

(FLEMING), who on 24th February 1912 recalled his Substitute's interlocutor, and found that Kelly had not acquired a residential settlement in the parish of Ayr, and therefore found that the defenders were bound to relieve the pursuers of their disbursements on his behalf.

The defenders appealed, and argued—The present case was ruled by the case of *Mackenzie v. Cameron*, December 10, 1858, 21 D. 93. The defenders did not invoke the doctrine of constructive residence. The question was whether the pauper's absences from the pursuers' parish during the currency of the three years prior to 27th June 1910 were such as to constitute a breach in the continuity of his residence there. Every absence would not have this result. It was a question of circumstances and a question of degree. The Court had to decide what for a man of the pauper's mode of life was a reasonable degree of absence, saving the continuity of residence. Here it could be said that during the whole three years the pauper was substantially working in the parish of Ayr. For the last twenty-one months of that period he was not out of Ayr at all, so that the continuity of his residence was more marked towards the end of the qualifying period, which circumstance was regarded as important in *Mackenzie v. Cameron*, *supra*. Reference was also made to *Beattie v. Smith & Patterson*, October 25, 1876, 4 R. 19, 14 S.L.R. 22.

Counsel for the respondents was not called on.

LORD PRESIDENT—I have no hesitation in saying that I think the learned Sheriff is right. It is a question of fact and a question of degree. I do not think the doctrine of constructive residence arises. In order to lose a birth settlement a man must acquire a settlement by continuous residence. The question is whether this man ever had such a residence in Ayr as can be said to be continuous residence. I think he had not. Mr Watson quite properly has quoted the case of *Mackenzie*. That case has gone a very long way—much further than I should have been prepared to go. But we cannot take that case as a standard and then see whether this one comes so near it that the same result must follow. Each case must be determined by its own circumstances, and what I think distinguishes this case from *Mackenzie*, if it is necessary to distinguish it, is that the period which *in toto* was dealt with in *Mackenzie* was very much longer than the period in the present case. In *Mackenzie's* case, for nearly twenty years of his life the man had shown that the one place where he had got subsistence from his labour was the parish of Blair Atholl, and the only period of the year when he was not there was when he went home to his own parents' house, when employment was slack at Blair Atholl. Here you have not got the same continuity of time. After Mr Allan had once begun to employ him Kelly not unnaturally went back to Ayr, where he thought a job was waiting for

him, but he would have been equally happy to go anywhere else if he could have got a better job. You have not got that long period of year after year which would enable you to say that Ayr was the only place where the pauper went for his livelihood, as it was possible to say of Blair Atholl in *Mackenzie's* case. I am therefore for adhering to the learned Sheriff's interlocutor.

The Court affirmed the interlocutor appealed against and dismissed the appeal.

Counsel for the Pursuers (Respondents)—Horne, K.C.—Valentine. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Defenders (Appellants)—Johnston, K.C.—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, October 29.

FIRST DIVISION.

[Junior Lord Ordinary.]

MACKINTOSH, PETITIONER.

Entail—Provisions to Younger Children—Free Rent—Deductions—Interest on Debt.

A deed of entail empowered the successive heirs to provide annuities for widows not exceeding one-fourth of the free rent "after deduction of all annual public and parochial burdens and interest of debts and provisions affecting the same at the time," and to grant provisions to younger children to the extent of five years' free rent "after deduction of all annual public and parochial burdens affecting the same at the time, but not of the existing liferents to widows or husbands." No mention was made of interest of debts.

Held, on a sound construction of the deed of entail, that in estimating the free rents in regard to the provisions for younger children interest on debt charged on the estate fell to be deducted.

Entail—Provisions to Younger Children—Free Rent—Deductions—Interest on Estate Duty—Finance Act 1894 (57 and 58 Vict. cap. 30), secs. 6 (8) and 9 (1).

An heiress of entail, who had succeeded to the estate subsequent to the passing of the Finance Act 1894, and thereupon became liable to pay estate duty, granted a deed whereby she made provision for younger children to the extent of five years' free rent of the estate. The entail provided that the free rent was to be computed as at the date of the deed of provision after deduction of annual burdens then affecting the same. The duty, though due, was not exigible till a date subsequent to that of the deed of provision.

