*Friday, February* 1.

## FIRST DIVISION.

[Exchequer.

## WATHERSTON'S TRUSTEES *v.* LORD ADVOCATE.

*Revenue — Settlement-Estate-Duty — Property Contingently Settled—Repayment—Finance Act* 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 5 (1) *and* 8 (1).

A truster who died in 1895, and consequently before the commencement of the Finance Act 1898, directed his trustees to hold the residue of his estate for his daughter in liferent and her children in fee, and provided that if she had no children the fee should go as she might direct by any writing under her hand, and, failing such direction, then to her first cousins.

On the death of the truster the trustees paid estate-duty on his estate, and settlement-estate-duty on the residue, under the provisions of the Finance Act 1894. The daughter died unmarried about two years after the truster's death. On her death estate-duty was claimed and paid on the residue.

In an action by the trustees for repayment of the amount paid as settlement-estate-duty, on the ground that the residue was only contingently settled, and that the contingency had happened, *held* that they were not entitled to the repayment claimed.

By the third purpose of his trust-disposition and settlement William Watherston, builder in Edinburgh, who died on 22nd November 1895, directed his trustees to hold the residue of his estate for his daughter Miss Christian Elizabeth Watherston in liferent, and her children, if any, in fee, subject to her apportionment, or failing apportionment, equally, and failing children, then as Miss Watherston might direct by any *mortis causa* deed or writing under her hand, and failing such direction, then to her first cousins. Miss Watherston survived her father. She was not married.

The trustees paid estate-duty on the trust-estate.* The Board of Inland Revenue also claimed settlement-estate-duty under section 5 of the Finance Act upon the residue of the trust-estate as being "settled property" within the meaning of the Act. The trustees objected to this claim upon the ground that Miss Watherston was then unmarried, and was competent to dispose of the residue. Ultimately, however, after some correspondence, the trustees paid settlement-duty as claimed.

On 11th January 1898 Miss Watherston died unmarried, competent to dispose of said residue.

On her death the Revenue authorities claimed estate-duty upon the said residue as having passed on her death. The trustees admitted this claim, and brought the present action against the Lord Advocate as representing the Commissioners of Inland Revenue for repayment of the sum paid as settlement-estate-duty on the death of William Watherston.

They pleaded, *inter alia*—"(2) On a sound construction of the Finance Act 1894, and in respect that the contingency attaching to the settlement of said residue (if it was settled) has happened, the pursuers are entitled to repayment of the settlement-estate-duty referred to."

In defence the Lord Advocate, on behalf of the Revenue authorities, pleaded, *inter alia*, "(4) In the case of a death prior to the commencement of the Finance Act 1898, settlement-estate-duty in respect of property contingently settled is not returnable."

The Finance Act 1894 enacts, section 5, sub-section 1—"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 at the rate hereinafter specified" . . . "but (*b*) during the continuance of the settlement the settlement-estate-duty shall not be payable more than once." Section 8, sub-section 1—"The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act and so far as the same are applicable, apply for the collection, recovery, and repayment of estate-duty, and for the exemption of the property of common seamen, marines, or soldiers who are slain or die in the service of Her Majesty, and for the purpose of payment of sums under one hundred pounds without requiring representation, as if such law and practice were in terms made applicable to this part of the Act."

The Finance Act 1898 (61 and 62 Vict. cap. 10), section 14, enacts as follows:—"Where in the case of a death occurring after the commencement of this Act (1st July 1898) settlement-estate-duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property shall be repaid."

By interlocutor dated 9th November 1900 the Lord Ordinary (STORMONTH DARLING) sustained the fourth plea-in-law for the defender, and assoilzied him from the conclusions of the summons.

*Opinion*—"The pursuers' claim for repayment of settlement-estate-duty is so absolutely fair and equitable that I have considered it with every desire to hold it well founded in law, and it is with reluctance that I have come to the conclusion that the Commissioners of Inland Revenue are within their strict right in resisting it.

