JULY 7, 1860.

The Right Hon. ALEXANDER FRASER BARON SALTOUN, *Appellant, v.* HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND, *Respondent.*

Succession Duty Act, 16 and 17 Vict. c. 51—Entail—Clause—Construction—Predecessor.

HELD (reversing judgment), *That, under the Succession Duty Act,* 16 *and* 17 *Vict. c.* 51, *the* predecessor *of the heir of entail in possession was the maker of the tailzie, and not the immediately preceding heir, and as the former was grandmother, and the latter was uncle, the duty of one per cent. only was due from the heir in possession.*[1]

In 1846, the Right Honourable Marjory Lady Saltoun, who died in 1851, executed a deed of tailzie of the lands of Ness Castle and others, the destination whereof was "to and in favour of the Right Honourable Alexander George, now Lord Saltoun, my only surviving son, and to the heirs of his body; whom failing, to Alexander Fraser, Esquire (the defender), captain in Her Majesty's 28th Regiment of Foot, presently in the East Indies, eldest son of my deceased son the Honourable William Fraser, sometime merchant in London, and the heirs of his body;" whom failing, to other heirs.

Alexander George Lord Saltoun, named in the deed, was infeft on 23d November 1846. He died on 18th August 1853, without issue, and the defender, Alexander Baron Saltoun, was thereafter served as "nearest and lawful heir of tailzie and provision in special to the said deceased Alexander George Fraser, Lord Saltoun," in the lands, conform to decree of service, dated 19th June 1854, and was infeft thereon upon 29th June 1855.

The Succession Duty Act, 16 and 17 Vict. c. 51, § 2, provides that,—"Every past or future disposition of property, by reason whereof any person has, or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution of law of any beneficial interest in property, or the income thereof upon the death of any person dying after the time appointed for the commencement of this act to any other person in possession or expectancy, shall be deemed to have conferred, or to confer, on the person entitled by reason of such disposition or devolution, a succession; and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other persons from whom the interest of the successor is or shall be derived."

Sect. 10th of the act fixes the duty at one per cent. where the successor is the lineal issue of the predecessor, and at three per cent. where the successor is the descendant of a brother of the predecessor.

The Crown claimed succession duty upon the defender's succession, at the rate of three per cent., according to his relationship to Alexander George Baron Saltoun, on the ground that the latter had been feudally vested in the fee of the lands under the entail; and, that the defender having made up titles to him by being served as his nearest and lawful heir of tailzie and provision, and having had himself infeft upon the service, Alexander George Fraser was the ancestor's predecessor, from whom the interest of the defender was derived.

The defender maintained, that the entailer was the predecessor of all the heirs taking under the entail; and therefore, that, as he was lineal issue of the entailer, he was only liable for duty at the rate of one per cent. Heirs of entail, he maintained, acquired no right from one another, as they neither gave to, nor took anything from, one another. Although they served as heirs to one another under the entail, it was to take up a right conferred on them by the entailer, and the provisions of the entail expressly excluded them from making up a title in any other manner. They could obtain no right to the lands, therefore, but by virtue of the disposition contained in the entail, and as that was granted by the entailer, their title consequently was derived from Lady Saltoun. The party to whom each heir served gave, and could give, them nothing—it was the entailer, through the entail, from whom their right was derived.

The Court of Session held, that the "predecessor" was the heir last seized, and that the duty was determined by the relationship between him and the heir who succeeded.

[1] See previous reports 21 D. 124; 31 Sc. Jur. 76. S. C. 3 Macq. Ap. 659; 32 Sc. Jur. 641.

Lord Saltoun appealed, maintaining, in his case, that the judgment of the Court of Session should be reversed, because, according to the sound construction of the statute, the late Lady Saltoun was the predecessor of the appellant, who took as substitute heir of entail under the deed of entail executed by her as disponer, and was therefore liable only in the duty of one per cent. on the amount of the succession, as being the lineal descendant of the entailer.

