because the answer to the fourth question in the proposal form contained a material misstatement of a circumstance by the insured material to assessing the premium under the policy, and *quoad ultra* adhered to the Lord Ordinary's interlocutor.

Counsel for the Pursuers and Reclaimers — Mackay, K.C. — Gentles — Jamieson. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Defenders and Respondents—Christie, K.C.—Ingram. Agents—Allan Lowson & Hood, S.S.C.

Saturday, March 19.

FIRST DIVISION.

FLEMING *v.* FLEMING.

Succession — Will — Construction—Bequest to Younger Children Equally among them of Annuity Secured on Lands — Permanent or Life Annuity—Accretion.

In a mutual trust-disposition and settlement by spouses the trusters, after disponing the lands to the two elder children who should survive the longest liver of the spouses declared that said disposition was with and under the real and preferable burden of a fixed yearly sum, payable to such children only as should not succeed to the lands, "equally between or among them," with power, however, to the heir in possession of the lands to disburden the same of the said yearly payment by paying a fixed capital sum to the parties in right of the yearly payment at the time of redemption. At the date when the succession opened there were three younger children entitled to share in the annual payment, and to each of these the trustees proceeded to pay one-third of the annual sum. Thereafter, following upon the death of one of the three children, questions arose as to the meaning and effect of the trust-disposition. *Held* (Lord Mackenzie *diss.*) (1) that failing redemption by an heir in possession, the yearly sum was a permanent burden on the lands, and (2) that the share of the yearly sum enjoyed by the deceasing child did not accresce to the survivors but passed to the child's executors.

Opinion per Lord Skerrington that there is no *prima facie* presumption in the law of Scotland that a testamentary gift of an annuity or rent-charge is for the life only of the annuitant.

The Reverend Archibald Fleming, D.D., of Inchyra, in the county of Perth, and others, being his brothers and sister and the executors of a deceased sister, presented a Special Case for the opinion of the Court.

The circumstances of the case and the contentions of the parties, as narrated in the opinion (*infra*) of Lord Mackenzie, were as follows — "The questions in this Special Case arise under the mutual disposition and settlement by the Rev. Archibald Fleming and his wife dated in 1872, with a codicil dated in 1892. He died in 1900, and his wife in 1910. The settlement proceeds on the narrative that they considered it to be a duty incumbent on them for the welfare of their family to settle their affairs in the case of their deaths. They then disponed the estate of Inchyra (which we were informed was the property of the wife) 'to and in favour of Archibald Fleming, our eldest son, and the heirs-male of his body, whom failing to Hamilton Fleming, our second son, and the heirs-male of his body, whom failing to Maxwell Fleming, our third son, and the heirs-male of his body, whom failing to any other son or sons that may be procreated of our present marriage in their order, and the heirs-male of their bodies, whom failing to Isabella Fleming, our daughter, and the heirs-male of her body, whom failing to any other daughter or daughters that may be procreated of our present marriage in their order, and the heirs-male of their bodies'; and then follows a destination to heirs-female and the exclusion of heirs-portioners, the clauses being suggestive of those appropriate to a deed of entail. The clause which follows is the one which gives rise to the present controversy — 'But declaring always, as it is hereby expressly provided and declared, that the foresaid lands and others are disponed with and under the real and preferable burden of a yearly sum of £250 sterling, payable to the said Isabella Fleming and Maxwell Fleming, and to any other child or children that may be procreated of our present marriage, but to such of them only as shall not succeed to the said lands of Inchyra or the lands of Hamilton House after disponed equally between or among them, and that at two terms in the year, Whitsunday and Martinmas, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas that shall occur after the death of the longest liver of us for the period from the date of the death of the longest liver of us to that term, and the next term's payment thereof at the term of Whitsunday or Martinmas following for the half year preceding, and so forth thereafter, with a fifth part more of liquidate penalty in case of failure in punctual payment, and interest at the rate of five pounds per centum per annum from the said respective terms of payment till paid; but declaring always that it shall be in the power of the heir in possession of said lands to free and disburden the same of said yearly payment by making payment of a capital sum of six thousand pounds sterling to the parties in right of said yearly payment at the time.' There is in the settlement a disposition of the lands of Hamilton House to and in favour of Hamilton Fleming (the second son) and the heirs-male of his body, with ulterior destinations in terms similar to those above quoted in the case of Inchyra, with a declaration that the children should only succeed to the lands of Hamilton House in the event of them and their heirs not succeeding to Inchyra 'if there shall be more than one heir of our bodies alive at the