"There can be no doubt that the late Mr Watherston at his death on 22nd November 1895 had so dealt with the residue of his estate as to make it 'settled property' within the meaning of the Finance Act of 1894. What he had done was to give directions to his trustees by which they were to hold the residue for his daughter in liferent and her children, if any, in fee. So long, then, as it was possible for Miss Watherston to have children, the residue was contingently settled; and the case of *Stewart's Trustees*, 1 F. 416, decides that property in that position is 'settled property' in the sense of the Finance Act, and as such is liable to settlement-estate-duty.

"Miss Watherston died unmarried in January 1898, when of course it became evident that the contingency affecting the settlement had not arisen, and could not arise. It then became equally clear that Miss Watherston was at her death 'competent to dispose' of the residue, because her father had provided that, failing children, it was to go as she might direct by any *mortis causa* deed or writing under her hand. Accordingly, the Inland Revenue claimed estate-duty on the residue as having passed at her death, and there was no answer to the claim. But this state of matters presented the obvious inconsistency that in 1895 the Crown had received settlement-estate-duty on the footing that the property was settled, and then in 1898 had received estate-duty on the footing that it was not settled. The whole purpose and meaning of the settlement-estate-duty, as correctly expressed by the editors of Mr Hanson's book at page 124, is 'to counterbalance the advantage given to settled property over other property by the direction contained in section 5 (2) that, when once estate-duty has been paid in respect of it, neither estate-duty nor the other schedule duties shall be paid until the property has come out of settlement.' Here, of course, the Crown required no compensation of that kind, because they received estate-duty on the death of Miss Watherston, exactly as if there had been no settlement at all. If the deaths of Mr Watherston and his daughter had occurred three years later than they did, the question would have been ruled in the pursuers' favour by the Finance Act of 1898, which provides that, in a case like the present settlement-estate-duty shall be repaid. Unfortunately the Act in remedying one injustice created another, for it confined the remedy to the case of deaths occurring after 1st July 1898, and thereby created that inequality of treatment in precisely similar circumstances, which is the worst vice that can infect taxation.

"That being so, the pursuers are compelled to fall back on the provisions of the Finance Act of 1894. They rely on these words of section 8 (1)—'The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act, and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of estate-duty.' Then they go on to point to sections 8, 17, 34, and 37 of the Legacy Duty Act (36 George III. cap. 52), and to sections 35, 36, and 37 of the Succession Duty Act (16 and 17 Vict. cap. 51, and they say that these, forming as they do the law and practice with regard to the repayment of previously existing death duties, ought by section 8 to be applied to repayment of estate-duty, including of course settlement-estate-duty.

"If I could bring myself to think that section 8 (1) was intended to have any effect on questions of liability for duty, I should be very glad to agree with the pursuers. But I cannot think that it was intended to do more than to incorporate the provisions of the former Acts relating to procedure. Undoubtedly that must hold good where the provisions relate to the collection and recovery of the duty. Why should it be different when the provisions relate to repayment? There are sections in the Finance Act itself, such as 8 (12) and 9 (3), providing for repayment of estate-duty in certain circumstances; and it seems to me quite a sensible and sufficient construction of 8 (1) to read it as meaning that, where estate-duty has to be repaid in terms of these other sections, the same procedure is to be followed as in the case of the earlier Acts. On the other hand, I think it would be a strained construction to hold it as conferring a substantive right to repayment by analogy. The cases where the earlier Acts provide for repayment are all cases where the benefit taken by the legatee or successor has been destroyed or abridged by some supervening occurrence; and at best there is only an analogy between that and a case like the present, where it turns out that settlement-estate-duty, which is exigible not from the individual beneficiary but from the whole estate, would never have been payable at all if the future could have been foreseen.

"A case on the construction of one taxing statute is never, perhaps, a very safe guide in the construction of another. But the argument of the pursuers has some resemblance to the unsuccessful attempt in *Hogg* v. *Parochial Board of Auchtermuchty*, 7 R. 986, to make out that a parish minister's exemption from poor rates extended to school rates. Reliance was there placed on a clause in the Education Act of 1872, providing that the 'The laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school rate.' It was urged that one of the laws applicable to the 'imposition' of poor's assessment was that it should not be imposed on parish ministers, but this view was rejected and the clause was treated as one regulating procedure merely.

