The accident in the present case cannot possibly come under that expression. To hold otherwise would virtually be to regard the expression "out of" only as a redundant alternative for "in the course of."

LORD MACKENZIE—I agree with your Lordship, and think that the Sheriff-Substitute has arrived at a sound conclusion in this case. I do not think it can be said that the part of the street on which the deceased was at the time of the accident was a place of danger, so that it could be said that he was then exposed to a peculiar risk which was reasonably incident to his employment; and therefore I am of opinion that the accident did not arise out of his employment.

The Court answered the question in the affirmative.

Counsel for the Appellants—Sandeman, K.C.—MacRobert. Agents—Fyfe, Ireland, & Company, W.S.

Counsel for the Respondents — Crabb Watt, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Wednesday, January 31.

FIRST DIVISION.

DUNDAS'S TRUSTEES *v.* DUNDAS'S TRUSTEES.

Revenue — Succession — Settlement Estate Duty — Incidence of Duty — Property Settled by Father in Son's Marriage Contract—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 5 (1)—*Finance Act* 1896 (59 *and* 60 *Vict. cap.* 28), *sec.* 19 (1).

Held (*diss.* the Lord President) that when a father becomes a party to the marriage settlement of a child and covenants to pay at his death a certain sum to the marriage-contract trustees, the latter, and not the father's testamentary trustees, have to bear the settlement estate duty.

In re Maryon Wilson, [1900] 1 Ch. 565, *followed.*

Marriage Contract — Construction — Property Settled by Father in Son's Marriage Contract—Incidence of Death Duties.

A in his son's marriage contract bound and obliged himself, his heirs, executors, and successors, to make payment to the marriage-contract trustees "at the first term of Whitsunday or Martinmas after his death of the sum of £3750, or such other sum, more or less, as with the . . . capital sum of £20,000 and the . . . sum of £6250, more or less, . . . shall make up the sum of £30,000 to be received by the trustees, and which sum the said" A thereby undertook and guaranteed to "make up" to the trustees. *Held* that, on a fair construction, the marriage contract did not bind the father's testamentary trustees to make good a total sum of £30,000 free of all Government duties.

Expenses — Special Case — Construction of Statute.

In a Special Case brought to determine a question as to the incidence of death duties arising out of an obligation undertaken in a son's marriage contract, but turning mainly on the construction of a statute, the parties upholding the wrong construction were found liable in expenses.

The Finance Act 1894 (57 and 58 Vict. cap. 30), section 5 (1), enacts—"Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—(*a*) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied. . . ."

The Finance Act 1896 (59 and 60 Vict. cap. 28), section 19 (1), enacts—"The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate."

Robert Nevill Dundas, W.S., Edinburgh, and John Ramsay Anderson, W.S., Edinburgh, testamentary trustees of the late Sir Robert Dundas of Arniston, Midlothian, Baronet, *first parties*, and the said Robert Nevill Dundas, and others, trustees acting under the antenuptial contract of marriage of Captain Henry H. P. Dundas (afterwards Sir Henry), the then younger son of Sir Robert Dundas, and Lady Beatrix Home, second daughter of the Earl of Home, *second parties*, presented a Special Case for the opinion and judgment of the Court of Session.

The following narrative of the *facts* is taken from the opinion of the Lord President:—"The late Sir Robert Dundas was a party to the marriage contract of his son Henry, now Sir Henry.

"The said marriage contract recites that it was part of the treaty for the marriage that a sum of £30,000 on behalf of Henry should be vested in the marriage-contract trustees, and goes on to mention that the said sum is made up of (1) securities and cash to the extent of £20,000, presently paid over; (2) the share of the funds in the marriage contract of Sir Robert which has been apportioned to Henry (these amounted at date to £6250 or thereby); and (3) an obligation by Sir Robert to pay the sum of £3750, or such other sum, more or less, as should make up the sum of £30,000.