time, it being our wish and desire that if more than one heir of our bodies shall be in life at the time the succession opens the said lands of Inchyra and the said lands of Hamilton House and others shall never at one time be in the possession of the same person.' There was in the settlement a reservation of a liferent to the grantors and the survivor. The spouses executed a codicil in 1892, on the narrative that Inchyra had reduced in value, which declared 'that the real and preferable burden of the yearly sum of £250 sterling, redeemable by payment of a capital sum of £6000 sterling, under which the lands of Inchyra are thereby disponed, shall be reduced to a yearly sum of £150 sterling, redeemable as therein provided by payment of a capital sum of £3000 sterling.' The parties to this case are—(1) The Rev. Archibald Fleming, D.D., the eldest son, who succeeded to Inchyra, the first party; (2) Hamilton Fleming, who succeeded to Hamilton House, the second party; (3) the executors of Mrs Clare Fleming or Reuther, who died in 1920—she was a daughter of the settlors who was born after the settlement of 1872—the third parties; (4) Mrs Isabella Fleming or Macarthur and Maxwell Fleming, the fourth parties. The contention of the first party is that under the bequest of a yearly sum of £150 each of the three children was entitled to £50 a-year during their respective lifetimes, and that upon the death of each child the burden of the annual payment was *pro tanto* discharged. The second party (who seems to have no *locus standi* in the case) concurs in this. The third parties contend that the right conferred upon each child not succeeding to the lands therein disponed, to an equal share of the annual payment, does not terminate upon his or her death, but that the annual payment was effectually constituted a permanent burden upon the lands and estate of Inchyra, unless and until redeemed by the heir in possession for the time being in the manner therein provided, and that they are now entitled to payment of Mrs Reuther's share of the said yearly sum or of any sum paid in redemption thereof. The fourth parties (1) put forward the same contention as the third parties, and (2) further contend, on the assumption that the yearly payment is not perpetual, that it is only upon the death of the last survivor of the original beneficiaries that the annual payment terminates, and that on the death of any of the beneficiaries the sum of £150 is payable to the survivors or survivor of them, and that accordingly the sum of £150 is now payable to the fourth parties equally."

The *questions of law* for the opinion of the Court were—"1. (*a*) Is the yearly sum of £150 provided by the said mutual disposition and settlement and codicil a permanent burden on the lands of Inchyra unless and until redeemed by the first party or the heir in possession of the said lands for the time being, as therein provided? and (*b*) are the third parties now entitled to payment of the said Mrs Reuther's share of the said yearly sum or of any sum paid in redemption thereof? or 2. Does the said real burden of £150 per annum cease and determine to the extent of £50 per annum upon the death of each of the three beneficiaries originally entitled thereto? or 3. (*a*) Does the said real burden of £150 per annum cease and determine only upon the death of the last survivor of the three beneficiaries originally entitled thereto? and (*b*) does the share of each beneficiary upon his or her death accresce to the survivor or survivors? 4. Can the parties in right of the said yearly payments of £150 or any of them compel the first party or the heir in possession of the said lands of Inchyra for the time being to redeem the same or their respective shares thereof at any time by payment as provided in the said mutual settlement?"