Rolt Q.C., *Anderson* Q.C., and *Tayler*, for the appellant.—The decision of the Court below was wrong, inasmuch as it was held, that Lady Saltoun, the maker of this entail, was not the predecessor of the appellant. The appellant was entitled to take this estate by virtue solely of the deed of entail made by Lady Saltoun in 1846, and by virtue of nothing else. The uncle of the appellant, who was the institute and preceding heir of entail, could neither give nor take away the estate as far as he himself was concerned. It was not by inheritance that the appellant took the estate from the preceding heir. It is no doubt the theory of Scotch law, that each heir of entail is fiar of the estate, subject to the restrictions put upon him by the deed, and it is the usual form for each heir to be served heir to the heir preceding him. But, that is a mere technicality; and the substance of the thing is, that each heir takes his succession from the maker, and is for all practical purposes a liferenter of the estate. The substance of the thing must be looked to, especially as this is an imperial statute passed for the express purpose of enacting a general rule capable of adapting itself as nearly as possible in the same way to classes occupying analogous positions under discordant laws. The legislature is not to be taken, therefore, as meaning, by the terms it uses, precisely the same thing as would be technically correct in either the law of England or of Scotland. By the statute, § 2, a "predecessor" is defined to mean the person "from whom the interest is derived." In that sense it was obvious that the appellant derived his interest solely from Lady Saltoun, the maker of the entail, and not from the preceding heir, who was merely passive in the matter. That this is a succession by deed and not by law is obvious. It may be said, that it is a devolution or succession by law, inasmuch as the words, "heir male of the body," used by the deed, makes the succession to some extent coincide with that *ab intestato*. But the words, "heir male of the body," are, in fact, only a circuitous description of the individual heir, and it can make no difference whether each heir substitute is called by his Christian and surname, or by a more general term which serves the same purpose in identifying him. At all events, here the appellant was identified by name in the deed. The majority of the Judges below were carried away by the theory, that each heir is fiar of the estate, and has the whole interest concentrated in his person. But this is a mere theory, and nothing else, and has been disregarded in the construction of statutes of general application to the other parts of the United Kingdom. Thus in *Baillie* v. *Lockhart*, 2 Macq. 258, *ante*, p. 501; 27 Sc. Jur. 367, the Apportionment Act was held to apply between the heir of entail and his heirs, thereby repudiating the strict technical construction, that the heir of entail is a fiar. Here it is not the feudal theory that is to govern the case, but the question, who is substantially the beneficial successor. One heir of entail succeeds another in the sense of sequence of time, but not in the substantial sense of acquiring a beneficial interest from the heir going before him. It is the maker of the entail who gives the beneficial interest to all of them alike. The case of *Gordon of Park*, 21st May 1751, Kames' Elucid. 384, is an apt illustration of the way in which an imperial statute overrides the mere peculiarities of Scotch feudal conveyancing, and looks beneath these into the substance of the rights dealt with.

The *Attorney General* (Bethell), *Lord Advocate* (Moncreiff), and *Russell*, for the respondent.—The judgment of the Court below was right, as it is not correct to say, that it is a mere theory of the law of Scotland, that each heir of entail in succession is the fiar. It is of the substance of the right. When an entail is made, the maker parts with his entire interest to the institute, in whom the whole fee and its incidents (so far as these are not taken away by the deed) are centred. Moreover, at his death, the next heir substitute is served heir to him, because the whole existing interest was vested in him. This, therefore, is a proper example of predecessor and successor. Each heir of entail is the predecessor to the next heir, and is, to all intents and purposes, the proprietor, if anybody is the proprietor. His lands must be adjudged from him precisely like those of a proprietor in fee—*Graham* v. *Hunter*, 7 S. 13; the next heir substitute must collate the entailed estate, just as if his ancestor were the owner in fee—*Anstruther* v. *Anstruther*, 1 Sh. & M'L. 463; and the next heir substitute is bound only to pay the casualty of relief as an heir, and not as a singular successor—*Stirling* v. *Ewart*, 4 D. 684. It is, therefore, a substantial principle, that the heir of entail in possession is the owner or fiar; and hence it follows, that the person who takes after him is the successor. A successor must enjoy the same interest as his predecessor: and this is true of the heirs of entail one after another. The power of the maker of the entail is exhausted in the making of the deed. He gives the first impetus to the fee, but when it is once propelled and set in motion, he is thereafter nowhere, and it goes on according to the rules of law, and not by virtue of the mere act of the entailer. This Succession Duties Act, in using words which have a well known technical meaning in Scotland, must be taken to have intended that meaning, and nothing else, to be put upon them.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—My Lords, in construing the statute on which this case depends, we must bear in mind, that it applies to the whole of the United Kingdom, and, that the intention of the legislature must be understood to be, that the like interests in property taken by succession should be subjected to the like duties, wheresoever the property may be situated. The technicalities of the law of England and of Scotland, where they differ, must be neglected, and the language of the legislature must be taken in its popular sense.