"I shall therefore sustain the defender's fourth plea-in-law, and assoilzie."

The pursuers reclaimed. They argued that the Lord Ordinary was in error in holding that the provisions of section 8 (1

of the Finance Act 1894 were applicable only to procedure. In support of this view they pointed out that the exemptions expressly referred to in that sub-section were not substantively provided by the 1894 Act itself, but must be sought for in previous statutes. On the assumption that this was a correct reading of section 8 (1), they maintained the repayment claimed was authorised by previous Acts, and referred to the Legacy Duty Act 1796, sections 8, 17, 34, and 37; and the Succession Duty Act 1853, sections 35, 36, and 37. The argument on this point is fully stated in the opinion of the Lord President (*infra*), where the sections of previous statutes, to which reference was made, are sufficiently set forth.

The respondent supported the reasoning of the Lord Ordinary, and cited the following authorities:—*Inland Revenue* v. *Stewart's Trustees*, January 20, 1899, 1 F. 416; *in re Webber* [1896], 1 Ch. 914; *Attorney-General* v. *Fawley* [1897], 1 Q.B. 698; *Attorney-General* v. *Clarkson* [1900], 1 Q.B. 156.

At advising—

LORD PRESIDENT—Mr Watherston died on 22nd November 1895, leaving a trust-disposition and settlement by which he conveyed his whole estate to the pursuers as trustees for certain purposes, of which the only one material to the present question is that which relates to the residue, which the trustees were directed to hold for his daughter Miss Watherston in liferent and her children, if any, in fee subject to her apportionment, or failing apportionment, equally, and failing children, then as Miss Watherston might direct by any *mortis causa* deed or writing under her hand, and failing such direction, to certain other persons.

The pursuers paid estate duty under the Finance Act 1894 on the amount of the trust-estate, and the Commissioners of Inland Revenue also claimed settlement estate duty upon the residue as being "settled property" within the meaning of that Act. The pursuers objected to this claim upon the ground that Miss Watherston was then unmarried, and was according to their contention, "competent to dispose" of the residue. Ultimately, however, the pursuers paid settlement estate-duty as claimed.

Miss Watherston died unmarried on 11th January 1898, and the Commissioners of Inland Revenue claimed estate-duty upon the residue as having "passed" on her death. The pursuers have admitted this claim, but they demand from the Inland Revenue authorities repayment of the settlement estate duty paid as above mentioned. These authorities, however, decline to repay that duty.

The pursuers allege on record that the residue of Mr Watherston's estate was not "settled property" within the meaning of the Finance Act 1894, but they now admit that it is so, maintaining, however, that it is only "contingently settled," inasmuch as it was possible that Miss Watherston might die competent to dispose of it, and that in the event of her doing so the settlement would not take effect. The Inland Revenue authorities deny that the residue was merely "contingently settled," that being an expression which does not occur in the Finance Act 1894, but was introduced by the later Finance Act of 1898, which does not apply to the present case. In the somewhat similar case of the *Inland Revenue* v. *Stewart's Trustees*, 1 F. 416, it was held that the bequests to daughters were "settled property" in the sense of the Finance Act 1894, and as such liable to settlement estate-duty under section 5 of that Act, but it does not appear to have been suggested in that case that the property was merely "contingently settled," and that consequently settlement estate duty was either not due, or that if paid repayment of it could be demanded. This is not surprising, as the question whether property is settled depends upon the state of things which existed at the death of the person to whom it belonged, not upon the course of events afterwards.

The claim of the pursuers to repayment is, as I understand, rested exclusively upon section 8 (1) of the Finance Act 1894, which provides that "The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act, and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of estate duty;" and the pursuers maintain that this section imports into the Finance Act 1894, sections 8, 17, 34, and 37 of the Legacy Duty Act of 36 Geo. III. cap. 52, and sections 35, 36, and 37 of the Succession Duty Act of 16 and 17 Vict. cap. 51, not only for the purpose of providing rules of procedure in regard, *e.g.*, to collection and recovery of estate-duty, but as specifying events in which it is to be repaid.