Argued for the first and second parties—There was a presumption in law for which there was authority in England that a gift of an annuity without mention of heirs or executors or representatives was a gift for the beneficiary's lifetime only, unless a contrary intention was clearly expressed—*In re Morgan*, [1893] 3 Ch. 222, *per* Lindley, L.J., at 228; *Blight* v. *Hartnoll*, L.R., 19 Ch. D. 294; *Lett* v. *Randall*, (1860) 2 de G. F. & J. 388, *per* Campbell, L.C., at 392; *in re Evans*, (1908) 99 L.T. 271; Jarman on Wills, p. 1138; Roper, Law of Legacies, vol. ii, p. 1480; Williams on Executors, 11th ed., vol. ii, p. 947. The case of *Mansergh* v. *Campbell*, 3 de G. & J. 232, was distinguished in respect that the testator's intention was there clearly indicated. Here the omission to mention the heirs of the annuitants must be taken as intentional, more especially when contrasted with the careful provision for the succession in the lands. With regard to the questions of accretion, a bequest such as this, of an annual sum to two or more persons equally among them, meant a life annuity of his share to each without accretion to the survivors—*Erskine* v. *Wright*, 1850, 8 D. 863; *Haldane's Trustees* v. *Murphy*, 1881, 9 R. 269, 19 S.L.R. 217; *Paxton's Trustees* v. *Cowie*, 1886, 13 R. 1191, Lord President Inglis at 1197, 23 S.L.R. 830; *Stobie's Trustees*, 1888, 15 R. 340, Lord President Inglis at 342, 25 S.L.R. 250; Stair iii, 8, 27; M'Laren on Wills, 3rd ed., vol. i, p. 634.

Argued for the third parties—At the date when the succession opened each of the three younger children acquired a vested right to a permanent annuity of one-third of the annual sum, subject only to the right of redemption by the heir in possession of the lands. These annuities being vested rights in each of the children, it followed that there could be no accretion. The presumption for a life annuity upon which the first and second parties founded had never been recognised in Scots law. It was, in any case, merely an inference of a testator's intention derived from the form in which the bequest was made. In this case there was a gift of annuity, not to a person named but to a class. The testator's intention evidently was to make compensating provision for those children *per stirpes* who did not succeed to the lands.

The terms of the redemption clause were conclusive as to the permanency of the annuities. The amount of the redemption value was fixed once and for all instead of being made subject to progressive reduction as would be the case with life annuities; furthermore, it was made payable "to the parties in right of said yearly payment at the time." Counsel referred to the following cases—*Blewitt* v. *Roberts*, 1841, Cr. & Ph. 274, at 282; *in re Morgan*.

Argued for the fourth parties — These parties limited their argument to the contention that the annuities, assuming them to be for life only, constituted a class gift to the younger children. Accordingly the case did not fall within the rule of *Paxton's Trustees* v. *Cowie* but was an instance of a joint bequest involving accretion to the survivors of the joint beneficiaries—*Mackenzie* v. *Dickson*, 1840, 2 D. 833; *Muir's Trustees* v. *Muir*, 1889, 16 R. 954, 26 S.L.R. 672; *Robert's Trustees* v. *Roberts*, 1903, 5 F. 541, 40 S.L.R. 387; *Bartholomew's Trustees* v. *Bartholomew*, 1906, 6 F. 322, 41 S.L.R. 259; *Ritchie's Trustees* v. *Macdonald*, 1915 S.C. 501, 52 S.L.R. 373. The cases of *Haldane's Trustees* and *Stobie's Trustees* were distinguished in respect that they were both cases of annuities to persons *nominatim*.