"The reason why the sum in the obligation of Sir Robert could not be precisely specified was because the marriage-contract funds under his (Sir Robert's) marriage contract were still held by trustees and were not payable to the children of the marriage until Sir Robert's death, as he enjoyed the liferent. Sir Robert had by deed of even date irrevocably apportioned in favour of Henry one equal fourth share

of the said funds (under deduction of £500 already apportioned to Robert *secundus*, the eldest son) along with his three sisters. The value of such fourth as at date was estimated at £6250, but obviously its actual value could not be precisely ascertained till the trust came to be wound up at Sir Robert's death and the investments realised.

"The actual words of obligation whereby Sir Robert bound himself in the marriage contract to make payment of the £3750, more or less, were as follows:—'The said Sir Robert Dundas has agreed, and hereby agrees and binds and obliges himself, his heirs, executors, and successors whomsoever, without the necessity of discussing them in their order, all jointly and severally, to make payment to the trustees at the first term of Whitsunday or Martinmas after his death of the sum of three thousand seven hundred and fifty pounds, or such other sum, more or less, as with the said capital sum of twenty thousand pounds and the said sum of six thousand two hundred and fifty pounds, more or less, apportioned to the said Henry Herbert Philip Dundas as aforesaid shall make up the sum of thirty thousand pounds to be received by the trustees, and which sum the said Sir Robert Dundas hereby undertakes and guarantees to make up to the trustees, with a fifth part more of the said sum of three thousand seven hundred and fifty pounds or other sum as aforesaid of liquidate penalty in case of failure, and interest of the said sum at the rate of five pounds per centum per annum from and after the date of death till payment thereof. . . .'

"The whole sums payable to the marriage-contract trustees were settled upon the spouses in liferent and the children of the marriage in fee.

"Sir Robert Dundas died on 11th November 1909, and left a trust-disposition and settlement under which he conveyed all his property to trustees, with directions, *inter alia*, to implement all obligations he had undertaken in his children's marriage contracts. As residuary legatee he appointed Robert Dundas, his eldest son, since deceased.

"On Sir Robert's death there became due to the Crown, and there has been paid by the executors, the following duties:—1. Estate duty on the £6250. This fund, except as to so much of the capital as represented the sum of £200 a-year which was contributed by Sir Robert's wife, and was treated as an 'estate by itself,' fell to be aggregated with Sir Robert's other estate. 2. Succession duty on the same sum. 3. Estate duty on the £3750. 4. Succession duty on the same. 5. Settlement estate duty on the same."

The *questions of law* were—"(1) In ascertaining the balance payable by the first parties to the second parties, do estate duty and succession duty, or either of them, fall to be deducted from the said sum of £6250? (2) Do settlement estate duty and succession duty on the balance of £3750, more or less, required to make up the said sum of £30,000, fall to be paid by the first or second parties?"

Counsel stated that on a construction of the statutes they were agreed that the estate duty on the £3750 fell to be borne by the first parties, and that the estate duty on the £6250, and succession duty on both the £6250 and the £3750, fell to be borne by the second parties.

Argued for the first parties—(1) The settlement estate duty fell to be borne by the second parties. The question depended on whether *in re Maryon Wilson*, [1900] 1 Ch. 565, was rightly decided or not—the answer was in the affirmative. In *in re Webber*, [1896] 1 Ch. 914, North, J., held that this duty was payable out of residue, and *in re Maryon Wilson* (*cit.*) had been regarded as overruling *in re Webber* (*cit.*). This view was confirmed by the commentators — Hanson's Death Duties (6th ed.), pp. 128, 188, and 251. The Finance Act 1894 (57 and 58 Vict. cap. 30), had left the matter doubtful, and the Finance Act 1896 (59 and 60 Vict. cap. 28), section 19 (1) so far cleared up the doubt. The only difficulty was that the latter Act only dealt with property settled by will, but there was no reason why a benefit given by a will should be treated differently from a benefit given by deed, and the reasoning of the Master of the Rolls in *in re Maryon Wilson* (*cit.*), at p. 570, was well founded. The Finance Act 1894—secs. 8 (3), and 4 and 9 (1) and (4)—clearly showed that the statute contemplated that in the ordinary working out of administration the executor might pay duty for which he was not liable and be entitled to recover it, and therefore the statute did not so much provide for the ultimate incidence of the duty as for recovery by the Crown. It followed, therefore, that North, J., in *in re Webber* (*cit.*), was wrong, and that *in re Maryon Wilson* had been rightly decided. In any event, Sir Robert Dundas had really made a testamentary disposition in undertaking to the marriage-contract trustees to make available so much money at his death, and that brought the case in terms under section 19 (1) of the Finance Act 1896. (2) On the question of the intention of the deed, the words "without any deduction" in *in re Maryon Wilson* (*cit.*) made it clear that in that case the deed meant the duty to be paid by the debtor, but there was no such clear language in the present deed—*In re Higgins*, 1885, 31 Ch. D. 142. The reason why the words "to make up" were added in the present deed was because it was uncertain what the stocks and shares would realise, but that had nothing to do with death duties. The following cases were also cited—*in re Countess of Orford*, [1896] 1 Ch. 257; *in re Gray*, [1896] 1 Ch. 620; *Berry* v. *Gaukroger*, [1903] 2 Ch. 116; *in re Hadley*, [1909] 1 Ch. 20.