Looking to the contents of this deed of entail, and the events which have happened, we are to say, who was the "predecessor" of the appellant within the meaning of the second section of 16th and 17th Victoria, chapter 51,—whether his grandmother, the Dowager Lady Saltoun, the entailer; or his uncle, the late Lord Saltoun, the last possessor of the entailed estate.

Relying on the feudal law still prevailing in Scotland, and the forms of Scotch conveyancing, it has been contended, on the one side, that the "entailer" must always be considered the "predecessor," because the interest of every substitute, as well as of the institute, is derived from the entail; and, on the other side, that the last preceding possessor under the entail must be considered the "predecessor," because he had the whole fee in him, whether he held under a strict entail with irritant and resolutive clauses, or under a simple destination, and, that the next substitute, being served heir to him, although a stranger in blood, is his successor, and derives his interest from him.

I shall abstain from attempting to lay down any general rule by which the question of *predecessorship* is to be determined; but I have no difficulty in saying, that, in my opinion, neither of these rules can be laid down to operate universally, as each would lead to consequences which the legislature cannot be supposed to have intended. Of these consequences I will give examples, which might be easily multiplied. The entailer being considered the predecessor of every successor from generation to generation, if the entailer settles the estate by a strict entail on a stranger in blood and his issue,—son succeeding father, brother succeeding brother, or nephew succeeding uncle, for hundreds of years,—the heir who succeeds under the entail, whatever may be his propinquity to the last possessor, must pay succession duty at the rate of ten per cent. The last preceding possessor being invariably considered the "predecessor" in Scotland, and the same rule being applied to England,—if there were an English settlement with successive estates tail in remainder,—on the failure of one estate tail, the remainder man, however nearly related to the donor, would pay succession duty according to his propinquity to the last preceding possessor, who may have been a stranger to him in blood.

But the second section seems to me to make a distinction, both as to Scotland and England, between what English lawyers call "taking by purchase" and "taking by descent." Seeking to use language which might be adapted to the technicalties of the law of property in both portions of the island, the section divides succession into succession by "provision," and succession by "devolution." All successions by the one and by the other are subjected to the duty; but the rate of duty is to be regulated by considering who is the predecessor; and this may be determined by considering whether the succession is by "provision" or by "devolution."

In fixing the rate of duty to be paid by the successor, the legislature was probably influenced by the probability he before had of enjoying the inheritance, and by the probability of his being able to pay a heavier duty without hardship, if the property comes to him from a distant relation, or from a stranger.

This object, I think, will best be obtained by holding, that where the succession is by "provision" the *settlor* is the "predecessor," and where by "devolution" the *last possessor* is the "predecessor." If the successor takes by "provision," the degree of relationship between him and the last possessor could hardly have been an ingredient in fixing the rate of duty to be paid by him; and this ought to be regulated by the relationship between the donor and the donee. Such is the rule where the donee takes immediately as the first object of the bounty of the donor; and there seems no reason why the same principle should not prevail, where a substituted donee takes, not as heir of the first donee, but only *per formam doni.*

No doubt, questions may arise, whether the successor takes by "provision" or "devolution," but I have not the smallest doubt, that, in this case, the appellant takes by "provision," and not by "devolution." Without at all relying on his being a *purchaser*, according to the phraseology of English lawyers, I would submit the question to any well educated English gentleman. The first meaning given in Johnson's dictionary to the word "provision," is "the act of providing beforehand." Lady Saltoun, by her deed of entail, first gave the estate to her eldest son and the heirs of his body; then to "Alexander Fraser, Esquire, Captain in Her Majesty's 28th regiment of foot, eldest son of her deceased son, the Honourable William Fraser." This is the appellant; and it is entirely by the provision thus beforehand made for him, that he is now the owner of Ness Castle. It did not devolve upon him directly from her, and he certainly does not take from the "provision" of his uncle, who had no power to alter the line of succession.