At advising—

LORD SKERRINGTON — The natural and grammatical reading as it seems to me of the *mortis causa* disposition and settlement and relative codicil is that the "yearly sum" of £150 thereby created a "real and preferable burden" upon the lands of Inchyra, was intended to remain a burden, and to continue to be paid half-yearly in equal moieties until the owner of the lands should choose to free and disburden them by paying a capital sum of £3000 "to the parties in right of said yearly payment at the time." This construction is consistent with what I regard as the plain object and intention of the testators, which was to secure to their younger children out of the estate of Inchyra a capital provision of £3000 payable at the time which should best suit the convenience of their eldest son and his heirs as the owners of that estate. It was argued to us on the other hand that the testators intended to provide for their younger children by creating a life annuity of £150 which should continue payable so long as any of the younger children lived, and which should accresce to the survivors but terminate with the life of the longest liver. The notion that the Rev. Archibald Fleming and his spouse contemplated the establishment of such a tontine is improbable *a priori* and derives no support from the terms of their testamentary writings. It is also open to the objection that it capriciously makes the beneficial interests of the younger children vary according as each of them should happen to predecease or to survive the moment at which their elder brother exercised his right of redemption. An alternative theory which was argued to us was that the testators intended to constitute in favour of each of their younger children an independent life annuity of an equal share of the yearly sum of £150, with the result that the real burden on the lands of Inchyra would be proportionately diminished on the death of each child. There is nothing in the will and codicil to support this theory, and it is contradicted by the redemption clause, which assumes a yearly payment of a fixed and not of a diminishing amount. Moreover, the fixed and unvarying amount of the redemption money militates against the theory of a life annuity in either of the alternative forms which I have mentioned. Lastly, although in special circumstances and for special reasons a parent's provision for a child often takes the form of a life annuity, such a provision would be unusual in the case of unborn children, of whose circumstances and requirements the testator could have no knowledge.

As regards the persons entitled to the benefit of the annuity, the provision was a class gift in favour of the younger children already born and that might thereafter be procreated of the marriage of the Rev. Archibald Fleming and his wife. The annuity did not begin to accrue due until the death of the longest liver of the spouses, and accordingly the share of the annuity destined to a younger child who predeceased that date would accresce to the surviving members of the class, unless indeed the issue of the predeceaser could establish that the *conditio si sine liberis* applied to their case. There would, however, be no further room for accretion, as each child's share of the annuity would on his death after that date fall to his heirs failing assignees *inter vivos* or *mortis causa*. We were referred to Lord M'Laren's observations in the case of *Bartholomew's Trustees* v. *Bartholomew* (1904, 6 F. 322, at p. 325), but they apply to a joint annuity in which each annuitant's interest terminated on her death or marriage, and not to an annuity given for a definite period or in perpetuity. The observations of Lord Deas in the case of *Hill* v. *Hill's Tutors* (1866, 5 Macph. 12, at p. 17) are more applicable to the present case, and they meet the objection that the testators did not expressly direct that the yearly payment should be continued to the heirs of the annuitants after their respective deaths.

No authority was cited in favour of the proposition that there exists in Scotland, as there is said to exist in England, a *prima facie* presumption that a testamentary gift of an annuity or rent-charge expressed in indefinite terms as to its duration ought to be construed to be for the life only of the annuitant or creditor. I am prepared to negative the existence of any such general presumption, though, of course, it is easy to figure particular circumstances where the natural inference would be that nothing more than a life pension was contemplated by the testator. Again, in certain cases there would be great force in the observation of Lindley, L.J., that if a testator meant an annuity to last for ever he would give his "money in another shape"—*In re Morgan*, [1893] 3 Ch. 222, at p. 229. This observation, however, when applied to the circumstances of the present case is really

in favour of the conclusion at which I have arrived. The "shape" of a redeemable annuity was chosen for the convenience of the eldest son, and not in order to deprive the younger children of the capital sum which, as I think, their parents intended them to receive. A testator's intention in regard to the duration of an annuity must in my opinion be ascertained in each particular case by applying the ordinary methods of construction unhampered by any legal presumptions.