Argued for the second parties—(1) Settlement estate duty ought to be paid by the first parties. The second parties did not maintain that *in re Maryon Wilson* (*cit.*) was wrongly decided, but only that an *obiter* of the Master of the Rolls in that case

was wrong. The Master of the Rolls had there decided a point which it was not necessary to decide, viz., whether settlement by will and settlement by deed were equivalent under the Finance Act 1896, sec. 19 (1). Section 5 of the Finance Act 1894 placed an additional duty on a particular kind of estate, but the Act treated settlement estate duty simply as another kind of estate duty, and the same rules applied to it, *mutatis mutandis*, and it was therefore payable by the executor. This view was supported by the decisions. *In re Webber* (*cit. sup.*) simply applied the reasoning of *in re Gray* (*cit. sup.*) to settlement estate duty in the case of testamentary settlement. Up to the date of the Finance Act 1896 it must be regarded as settled that this duty was only a further estate duty. If the executor, therefore, was to get rid of the burden he could only do so by section 19 (1) of the Finance Act 1896. But that section only dealt with settlements by will, and it was impossible to construe that section by reference to the remarks of the Master of the Rolls in *in re Webber* (*cit. sup.*), as including also settlement by deed. The whole purpose of the Finance Acts was to tax legatees and not creditors, and the second parties here were creditors. (2) On the question of intention, the obligation in the present case was totally different from the obligation to pay a certain sum of money. It was an obligation to pay over a sum depending on outside considerations. The intention of the deceased was to build up a beneficial trust fund for his son, and any deficit in the totals had to be made up by the trustees.

At advising—

LORD PRESIDENT—[*After the foregoing narrative of facts*]—Two questions have arisen between the executors and the marriage-contract trustees of Henry:—1st. On whom do the various duties primarily fall? 2nd. Is this incidence altered by the obligation of Sir Robert which binds him to pay £3750 more or less, so as to make up the sum of £30,000.

Although logically the latter question comes second, it will be convenient to take it first, or, in other words, to assume first that all the duties above narrated fell to be entirely borne by the recipients, *i.e.*, the marriage-contract trustees, and not by the residuary legatee under Sir Robert's will.

I am of opinion that upon a fair construction of the words used Sir Robert's obligations do not bind him to make good a total sum of £30,000 after all Government duties have been paid. I think the words are accounted for by the narrative I have already given. It seems to me that the parties were considering only the three sources from which the £30,000 was to be made up—first, the £20,000 hard cash; second, the share of the old marriage-contract funds apportioned to Henry and settled by him to the extent of £6250; and third, such balance as it was necessary to provide, keeping in view the fact that £6250 was not an exactly ascertained figure to make up the £30,000. I do not think the case falls within the considerations which are given effect to in *Maryon Wilson's* case ([1900], 1 Ch. 565), where a father had consented to pay to the trustees of his daughter's marriage settlement £25,000 "without any deduction," and it was held that his executors must bear the settlement estate duty payable in respect of that sum. The word "deductions" pointed, I think, to all Government duties. Here the expression is, in my judgment, *alio intuitu* altogether.