The word "derived," with which the second section concludes, is certainly most important; and to make Lady Saltoun the "predecessor" of the appellant, his interest must be derived from her. Some Scotch lawyers say his interest must be derived from his uncle, who had the whole fee in him; but "derived" is not a *vox signata* either in the law of Scotland or of England; and being of flexible signification, it seems to me, that it has been happily selected by the learned framers of this act of parliament, with a view, that it might apply both to "provision" and "devolution;" one meaning of "derivation" given by Dr. Johnson being "the transmission of anything from its source," and to "derive," he says, is "to receive by transmission."

The great obstacle with the Scotch Judges, in the way of this reasoning, was the doctrine, that every succeeding substitute takes from the last possessor, who, in contemplation of law, had the whole fee in him, though substantially he may have been only tenant for life; and that, when the appellant was served heir, he could not derive any interest from his grandmother, because, in her lifetime, she had denuded herself of all interest whatsoever in the entailed premises. But I think we may look at the state of things at the making of the entail, when, having disponed an estate to her eldest son and the heirs of his body, Lady Saltoun had substantially in her the rest of the fee, and she carved out of it another estate tail to her grandson Alexander, and the heirs of his body.

At any rate, let us attend to the correspondence on this subject between Lord Hardwicke and Lord Kames, and to the decision of this House in the celebrated case of *Gordon of Park*, and we shall learn, that such subtle technical rules are to give way for the purpose of doing justice, and fulfilling the intentions of the legislature, without infringing the genuine principles of Scottish feudal law, which I wish ever to hold sacred, unless where they have been relaxed by the legislature. I think, that the appellant may be considered in the situation of a remainder man in tail, according to English law, taking *per formam doni*,—to whom I conceive, that the donor, and not the last person who held under the first estate tail, would be considered the "predecessor."

In the present case, the appellant is named and circumstantially described in the deed; he takes directly from the donor by virtue of the deed, and she unquestionably was the "settlor," "disponer," and "ancestor," from whom, in one sense, his interest in the estate was derived.

I would not by any means presume to express any opinion beyond what is necessary for this particular case; but I may say, that, in harmony with the decision which I venture to propose, viz., that here the maker of the settlement is the "predecessor," and not the last preceding possessor, I consider it equally clear that, if the appellant were to die leaving a son, the son would take by "devolution," the appellant being considered his "predecessor," and so it would go on by devolution from generation to generation, till a new *stirps* came in under the entail.

I ought to add, that my opinion is not in the remotest degree influenced by the argument, that in a doubtful case we ought to decide, so as that the smaller fiscal burden may fall upon the subject. In this case it is a pure accident, that the entailer is the direct lineal ancestor of the substitute; and in another case, to be decided on the same rule, the substitute might be a stranger in blood to the entailer, and nearly related to the institute, and thus he might be liable to a duty of ten per cent. instead of one per cent.

Upon the whole, I must advise your Lordships to reverse the interlocutor appealed against, and to declare that the succession duty due from the appellant to the Crown is at the rate of one per cent. only.

LORD CRANWORTH.—My Lords, although the question in this case arises on an appeal from a Scotch decision, yet it cannot be disposed of satisfactorily without considering it in its bearings on the whole of the United Kingdom. What we have to determine, is the true construction of an act of parliament, imposing a tax on the succession to property in every part of the United Kingdom. And it may safely be assumed, that the intention of the legislature was to make its operation equal wherever it was to be put into force. And if, therefore, we can come to a satisfactory conclusion as to what would have been the duty payable in England or Ireland on a succession arising on a settlement, as nearly as possible the same as that now before us, we shall arrive at a solution of the difficulty we have to deal with.

Suppose, then, that Lady Saltoun had, by a settlement of lands in England, made according to our forms of conveyancing, conveyed real estate to the use of her eldest son, Lord Saltoun, in tail, or to him for life, with remainder to his first and other sons in tail, with remainder to Alexander Fraser, eldest son of her deceased son William in tail, or for life, with remainder to his first and other sons in tail, with remainders over, and that Lord Saltoun, having survived his mother, had died without issue, so that the limitation in favour of Alexander should have taken effect, at what rate of succession duty would he be chargeable? If his uncle Lord Saltoun was his predecessor, he would be chargeable at three per cent.; if his grandmother was his predecessor, then he would be chargeable at one per cent. only.