LORD CULLEN—I do not think it necessary to express any opinion on the question whether in the case of a simple gift by will of an annuity to A, without duration specified, there is or is not a presumption that the annuity is for the life merely. Here we have to deal with a special kind of provision. It is a provision to the younger children of the marriage in the form of a real burden allotted to them out of the total value of heritage which is disponed in property to the heir or eldest son, and it has this special feature that the charge thus imposed on the interest taken by the heir is, in the option of the heir and his successors, to assume the form either of a continuing annual payment or of a single capital payment by way of redemption. Now while the payment of the capital sum is optional to the heir and his successors, I think that the way in which this capital payment is conditioned by the terms of the deed is very material to the question whether the continuing annual payment constituted a real burden was intended to be a permanent charge or to be for life merely. Now in the first place it is to be noticed that the capital sum which "the heir in possession" has the option to pay in redemption of the yearly payment is of fixed amount, no matter at what period it may be paid. This is not appropriate to the conception of life annuities to the younger children, inasmuch as the capital values of such annuities would steadily diminish from the period when they began to run. It is on the other hand quite appropriate to the case of perpetual yearly payments not subject to such progressive diminution in capital value. In the second place, the amount of the redemption money, if and when paid by the heir in possession, is divisible equally among the younger children. No other mode of division is directed. This, again, is not appropriate to the case of life annuities, seeing that the capital values of such annuities would vary according to the ages of the respective younger children in right of them. It is, on the other hand, quite appropriate to the case of perpetual yearly payments, where no such differentiation of capital values would enter in.

In view of these features of the redemption provision I construe the deed as intended to create a permanent charge of yearly payments under the real burden.

LORD MACKENZIE—[*After the narrative quoted supra*]—Upon the question whether the intention was to create a perpetual burden or only to give a life interest, the clauses of the settlement appear to me to point to the latter being the true construction. The object of the bequest was to create a provision in favour of the younger children. Although there is careful provision in the destinations of both Inchyra and Hamilton House with regard to heirs, there is no mention of the heirs, executors, or assignees of Isabella Fleming or Maxwell Fleming, or the child or children who might be procreated after the date of the settlement. This points to the granters' intention having been to benefit only their immediate issue. The provision of a yearly sum may fairly be taken as the same as the provision of an annuity. If the term used had been "annuity," the natural meaning of that term, occurring in such a deed as we are here dealing with, would be to construe it as equivalent to a liferent annuity.

Although there is apparently no authority on the point in Scotland, there is in England. We were referred to several passages in the textwriters. In the case of *In re Morgan* ([1893] 3 Ch. 222), Lindley, L.J., said—"I do not think the law is really open to much doubt; the application of it is the difficulty. I will read from the decision of Mr Justice Fry, as he then was, in *Blight* v. *Hartnoll*, what I take the law to be. He says (19 Ch. D. 294)—'As a general rule there can be no doubt that the gift of an annuity to A is a gift of the annuity during the life of A, and nothing more.' That seems to be uncommonly good sense. If I give a person an annuity I do not mean that it is to last for ever. If I meant it to last for ever I should give my money in another shape." Lindley, L.J., then goes on to point out that if the annuity is given not only to the person, but afterwards to others, in language which shows there is to be no end of it, of course it is a perpetual annuity.

The observations of Lord Chelmsford in *Mansergh* v. *Campbell* (3 De Gex & Jones 232) proceed on a construction of the will which involved the duration of the bequest beyond the lifetime of one of the legatees.

The general rule depends not upon any technicality of English conveyancing but upon the proper construction of the particular deed.

As against the view that what was intended here was a life interest the third parties founded on the redemption clause. The fact that the redemption money was fixed once and for all, although as time went on the life interests diminished in value, and might be extinguished by death, was pointed to as an indication that the payment was of the nature of a perpetual real burden. This argument would have been conclusive if there had been an obligation on the proprietor of Inchyra to redeem. But that is not so. There is an option only, which he was free to exercise or not as he pleased. I cannot take the view that the testator intended, by a clause which has the object of giving a privilege to the heir in possession, to impose upon him a burden which the words in the earlier part of the deed do not naturally involve. The language of the redemption clause, which provides that the capital sum is to be paid

to the parties in right of the yearly payment "at the time," is explainable on the ground that it was at the date of the settlement uncertain who would compose the class. It is not possible to draw any conclusion from the relation the redemption money bears to the annual payments, for the necessary data are not ascertained and would involve actuarial calculations.