Held that in estimating the free rent interest on the duty fell to be deducted.

The Finance Act 1894 (57 and 58 Vict. cap. 30), sec. 6, which deals with the collection and recovery of estate duty, provides—Sub-section (8)—“Provided that the duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments . . . with interest at the rate of 3 per cent. per annum from the date at which the first instalment is due, . . . and the first instalment shall be due at the expiration of twelve months from the death, . . .” Section 9 enacts—Sub-section (1)—“A rateable part of the estate duty on an estate . . . shall be a first charge on the property in respect of which duty is leviable. . . .”

On 5th March 1912 Ian Keith Mackintosh of Usan, Forfarshire, with consent and concurrence of his mother Mrs A. M. Mackintosh, Inchbrayock, Montrose, widow of W. A. Mackintosh, M.B., C.M., who resided there, as his curator and administrator-in-law, presented a petition under the Entail Acts 1824 to 1882 and the Finance Act 1894 for authority to charge the said estate with estate duty, settlement estate duty, and provisions to younger children.

The deed of entail provided, *inter alia*, that it should be lawful for the heirs of entail to grant to their widows provisions by way of annuity not exceeding “one-fourth part of the free rents thereof, to be computed and taken as at the date of the deed granting the annuity, after deduction of all annual public and parochial burdens and interests of debts and provisions affecting the same at the time.”

The deed further provided that with regard to provisions for younger children it should be lawful for the heir of entail in possession—in the event of their having three or more children other than the heir—to grant a bond in favour of his younger children, burdening the succeeding heirs for payment of provisions not exceeding “the sum of five years’ free rent of the said whole lands and others, the rent in all such cases to be computed and taken as at the date of the deed granting the provisions, after deduction of all annual public and parochial burdens affecting the same at the time, but not of the existing liferents to wives or husbands.”

The petitioner succeeded to the entailed estate on the death of his grandmother the late Mrs Helen Keith or Keith Mackintosh of Usan, wife of the Rev. Thomas Mackintosh, St Cyrus, and the Government duties which he now sought to charge on the said estate were the estate duty and the settlement estate duty thereon, exigible in respect of the passing of the estate to the said Mrs Keith Mackintosh on the death of her brother the late George Keith, *Secundus* of Usan, the former amounting to £1481, 12s. 6d., and the latter to £276, 4s. 8d., together £1757, 17s. 2d. At the date of Mrs Keith Mackintosh’s death the said duties were unpaid, and on 29th December 1911 her executors paid the amount of said duties to the Inland Revenue.

On 16th March 1912 the Lord Ordinary (HUNTER) remitted to Mr W. S. Haldane,

W.S., Edinburgh, to inquire into the facts set forth in the petition, and as to the regularity of the procedure, and to report.

With reference to the provisions for younger children the reporter stated:—“By bond of provision, dated 16th March 1909, the said Mrs Keith Mackintosh, on the narrative that she was heiress of entail in possession of the said lands and estate, that the free rental of the said lands and others at the date of said bond of provision amounted to the sum of £1628, 6s. 5d., and that she was desirous of exercising the powers conferred on her by the said deed of entail, by securing the sum of eight thousand one hundred and forty pounds sterling to the said Thomas Mackintosh and Archibald Mackintosh, and to Mrs Jane Christina Mackintosh or Tod, wife of William Leonard Tod, residing at Glenesk, Polton, being her whole children then in existence other than and besides the said William Alexander Mackintosh, her eldest son, and then heir-apparent to the said lands and estate, *inter alia*, bound and obliged herself and the heirs of entail succeeding to her in the said lands and estate on the day after her death to pay to the said Thomas Mackintosh, Archibald Mackintosh, and Mrs Jane Christina Mackintosh or Tod the said sum of £8140, which was therein stated to be ‘under five years’ free rent’ of the said estates as at that date after deduction of all legal and public burdens in terms of the said disposition and deed of entail, and that in the following proportions, *videlicet*—to the said Thomas Mackintosh the sum of £2714, to the said Archibald Mackintosh the sum of £2713, and to the said Mrs Jane Christina Mackintosh or Tod the sum of £2713, together with interest on the same at the rate of five pounds per centum per annum from the date of payment during the non-payment, and penalty as therein specified. The said provisions were declared to be granted with and under the provisions, declarations, and others contained in the said deed of entail, and restrictable so as to be precisely consistent with the powers thereby bestowed. . . .”