The act says, that the predecessor is the "settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is derived." The interest of Alexander certainly would not have been derived in the case I have put from any testator, obligor, or ancestor. The words "settlor" and "disponer" may for the present purpose be treated as synonymous; and therefore the predecessor must have been either the *settlor* or the *other person* from whom the interest of Alexander was derived. The grandmother certainly was the settlor from whom the interest of Alexander was derived. Was his uncle, Lord Saltoun, another person, or the other person within the meaning of the statute, from whom his interest was derived? And if he was, then which of the two was his predecessor? I think, that the uncle was not a person from whom Alexander derived title within the meaning of the statute. He was not a person answering that description, unless we can understand the act to describe the person in possession, on whose death the successor comes into the enjoyment of the estate, as the person from whom the interest of the successor is derived; *i. e.* that for the purposes of the act the interest of the successor is always to be considered as derived from the person on whose death his title accrues in possession. I think it impossible so to construe the act. On such a construction the word "settlor" never can have any operation. That word "settlor" evidently is meant to apply only to a person creating a settlement by deed in his lifetime. For in the case of a settlement by will, the word "testator" would apply; and if, in the case of a remainder coming into possession under a settlement by deed, the person dying in the enjoyment of the preceding estate is the predecessor of the remainder man, the settlor never can be a predecessor, and the introduction into the act of the word "settlor" will have been useless.

Where a successor derives his title by descent, whether as heir general or heir in tail, there, by a reasonable construction of the act, the person from whom he claims as his ancestor is the predecessor; so that it then becomes unimportant to consider from whom the title was originally derived, by settlement or will. The settled lands are by the hypothesis passing in a course of descent, and the ancestor is the predecessor. But when the lands are taken by any one as a purchaser under a deed, the settlor must be the predecessor for the reason I have mentioned; that is, that otherwise a settlor never can be the predecessor.

This is illustrated by several clauses in the act. Clause 3 enacts, that where there are joint tenants, not having become so as successors, and one of the joint tenants dies, he shall be deemed to be the predecessor in respect of the interest passing to the survivor or survivors. This provision was unnecessary, if, as being the person last in the enjoyment of the property, he was, within the meaning of clause 2, the person from whom the interest of the successor is derived. And the principle is well illustrated by the subsequent part of the clause, which provides, that where the joint tenancy has arisen from a joint succession, which would be the case if an estate were devised to two as joint tenants, or were settled on two as joint tenants in remainder after a preceding particular estate for life, then, on the death of one of the joint tenants, the title of the survivor shall be deemed to be a title derived from the same predecessor from whom the joint title was derived. In the case provided for by the first branch of the clause, it was necessary to make a special provision, because there was no person from whom the interest of the survivor was derived. In the second, as by the hypothesis there was a person from whom the joint interest was derived, it was only necessary to say, that the same person should be deemed predecessor in respect of the interest accruing by survivorship, excluding in that case the predeceasing joint tenant.

The fourth clause evidently proceeds on the same principle. Any person having an absolute power of appointment is, on principles easily understood, treated as owner; but if his power is only to apportion among particular objects, then the author of the power is the predecessor, obviously on the ground, that it is from him that the interest of the appointees is derived.

So, again, by the fifth clause, where any property is subject to any charge, or estate, or interest terminable on the death of any person, the additional value conferred by the death of such person is to be deemed a succession derived, not from the person dying, but from the predecessor from whom the property charged was derived. And there are many other clauses leading to the same result; see particularly clauses 12 and 13.

I have, on these grounds, come to the conclusion, that in the case of an English settlement, corresponding as exactly as the laws of the two countries permit with that now before the House, duty would be chargeable at one, not at three per cent. If that be so, the presumption is irresistible that the same rate of duty is payable on the succession arising under the corresponding Scotch settlement. It could not have been intended, that the burden imposed on the succession to property should be differently estimated on the one side of the Scotch border and on the other. And then the only question is, how this can be reconciled with Scotch law.