I am unable to take the view that the redemption clause requires the Court to construe the yearly payment as being other than a liferent annuity.

There remains the question whether on the death of Mrs Reuther there was accretion of her share of the yearly sum to the fourth parties. In my opinion there was. This is the case of a bequest to a class, and therefore the rule of *Paxton's Trustees* does not apply. In *Muir's Trustees* (16 R. 954) the Lord President (Inglis) explained that there is no room for accretion when the persons to whom the legacy is left are named or sufficiently described for identification. This is the rule of *Paxton's* case. But the Lord President went on to point out that this rule cannot apply to a class of persons of unascertained number, which is the case we have here. It makes no difference that the bequest is one in liferent, for, as was pointed out by Lord M'Laren in the case of *Bartholomew's Trustees* (6 F. 322), this is the equivalent of a bequest of a series of half-yearly payments, and the members of the class who are entitled to the benefit of it must be determined at the period at which each half-yearly payment falls due.

I am accordingly of opinion that the questions should be answered as follows—(1) (*a*) and (*b*) in the negative; (2) in the negative; (3) (*a*) and (*b*) in the affirmative; (4) this, the parties agreed, should be answered in the negative.

The LORD PRESIDENT did not hear the case.

The Court answered the first question of law in both its branches in the affirmative, and questions two, three, and (of consent of parties) four, in the negative.

Counsel for First and Second Parties—Dean of Faculty (Constable, K.C.)—King Murray. Agents — Hamilton, Kinnear, & Beatson, W.S.

Counsel for Third Parties — Cooper. Agents—W. W. Learmonth, Solicitor.

Counsel for Fourth Parties—R. C. Henderson. Agent—Harry H. Macbean, W.S.

VALUATION APPEAL COURT.

Saturday, February 5.

(Before Lord Salvesen, Lord Cullen, and Lord Hunter.)

NAISMITH *v.* ASSESSOR FOR RENFREW.

Valuation Cases—Value—House in Occupation of Owners — Flat Rate Increase in Value—Evidence of Value—Common Knowledge—Onus of Proof in the Case of Houses with a Pre-War Rent of Less than £30 — Increase of Rent and Mortgage Interest Restrictions Act 1920 (10 *and* 11 *Geo. V, cap.* 17).

The occupying-owner of a house, the pre-war rent of which was under £30, appealed against an increase of 20 per cent. on its value made by the Valuation Committee. The increase in value was made in accordance with a resolution that a general increase of 20 per cent. should be applied in the case of all owner-occupiers irrespective of whether the subjects were houses, shops, public works, or public buildings, excepting the case of schools and churches, which were fixed at 10 per cent. No evidence was led by the assessor, and in view of this none was led by the appellant. The Court (*diss.* Lord Cullen) *refused* the appeal on the ground, *per* Lord Salvesen, that the increase in value of houses of a standard rent of less than £30 was matter of common knowledge upon which the assessor and the Committee were entitled to proceed; and *per* Lord Hunter, on the ground that the general rise in the letting value of house property was a matter of general knowledge, and imposed upon the appellant the onus of proving that the subjects had not participated in the general rise of values.

M'GEORGE *v.* ASSESSOR FOR RENFREW.

STEWART *v.* ASSESSOR FOR RENFREW.

KERR *v.* ASSESSOR FOR RENFREW.

CLIFTON & BAIRD *v.* ASSESSOR FOR RENFREW.

Valuation Cases—Value—Villa Property and Works in Occupation of Owners—Flat Rate Increase in Value—Proof of Value—Onus—Common Knowledge—No Evidence Led by Assessor.

The occupying owners of (*a*) certain villas which had, prior to the valuation complained of, been valued at £160, £130, and £80 respectively, and (*b*) certain engineering works valued at £296, appealed against an increase of 20 per cent. made by the Valuation Committee in accordance with a flat rate scheme of increase. No evidence was led by the assessor as to the increase in value of the subjects, but evidence was led by the owners, or facts were admitted, which showed that the rents of similar