If this be so, parties are really agreed as to all the other taxes except one.

They agree that Sir Robert's executors must bear the estate duty on the £3750, and that Henry's marriage-contract trustees must bear estate duty on the £6250 and succession duty on both the £6250 and the £3750.

They do not agree as to which should bear settlement estate duty on the £3750. I am of opinion that this falls to be borne by Sir Robert's executors.

I am aware that in coming to this conclusion I am disagreeing not only with your Lordships, but also with the reasoning in the judgment of Lindley, M.R., in *Maryon Wilson's* case, and one must always be diffident of an opinion which is diametrically opposed to such high authority—I am not sure that I ought not to add the authority also of Rigby and Vaughan Williams, L.JJ., who concurred in the judgment. I say I am not sure, because they delivered no opinion, and the actual judgment rests, as I have already mentioned, on the expression "without deductions," and did not therefore actually require that an opinion should be pronounced on the question who would have had to bear the settlement duty had the words not been there. But as my own opinion is clear, I do not think I should be doing justice to the litigant before me if I bowed in silence to authority with which I did not agree. I may also add that my opinion is the same as that of North, J., pronounced in the earlier case of *in re Webber*, which was of course disapproved by Lindley, M.R., in *Maryon Wilson's* case.

I pause to say that so far as the facts are concerned there is on this point no difference between that case and the present.

Indeed, the question may be put generally thus—When a father becomes a party to the marriage settlement of a child and covenants to pay at his death a certain sum to the marriage-contract trustees, is it the father's executors or the marriage-contract trustees who have to bear the settlement estate duty?

Lord Lindley's argument is as follows—"The argument for the appellants, so far as it is based on the Finance Acts, is reducible to the following propositions—(1) That by the Act of 1894, sections 5 and 6, sub-section 2, the settlement estate duty is payable by the executors of the testator; (2) that the Finance Act does not say by whom the duty so payable is ultimately to be borne in a case like the present, section 8, sub-section 4, not applying; (3) that

consequently the duty must be borne by the residuary legatees. The first two of these propositions are correct, but the third is, in my opinion, erroneous, although it was adopted by North, J., in *in re Webber*, [1896] 1 Ch. 914. The executors pay the settlement estate duty as trustees for somebody, but as trustees for whom? Certainly not as trustees for the residuary legatees, who take no interest whatever in the fund in respect of which the settlement estate duty is payable. The executors pay that duty as trustees for those who are beneficially entitled to that fund, and upon plain principles of equity the executors are entitled to be repaid out of that fund what they have by law to pay in respect of it. In my opinion it lies upon the beneficiaries of that fund to show why this burden which thus falls upon them should be borne by somebody else. The settlement estate duty, although described and imposed as a further estate duty, is imposed, not on the general estate of the deceased, but on specific portions of it, and ought in common fairness to be borne by those who take those portions. To facilitate collection the executors have to pay it, but this I regard as mere machinery."

The flaw in the reasoning, to my mind, consists in the introduction of equitable considerations which, in my judgment, have nothing to do with the question.

It must be remembered that as between not only each other but also all other persons the marriage-contract trustees are creditors of the deceased, who bound himself in an onerous obligation, the consideration for which was the marriage. Had the deceased died insolvent the marriage-contract trustees would have ranked on his estate *pari passu* with all other onerous creditors. Accordingly the demand of the marriage-contract trustees as made is—Pay us x pounds which the deceased bound himself to pay us at his death.

Now it is true that for the purposes of the Finance Act the money so due is not allowed as a deduction. That is the result of section 7 (1), which provides—"In determining the value of an estate for the purpose of estate duty, allowance . . . shall not be made (*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest."