The opinions of the majority of the Scotch Judges rested on the ground, that the appellant derived title from his late uncle; that the institute and every successive substitute has in him, according to the law of Scotland, the whole fee; and that, whether the heir of provision succeeds by reason of his being heir of the body of the institute, or of his being specially designated in the deed of tailzie as a substitute called *nominatim* on failure of heirs of the body either of the institute or of a preceding substitute, the result is the same. In both cases the relation of the person dying in possession to the person who succeeds him in the enjoyment of the estate, is that of heir and ancestor. And this being so, the majority of the Judges held, that duty must be charged on the principle, that the ancestor is to be treated as the predecessor within the true intent and meaning of the second section of the act.

This reasoning would be unanswerable, if the duty were to be assessed on feudal principles;

but this is not the case. The principle is correctly enunciated by Lord Ivory. It is true, that a substitute designated by name to take the estate on failure of heirs of the body of the institute, or of a preceding substitute, takes as heir of provision; but he does not take "*by devolution of law*," according to the true intent and meaning of those words as used in the statute. He becomes a new *stirps*, taking by disposition of the disponer, as he would have done if all who preceded him in the enjoyment of the estate had been mere liferenters.

This decision, though it would do violence to some of the best established doctrines of Scotch law, if the present question were one of conveyancing, may yet be well admitted in the construction of an act intended to impose corresponding duties on successions happening under two different systems of law. Lord Hardwicke held, that where a statute (the Act of Union) had said that a particular law (that of treason) should be administered as nearly alike as possible in the two countries, we were at liberty to disregard, in the application of that law, the rules prevailing in Scotland as to the tenure of land, and the feudal rules of forfeiture. Though the statute now under consideration does not contain any express declaration similar to that in the Act of Union relative to treason, yet it must be assumed, that such a principle was implied, though not expressed. And on these grounds, I have come to the same conclusion as my noble and learned friend on the woolsack, namely, that the interlocutor ought to be reversed.

LORD WENSLEYDALE.—My Lords, I take the same view of this case as my two noble and learned friends who have preceded me; and they have explained the reasons upon which their opinion is founded so fully and clearly, that I have very little to add.

I think it plain, that, as only one rule is given in the Succession Duty Act, the legislature have intended, that the same rule is to govern the taxation of succession to property in every part of the United Kingdom, notwithstanding the differences of the law which regulates the transmission of real estate in one of them; and technical distinctions, which really make no substantial difference, must be overlooked, and all the subjects of each kingdom must have been meant to be taxed equally in the same circumstances. The problem is, therefore, to determine what rule best accords with the intentions to be collected from the act. Upon the best consideration I have been able to give to the subject, I think a very reasonable rule may be deduced with sufficient clearness from the words of the act, construing them according to the established rule.

By the second section a succession may be constituted in two ways, either by reason of a disposition or by a devolution. The person entitled to that succession is a successor. The predecessor may be the settlor, or disponer, or obligor, where the disposition is by deed; or the testator, where by will; or he may be the ancestor, where the succession is by devolution. The addition of the words "other person" was probably *pro majore cautelâ*, perhaps, though indeed unnecessarily, to include the case of any other person, by whom a disposition might be made of the estate, or from whom a devolution might take place, who might not strictly come under any of those descriptions.

In England and Ireland I think it clear, that where there is an entail giving an estate tail to one, with remainder to another, the donee or remainder man, who takes by purchase, is the successor, and the entailer the predecessor; but with respect to the heirs of the body, the donee in tail is the ancestor, and the heir of the body is the successor. It seems to me, that we ought to hold, in analogy to that, that the entailer of a Scotch entailed estate is the predecessor with respect to the institute and substitute, and the institute and substitute respectively the successors, and again the heir of the body of the institute or substitute is the successor to them respectively. And thus the same rule will apply to real estates in every part of the United Kingdom. The institute or substitute thus becomes a fresh *stirps* from whom the heirs of the body derive their title by descent. It is true that, by the technical rule of the Scotch law, each succeeding substitute takes the whole fee, and must be served heir to the preceding owner, and in that sense takes by devolution, whereas in England and Ireland each remainder man takes a part of the same estate, and takes it from the settlor. But, notwithstanding this technical distinction, substantially the position of the respective parties is the same in all parts of the United Kingdom, and they should be taxed in the same way.

The rule as to the rate of payment is evidently fixed at a larger rate where the successor is a stranger in blood, because it may be presumed, that he received a more unexpected benefit, and would therefore be willing to pay more of it by way of tax; and in the case of relations, a similar reason may have influenced the legislature in imposing a greater duty on the more distant relative. It cannot make distinctions as to particular cases, and must act by general rules, and, generally speaking, the provision is reasonable.