In considering whether and to what effect these sections are imported into the Finance Act 1894, or in the language of section 8 (1) how far they are applicable, it should be kept in view that estate-duty (including settlement estate-duty) is the same in substance as the old probate-duty, although it is charged upon property, *e.g.* heritage, in respect of which probate-duty was not payable. It is charged, not upon the interest to which some person succeeds on a death, but upon the interest which ceased by reason of the death. This is a very essential distinction, and makes it necessary to observe much caution in applying to estate duty statutory provisions made with respect to legacy or succession duty.

Section 8 of the Legacy Duty Act provides for the mode of charging the value of legacies given by way of annuity, declaring, *inter alia*, "that the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency; provided always that if any such annuity shall determine by the

death of any person before four years' payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine upon any other contingency than the death of any person or persons, then and in such case not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease; but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a return of so much of the duty so paid as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured." Upon this provision it is sufficient to say that it is impossible to apply it to the present case. There is here no question of any legacy or other testamentary gift made by way of annuity, or of any duty payable by four yearly instalments, or of any annuity determining by the death of any person before four years' payment of the annuity had become due and payable, or of any of the other very special conditions under which repayment may be demanded. Further, the provisions of the section which relate to legacies, and consequently look to the benefits taken by legatees, would not upon principle apply to what is in effect a probate duty which regards the estate left by the deceased.

Section 17 provides for the duty on legacies subject to contingencies being charged as for absolute bequests, declaring that if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or testatrix under the same title, would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto shall be charged with and shall pay the difference between the duty so paid and such higher rate of duty. This is a provision in favour of the Revenue, and it is to be observed that if a contingency happens upon which the property goes to some person chargeable with a lower rate of duty, or not chargeable with duty at all, the section makes no provision for all or any part of the duty previously paid being returned. This provision also seems to me to be inapplicable to estate duty (including settlement estate duty), and if it were applied it would not, for the reasons now given, aid the pursuers.

Section 34 declares that if at any time after payment of duty on any legacy or residue or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person by whom any legacy or part of legacy, or any residue of any personal estate hath been received or retained, shall be obliged to refund the same or any part thereof, the Commissioners of Stamp Duties are required to refund what turns out to be an overpayment of duty. There is nothing in the present case equivalent to any of the conditions upon which repayment could be required under this section. No debt was recovered against Mr Watherston's estate which reduced the value upon which estate duty had been paid. The whole residue passed under his testamentary settlement to the persons whom he intended to receive it, in the events which occurred.

Section 37 provides for the case of persons whose administrative title is declared void after they have paid legacy-duty, but there was no avoidance of any administrative title in this case, and, as has been already pointed out, Mr Watherston's testamentary settlement received full effect, *modo et formâ*, according to its terms.

Section 35 of the Succession Duty Act provides that "In estimating the value of a succession no allowance shall be made in respect of any contingent incumbrance thereon; but in the event of such incumbrance taking effect as an annual burden on the interest of the successor, he shall be entitled to the return of the proportionate amount of the duty so paid by him in respect of the amount or value of the incumbrance when taking effect." In the present case there was no contingent incumbrance which either did or did not take effect, or anything like it.

Section 36 declares that "In estimating the value of a succession no allowance shall be made in respect of any contingency upon the happening of which the property may pass to some other person; but in the event of the same so passing, the successor shall be entitled to a return of so much of the duty paid by him as will reduce the same to the amount which would have been payable by him if such duty had been assessed in respect of the actual duration or extent of his interest." This section, well illustrates the distinction between a succession-duty which looks to the quality and value of the interest taken by a successor, and what is in effect a probate duty which looks to the estate left by the deceased. In the present case the duty is assessed upon the latter basis, and section 36 cannot either in form or in substance have any application to it.

Section 37 provides for allowance o return of duty being made where it turns out that the duty, not being due from the person paying it, was paid in mistake, or in respect of property which the successor was unable to recover, or from which he was evicted or deprived by any superior title, or that for any other reason it ought to be refunded, the Commissioners are required to refund it. None of the events, or anything like the events, upon which provision is here made for return of duty has occurred, or could occur in the present case, and none of the provisions made for

wholly different events apply, or could be made to apply, to it.