That, however, is dealing only with the matter of ascertaining the value of the deceased's estate on which duty is payable, and in no way touches the incidence of the duty. Lord Lindley indeed concedes this when he says that propositions (1) and (2) are correct. To my mind if these propositions are conceded everything is conceded. What is the answer to the demand for x pounds? I have had to pay duty, says the executor. To which the answer is conclusive—You have had to pay it because the statute made you pay it—what have I to do with that? The proper retort for the executor would be—And the same statute said I might deduct it from your share, but that retort is impossible if proposition (2) is correct.

To my mind the fallacy of the reasoning is apparent when the learned Lord deals with the third proposition. In the first place, I think the third proposition is inaccurately stated. The third proposition is not that consequently the duty must be borne by the residuary legatee, it is that consequently it must be borne by the person on whom the statute put it, viz., the executor, or, in other words, the deceased's estate. Of course where there is a residuary legatee it is his pocket which in the end will suffer, but that is only because he is a residuary as opposed to a special legatee, and on that account it is he who bears the duty. But that is a convenient, not an accurate, way of describing what really happens. Take the case where there is no residuary legatee, as, *e.g.*, where a testator directs his whole estate to be divided in equal parts between A, B, and C. The executor pays the duties and they do not fall on the residuary legatee, because there is none. The same fallacy lurks in the expression that follows. "The executors," says his Lordship, "pay the settlement estate duty as trustees for somebody, but as trustees for whom?" I do not think the executors pay the duty as trustees for anybody. They pay it because the Act of Parliament has made them pay it. In certain cases the statute provides that the executors may get back part of what has been paid from someone else, *e.g.* section 9 (4). But as to this duty the statute is admittedly silent (proposition (2)). Indeed if the "trustee" theory were correct I do not see why it would not embrace the estate duty just as much as the settlement estate duty. The residuary legatee "takes no interest whatever in the fund," which is given to a special legatee, or is paid over to the marriage-contract trustees as a debt. But no one doubts that in these cases he eventually bears the brunt of the estate duty, or that *in re Gray* ([1896] 1 Ch. 120) was rightly decided.

Of course, when one comes to equitable considerations in the business of legislation one can easily see why the residuary legatee, just because he is a residuary legatee, should be left to bear the brunt of the general estate duty, but should not be asked to bear the settlement estate duty, which is really exacted in respect of the enfranchisement for a period from estate duty of the settled fund in which the residuary legatee has no interest. To say that the testator had nothing to do with it is, I think, in a case like this to go too far. The testator knew when he bound himself that the money for which he bound himself was to be settled and was settled in the very deed to which he was a party (section 5 (1) (*b*)). But if the residuary legatee was not to bear the settlement estate duty it was for the Legislature to say so, and admittedly it did not say so in the Act of 1894 (proposition (2)). It did say so in 1896 (59

and 60 Vict. cap. 28, section 19), but in saying so it used a form of expression which does not apply to this case. According to Lord Lindley the Act of 1896 was unnecessary except to save time in appealing the judgment in *in re Webber*. I think that is a curious view. But it is immaterial whether it is right or wrong. The true meaning of a statute is *pro tempore* at least the meaning which the courts of law put upon it. When the statute of 1896 was passed, *in re Webber* held the field. The statute was passed to fill up the gap disclosed by *in re Webber*. It adopted a certain form of words which suited the particular gap in *in re Webber*, but did not suit other gaps analogous thereto. The result, says Lord Lindley, will be that if his ruling is not correct there will be an anomalous distinction between the effects of settlements made by will and settlements made by deed. That is so. It is not the first time that an amending statute has by its words not hit all possible forms of the evil it sought to amend. But that fact, if the words be explicit, does not invest the law courts with the function of amending legislators, as was said by their Lordships in the case of *Banknock Colliery Co.* (December 12, 1911, 49 S.L.R. 98) in the House of Lords a few weeks ago.

On the whole matter, therefore, I am of opinion that the first question of law in the case should be answered in the negative, and that the second question should be answered by saying that settlement estate duty on the £3750 falls to be paid by the first parties and succession duty by the second parties.