I come, therefore, to the conclusion, that the appellant, who derived the estate as substitute from his grandmother, the settlor or disponer, is liable only to one per cent. duty; and, that, therefore, the judgment of the majority of the Judges of the Court of Session ought to be reversed.

LORD CHELMSFORD.—My Lords, if it had not been for the great difference of opinion among the learned Judges of the Court of Session, I should not have considered this case to be one of much difficulty.

Had it been necessary upon this occasion to lay down a general rule applicable alike to England and to Scotland, when the law of succession to real property differs so much in the two countries, it would perhaps not have been easy to discover such an interpretation of the act as would be of uniform application to every case which might possibly occur.

The general object of the act is to establish a scale of succession duty, varying in amount according to the nearness of relationship of the person succeeding to the person from whom the benefit of the succession is derived. There would be a presumption, therefore, in the outset, in favour of an interpretation of its provisions, which regarded the relation to the person from whom the interest originally proceeded, rather than to him through or after whom it merely falls in succession. The act distinguishes between two general modes of acquiring property which confer a succession, viz., disposition and devolution by law; and if we are able to ascertain in each case in which of these two ways the property is derived, we shall always be able to determine the amount of the succession duty to be paid. In the present case, I am of opinion, that the appellant took by disposition from his grandmother, Lady Saltoun, and not by devolution by law from his uncle, the late Lord Saltoun.

In construing the act, it must be remembered, that the thing to be regarded is the beneficial interest only; for it is in respect of persons becoming "beneficially entitled" that the succession duty is to be paid. This renders it necessary, when the act is to be applied to Scotland, to look to something beyond the mere acquisition of the feudal title. For, by the law of that part of the kingdom, the service as heir to any person is no proof that the property came by disposition or devolution from the so called ancestor. In the present case, for instance, the entail is one which is strictly fettered with irritant and resolutive clauses, so that the institute could not in any way hinder or prejudice the right of succession of the substitutes; and yet the institute, though virtually merely a liferenter, is regarded as having the fee in him, and the appellant is compelled by law to be served heir to him, and is called in the decree of special service the nearest heir of tailzie and provision of the deceased Lord Saltoun, although the deed of tailzie was in no respect the act and deed of the assumed ancestor, and the appellant claims nothing from or through him.

These considerations will go far to determine the question, whether the late Lord Saltoun was the predecessor of the appellant within the meaning of the act. The specific words explanatory of the term "predecessor," (as my noble and learned friend (LORD CRANWORTH) has shewn,) do not apply to him, and he can only be brought within the definition under the general words "other person from whom the interest of the successor is or shall be derived." It is difficult to see in what sense the interest (which, from the context, must mean the beneficial interest) can be said to have been derived from the late Lord Saltoun, who neither gave the succession nor could have prevented its falling to the appellant. The clauses in the act relating to joint tenancy and powers of appointment, appear to me strongly to illustrate the intention of the legislature, that the predecessor is to be ascertained by looking to the source from which the interest flows to the party succeeding. This is shewn in the third section by the distinction made between the survivorship of joint tenants where they are in by a title not conferring a succession, and where a succession is taken jointly; that, in the first case, the accruing interest shall be deemed a succession to the person on whose death the accruer takes place, and in the latter, that it shall be deemed a succession derived from the predecessor from whom the joint title shall have been derived. And, in the fourth section, a person having a general power of appointment, which gives him an absolute right of disposition over the property, equivalent to the ownership of it, is to be deemed to be entitled at the time of his exercising the power to the property or interest appointed as a succession derived from the donor of the power, whereas, where there is a limited power of appointment, the donee of the power has no interest in the property; and therefore the act makes the appointee to take from the person creating the power, as his predecessor. And these sections shew, that the legislature meant to use the word "derived" in the sense of "having its source or origin from," and selected it as best adapted to embrace both modes of acquiring a succession, viz., by disposition and by devolution.