Upon this part of the case I need only add that the question in what cases repayment of estate-duty should be directed was considered and provided for in sections 8 (12) and 9 (3) of the Finance Act 1894, and that these sections make no provision for repayment in such a case as the present.

The provision in section 14 of the Finance Act 1898, that where in the case of a death occurring after the commencement of that Act, settlement-estate-duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen and cannot arise, the duty paid in respect of such property shall be repaid, seems a very reasonable and proper one, but the fact that it was considered necessary to make it by subsequent legislation affords additional evidence that the right to repayment in such a case did not already exist under the Finance Act 1894.

For these reasons I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN not having been present at the hearing gave no opinion.

The Court adhered.

Counsel for the Pursuers and Reclaimers —Ure, K.C.—Clyde. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Defender and Respondent—Solicitor-General (Dickson, K.C.)—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor for Inland Revenue.

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*Tuesday, February* 12.

## FIRST DIVISION.

[Sheriff Court at Airdrie.

## NEILSON, PETITIONER.

*Bankruptcy—Sequestration—Discharge—Failure to Pay Five Shillings in the Pound—Circumstances for which Bankrupt not Responsible—Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 6, *sub-sec.* 1.

By section 6, sub-section 1, of the Bankruptcy and Cessio (Scotland) Act 1881, it is enacted that a bankrupt shall not be entitled to his discharge unless he has paid or found security for 5s. in the £, or unless "the failure to pay five shillings in the pound, as aforesaid, has in the opinion of the Lord Ordinary or the Sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible."

A bankrupt who had been sequestrated in 1896, and whose estate had paid no dividend to his creditors, presented a petition for discharge in 1898. Objections were lodged by one of his creditors. The reports of the trustee in the sequestration and of the Accountant of Court were favourable. *Circumstances* in which the Court (*affirming* the decision of the Sheriff-Substitute) *refused* the prayer of the petition *in hoc statu.*

On 7th September 1896 the estates of David Neilson, Coatbridge, were sequestrated, and Mr John Wishart, accountant in Glasgow, was elected trustee. In 1898 Neilson presented a petition for discharge in the Sheriff Court of Lanarkshire at Airdrie No dividend had been paid on the estate.

Objections were lodged by Messrs Murray, timber merchants, Coatbridge, who were creditors of Neilson, for the sum of £230 lent to him. They alleged (1) that he had not paid five shillings in the pound; (2) that his failure to do so arose from circumstances for which he was responsible; and (3) that he had obtained from them a loan of £230 by falsely representing that he was negotiating for the sale of his business (the lease of a coal mine), that he was solvent and merely wanted a temporary loan, whereas he was insolvent at the time and used the loan to pay off other creditors.

The trustee reported that the bankrupt had complied with all the provisions of the statute, that he had made a fair discovery and surrender of his estate, that he had attended the diets of examination, and had not been guilty of any collusion, but that his bankruptcy had arisen from innocent misfortune and not from culpable or undue conduct. The Accountant of Court reported that the bankrupt had not fraudulently concealed any part of his estate, and that he had not wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act 1856.

On 23rd November 1898 the Sheriff-Substitute (MAIR) allowed Neilson a proof that his failure to pay five shillings in the pound had arisen from circumstances over which he had no control, and to the objecting creditors a proof of their objections.

On 16th December 1898 proof was led. Neilson deponed that for about five years before his bankruptcy he had been carrying on business as lessee of Gartsheugh Colliery, and had during that period lost his whole means, amounting to about £1500. He attributed his loss to the fact that the mine had a bad roof, and was much troubled in the strata, and with water. He admitted that other people had previously tried to work the pit, and had been unsuccessful. With reference to the loan obtained from Messrs Murray he deponed that he had obtained it about eight months before his bankruptcy, and that he was pressed for money at the time, but did not consider his position hopeless. He also deponed that he was now assisting in a business carried on by his son, but that he got little from his son except his food.

After hearing parties on the proof the