LORD KINNEAR—I agree with your Lordship on all points except as to the incidence of the settlement estate duty on the balance of £3750 required to make up the £30,000 provided by the trust-disposition of Sir Robert Dundas. I have found that question to be one of great difficulty, not only in itself, but more especially because I have been unable to agree upon it with your Lordship. But my difficulties have been finally resolved by the reasoning by the Master of the Rolls, afterwards Lord Lindley, in the case of *in re Maryon Wilson*. That is not a judgment which is binding on this Court, and an opinion on this particular point was not necessary for the decision of the case then before the Court of Appeal, but it is a judgment of very high authority, and I think that great weight ought to be attributed to it, as determining a very difficult question. I agree that the incidence of taxation is not to be determined by considerations of equity but by construction of the taxing enactment. But it does not necessarily follow that the consequent rights and liabilities of the persons affected are not to be determined by the settled principles of law and equity on those points on which the Act is silent; and I do not think that Lord Lindley referred to considerations of equity for any other purpose. I think the true ground of judgment is to be found where his Lordship says that the settlement estate duty is imposed, not on the general estate of the deceased, but on the settled portion of it, and I think we should be departing from the words of the statute if we imposed settlement estate duty on the general estate and not on the particular portion of it appointed by the statute. The particular portion of the estate is set apart in a very specific manner, which answers directly to the description of the subject on which settlement estate duty is imposed; for that duty is to be charged when property in respect of which estate duty is leviable has been settled by disposition and passes under that deed on the death of the deceased to some person not competent to dispose of it. When that happens the statute says that the property so settled shall be liable to settlement estate duty. Why should that tax fall upon any other part of the estate of the deceased? It is said that it must do so because it is the executor who pays it. But in doing so he is only performing an administrative duty incumbent upon him in executing the will of the deceased, and makes the payment on behalf of the persons ultimately liable to pay the duty. The argument to which Lord Lindley declined to give effect is that under the Act of 1894 settlement estate duty is to be paid by the executor, and as the Act does not say by whom it is ultimately to be paid that consequently the residuary legatee is to pay. I cannot see the consequence. No one doubts that the executor is liable in the first instance, but he is liable only as trustee, and he is entitled to relief from those upon whom ultimate liability for the tax falls. If he is not in express terms authorised to recoup himself by deduction from the settled property, just as little is he authorised to deduct the tax from any other part of the estate. He is paying it as a trustee. That expression may or may not be perfectly exact, but at least he pays only as administrator of the estate, is doing an administrative duty, and on plain principles of equity, as the Master of the Rolls said, he must be entitled to charge the payment on that part of the estate which is subject to the tax.

The question therefore comes to be, what is the estate subject to this tax? This question is not to be solved by answering that it is the estate of the testator. That is the assumption with which the question starts. The £3750 is as much a part of the estate as any other sum that comes into the hands of the executor. It is because the executor takes up the whole of the estate that he has to pay out this sum as well as the rest. But the sum is chargeable with duty only when set apart in accordance with the settlement for the benefit of particular persons and not of the residuary legatee. Each portion of the estate must be subject to the obligations of the testator, but when the will is to be carried out then, if the statute says that property settled in the terms of the Act itself is to be taxed, why is that tax to be laid upon some other portion of the testator's estate and not upon the portion thus settled?

That does not, of course, exhaust the question, because there may be no residue. The estate may be exhausted by special legacies, and if so there is nothing in the statute which will entitle the executor to deduct the tax from one or all of those. Or the estate may be insolvent, and in that case I can see no ground on which creditors in the position of the second parties could throw the burden of their tax on the competing creditors with whom, as the Lord President points out, they are entitled to rank. The opinion of North, J., would be conclusive if it were sound, because he decides that the burden of the settlement estate duty is thrown upon the executor in respect of the residue of the estate. From that proposition I respectfully differ—I think it is thrown upon him in respect of a particular part of the estate, the whole of which is in his hands in his capacity of executor.