If the question in this case had arisen as to the succession of the heir of the body of the institute, there might have been some difficulty in determining whether he took by disposition from the settlor, or by devolution from his ancestor; because the entail being fettered with irritant and resolutive clauses, the heirs of the body could not be deprived of their succession by any act of their ancestor; and both ancestor and heirs would take in the same manner as a succession of usufructuaries, each of whom during his life would have enjoyed the beneficial interest, but none of them could have lawfully disposed of the property. The interest of the heirs of the body in such an entail seems to be rather more like that which belongs to first and other sons in an English settlement, than to that of heirs of the body creating an entail, the whole power over which is vested in the tenant in tail, as it would be in Scotland in the case of a simple destination. But, whatever may be the proper view of such a supposed case, I think, that the position of the *nominatim* substitute in this deed of tailzie is precisely analogous to that of a person who, in an English settlement, is named as the remainder man in tail after a previous estate tail, and who, there can be no doubt, would be considered as taking by disposition from the author of the settlement, and not by devolution from the previous tenant in tail.

I agree with all my noble and learned friends, that the succession duty payable by the appellant, is to be at the rate of one per cent., and that the interlocutor appealed from ought to be reversed.

Mr. Rolt.—My Lords, I think the Crown will hardly oppose our having costs. We were decreed to pay the costs in the Court below, and we ought to have the costs either here or in the Court below, as your Lordships may think fit.

Mr. Solicitor General.—On the part of the Crown I should not presume to argue the question of costs, but leave it entirely to your Lordships.

LORD CRANWORTH.—Is it a matter to argue in this particular case? The Crown will only get one per cent. duty.

Mr. Rolt.—The Crown hardly opposes it.

LORD CHELMSFORD.—I should be very much disposed to think, that the appellant should have costs, either here or in the Court below.

LORD CRANWORTH.—The costs below, of course.

LORD CHANCELLOR.—Clearly it is not according to our course of proceeding to give the costs of the appeal when the judgment is reversed.

Mr. Rolt.—The costs in the Court below it would be quite according to your Lordships' course of proceeding to give us.

LORD CHANCELLOR.—Yes; I think so. I think the costs below ought to be awarded to the appellant.

Mr. Rolt.—That will be added to the declaration?

LORD CHANCELLOR.—I think so. I think we all agree in that.

LORD CHELMSFORD.—The Lord Ordinary gave costs?

Mr. Rolt.—Yes, my Lord.

LORD CHELMSFORD.—That was reversed by the Court of Session, and they gave costs against you.

Mr. Rolt.—And your Lordships now reverse that?

LORD CHANCELLOR.—That is the opinion of the House.

Interlocutor reversed, and the cause remitted to the Court of Session, with a declaration, that the duty due by the appellant to the Crown is at the rate of one per cent., and that the costs in the Court below are to be paid to the appellant.

Agents for the Appellant, Watkins, Hooper, Baylis, and Baker, Solicitors, London; Walter Duthie, W.S., Edinburgh.—*Agent for the Respondent,* J. Timms, Solicitor, London.

AUGUST 3, 1860.

THE CALEDONIAN RAILWAY COMPANY, *Appellants*, *v.* JOHN HAMILTON COLT, *Respondent.*

Railway Clauses Act — Jurisdiction — Damage too Remote — Penalty — Action for Relief — *C. was owner of a clay field, to which he had a private railway, and the Caled. R. Co., under their act, having interfered with it, were bound by the Railway Clauses Act, to make a substituted road under a penalty of £20 per day, besides in the end restoring the private railway to its former state. C. agreed with M. to let to M. the clay field, and reciting the obligation of the Caled. Co. engaged to make the substituted road himself, if the Co. failed to do so.*

HELD (affirming judgment), *That C. could maintain an action against the Co. for failure to make the substituted road, though a penalty was also incurred.*

HELD (reversing judgment), *That C. could not recover from the Co. by way of relief the damages which he had to pay to M. for breach of his agreement with M., for this was not the natural consequence of the Co.'s failure.*[1]

In the year 1845 the defenders obtained their Act of Corporation, by which they were authorized to make the Castlecarry Branch from the Monkland and Kirkintilloch Railway to the Scottish Central Railway. The Castlecarry branch passed through the pursuer's estate of Gartsherrie, and crossed a branch railway belonging to him, connecting his fire clay field at

[1] See previous reports 21 D. 1108; 31 Sc. Jur. 621. S. C. 3 Macq. Ap. 833: 32 Sc. Jur. 707.