lands had ever been thirled to the mill of Manuel, averred and pleaded, *inter alia*, that any right of thirlage ever com-