I am not disturbed by the provisions of the Act of 1896. I do not think it is a relevant inquiry whether that Act was a recognition by the Legislature of the soundness of the reasoning of North, J., or, as Lord Lindley thought, was passed in order to correct a mistake and save further litigation. I cannot say that I think it is doing justice to Lord Lindley to say that he thought it was introduced in order to prevent an appeal. The Crown was not a party to the case and could not appeal. But the suggestion is not improbable, that if a decision which could not be regarded as final were either erroneous or doubtful it must give rise to litigation, and therefore it was thought that the question should be cleared by Act of Parliament. His suggestion seems to me worthy of consideration, that since litigation had been the main result of the Act it had seemed better to put matters on a clearer footing in a later statute. I can hardly assent to the opinion that the Act was intended to be an amendment of the existing law as expounded by North, J. The existing law was what the statute of 1894 made it, and it was for the Courts to interpret that Act. But a single decision by a single Judge does not make law, and the weight which would otherwise have been due to Mr Justice North's opinion is displaced because his judgment is distinctly overruled by the Court of Appeal. The question is, what did the Act of 1894 really provide? and as to that I acquiesce in the reasoning and I think we should follow the judgment of Lord Lindley.

The result is that if the Act of 1896 is to be held to rule cases to which it applies, that is, cases of settlement by will, and if Lord Lindley was wrong in his construction of the Act of 1894, there would undoubtedly be an anomaly; in the case of a settlement by will the settlement estate duty would be borne by the property settled, and in the case of a settlement by deed it would be borne by the general estate. This seems to me to be an unreasonable result which we ought not to accept unless we are compelled to do so by the plain terms of the statutes.

LORD MACKENZIE—I concur with your Lordship in the Chair except as regards settlement estate duty. Upon that question I agree with the opinion just expressed by Lord Kinnear. I am of opinion that the executors of the deceased Sir Robert Dundas, who have paid settlement estate duty upon the sum of £3750 mentioned in the case, are entitled to be repaid the amount out of the settled fund.

The benefit in respect of which settlement duty is paid is one which enures solely to those who take under the settlement. The clauses referred to in the Finance Act of 1894 do not, in my opinion, saddle the estate of the deceased with the ultimate liability for it. No doubt section 5 (*a*) calls settlement estate duty a further estate duty. But it is not a mere addition to the estate duty. It is imposed on the settled property because it is settled. It is of the nature of a composition which enfranchises those who take under this settlement until the death of one competent to dispose of the settled property at the date of his death, or who had been competent at any time during the continuance of the settlement. This leads to the conclusion that even if by the provisions of the Finance Act it is not expressly provided that the executor who pays in the first instance shall be repaid out of the specific fund, this is to be inferred from the nature of the duty itself. It is said that settlement estate duty must be borne ultimately by the person on whom the statute put the burden, viz., the executor, *i.e.*, the deceased's estate. The statute no doubt says, as in a question with the tax collector, that the person to pay is the executor. It is natural there should be this provision for the convenience of collection. The whole estate of the deceased is embraced in the administrative title of the executor, but he takes that estate as trustee merely. The enactment that he is to pay does not determine the question of ultimate liability. The burden is not the direct consequence of the statute, but is a result which follows from the act of one who may be a stranger to the estate. It was argued that the deceased contracted to pay £3750 or such sum as was necessary to make up £30,000, and that the result of giving effect to the contention of the first parties would be to enable his executors to fulfil their obligations by paying a lesser sum and accounting for the balance to the revenue in name of settlement estate duty. This argument, however, is double-edged. Why should the executors of the deceased, whose debt was limited to a definite sum, have their debt increased in amount? Again it is replied, this is done by the statute. With deference, it appears to me that the debt is increased by an act of the creditor which is solely for his own benefit or for the benefit of those who come after him.

The argument put forward by the second parties here was maintained as regards legacies and residue settled by a testator's will in the case of *in re Webber*, 1896, 1 Ch. 914. North, J., held that the whole of the duties

must be borne not by the settled legacies or shares but by the general residue. The immediate result of this judgment was that section 19 of the Finance Act 1896 (59 and 60 Vict. cap. 28) was passed, which provides (1)—". . . (*quotes* v. *sup.*) . . ."

This section does not apply to the case in hand, for the settlement is not contained in the will of the deceased. The result of holding that the settlement estate duty is to be borne by the general residue is that, as the law now stands, if the settlement is by the will of a Scotch testator settlement estate duty is payable out of the settled legacy or property in exoneration of the rest of the deceased's estate. If, on the other hand, the settlement is by some other disposition, the residuary legatees of the deceased are to bear the burden of the settlement estate duty. If settlement estate duty is to be a burden on the general residue here, then not only will there be a difference in Scotland between settlement by will of the deceased and settlement by other disposition, but the effect of the Finance Act of 1894 in this respect will be different in Scotland and in England. The reasoning of Lindley, M.R., *in re Maryon Wilson*, 1900, 1 Ch. 565, involves this. No doubt the judgment in that case was that the settlement estate duty was to be paid out of the residuary estate, but this was because there was a covenant by the father with the trustees of his daughter's marriage settlement that his executors should within six months after his death pay to them the sum of £25,000 "without any deduction," to be held by them upon the trusts of the settlement. Before deciding that the effect of these words was to free the settled fund from liability for the settlement estate duty, the opinion was expressed by the Master of the Rolls that but for these words the settled fund would have had to bear the duty. I think it must be held that Rigby and Vaughan Williams, LL.J. (who concurred in the judgment) concurred in this part of it. The Court of Appeal in that case held that they were not compelled by the language of the statutes to reach what was there described as an utterly irrational conclusion, viz., that if a settlement is made by will the settlement estate duty is to be borne by the settled property, whereas if the settlement is made by deed that duty is not to be borne by that property at all.

With all deference I take the same view. I am therefore of opinion that settlement estate duty on the balance of £3750, more or less, required to make up the said sum of £30,000, should be paid by the second parties.

LORD JOHNSTON was present at the advising, but delivered no opinion, not having heard the case.

The Court answered the first question of law in the case in the negative, and found in answer to the second question that the duties mentioned therein fell to be paid by the second parties.

Counsel for the first parties moved that the first parties be found entitled to the expenses of the Special Case. Counsel for the second parties moved that the expenses should come out of the testamentary estate of Sir Robert Dundas.

LORD PRESIDENT—This is a case in which the expenses must follow the result, there being no arrangement between the parties. We are accustomed in many cases to give expenses out of the estate when the difficulty has been due to some act of the testator. But here that is not so. The question is as to the true meaning of an Act of Parliament. It must always be assumed that parties know the true meaning of Acts of Parliament, and if they go wrong in their construction I fear they must bear the consequences.

LORD KINNEAR and LORD MACKENZIE concurred.

The Court found the second parties liable in expenses.

Counsel for the First Parties—D.-F. Dickson, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Second Parties—Murray, K.C. — Skelton. Agents — Strathearn & Blair, W.S.

Tuesday, February 6.

SECOND DIVISION.

[Sheriff Court at Paisley.

PATRICK *v.* WHYTE.

Bill of Exchange—Personal Bar—Waiver of Statutory Requirement — Essential Error—Presentment, Dishonour, Notice of Dishonour.

Circumstances in which *held* that the endorser of a bill of exchange had not waived her right to found upon the non-fulfilment of the statutory requirement of presentment of the bill and notice of dishonour, and in respect thereof was free; although an agent on her behalf had sought delay, proposed to compromise, and made a payment to account.

On 24th September 1909 Joseph Patrick, chartered accountant, 203 West George Street, Glasgow, judicial factor on the trust estate of the deceased Dugald Alexander Mactavish, writer in Johnstone, *pursuer*, brought an action in the Sheriff Court at Paisley against (1) Matthew Whyte, residing at Overton, Johnstone; (2) Rev. Quintin Whyte, Inch, Stranraer, and others, trustees and executors of the late Mrs Robina Dick or Michael, who resided in High Street, Johnstone; and (3) Ninian Glen, chartered accountant, 107 St Vincent Street, Glasgow, trustee on the sequestrated estates of Alexander Whyte, grocer, Johnstone, *defenders*, in which the pursuer claimed payment of the sum of