“A point which has arisen in connection with the ascertainment of the precise amount of the younger children’s provisions is whether interest on the estate duties now proposed to be charged on the estate in respect of the late Mrs Mackintosh’s succession, and which, by section 9, sub-section 1 of the Finance Act of 1894, became first charges on the estate, falls to be taken into computation. The reporter is of opinion that in the circumstances of the present case it does not, the duties not having become exigible until one year after her succession, in terms of section 6, sub-section 8 of the Finance Act 1894, which in this case would mean that the first instalment of duty became due on 1st February 1910—the year following the creation of the provisions. Moreover, they have not in point of fact been yet created charges on the estate. . . .”

“In computing the free rental, as stated in the said bond of provision, on which the

said Mrs Keith Mackintosh fixed the amount of her younger children's provisions, no deduction apparently was made in respect of interest on debt affecting the estate, which the reporter understands amounted to £5575, created subsequent to the date of the entail. The deed of entail itself only expressly excludes from computation 'existing liferents to wives or husbands,' but having regard to the terms of section 4 of the Aberdeen Act (5 Geo. IV, cap. 87), and to the reasoning of the Judges in the case of *Lord Lovat v. Fraser, &c.*, 30th June 1885, 12 R. p. 1179, 22 S.L.R. 786, it appears to the reporter that interest on debt affecting the estate falls to be deducted in ascertaining the 'free rent.' The point is respectfully submitted for your Lordship's consideration. The reporter is informed that in 1909 the interest actually paid on such debt was at the rate of $3\frac{1}{2}$ per cent., and amounted to £195, 2s. 6d. per annum, and if it falls to be deducted the free yearly rent as at the date of the bond of provision would be reduced to . . . £1441 0 10

Five years thereof would amount to . . . 7205 4 2 to which, in that view, the sum which the petitioner should be authorised to charge under this head would fall to be restricted. If interest on the Government duties falls also to be computed, the amount of the provisions would be correspondingly still further reduced by five times the amount. In the alternative view the sum stated in the bond of provision, viz., £8140, is within the limits prescribed by the entail."

On 22nd May 1912 the Lord Ordinary (HUNTER) pronounced the following interlocutor:—"Finds (1) that the interest on debts charged upon the entailed estate falls to be deducted in calculating the free rent on which the amount of the provision to younger children is to be based; (2) that interest on the amount of the estate duty (including settlement estate duty), payable in respect of Mrs Keith Mackintosh's succession, also falls to be deducted in calculating the said free rent; and (3) that the expenses of the bond or bonds and dispositions in security for the amounts of the said younger children's provisions, and the said estate duty, cannot form a charge upon the entailed estate: Remits of new to Mr W. S. Haldane to proceed with the remit contained in the interlocutor of 16th March 1912."

Opinion.—"This is an application by an heir of entail in possession to charge the entailed estate with estate duty, settlement estate duty, and provisions to children. Mr Haldane, to whom a remit was made, has raised certain questions which were argued before me. They arise in this way.

"Mrs Keith or Keith Mackintosh, the former heir in possession, succeeded to the estate on 1st February 1909. On 16th March 1909 she executed a deed of provision in favour of her younger children for the sum of £8140, a sum said to be under five years' free rent of the estate, and therefore competent under the deed of entail. In calculating free rent no deduction was made in respect of interest on debts charged upon

the estate. The reporter is of opinion that this was wrong. I agree with him.

"Under the deed of entail it is provided that the heir of entail in possession may, in the event of there being three children other than the heir—the case in point—grant a bond to his said younger children burdening the succeeding heirs for payment of provisions not exceeding 'the sum of five years' free rent of the whole lands and others'—'the rent to be computed and taken after deduction of all annual public and parochial burdens affecting the same at the time, but not of the existing liferents to wives or husbands.' If these words stood alone I do not think it could be successfully contended that interest upon debt charged upon the estate did not form a proper deduction from the rental to be taken as the basis for calculating the amount of the provision to younger children. The expression 'free rent' would appear to be used in the same sense as it is used in the Aberdeen Act (5 Geo. IV, cap. 87, sec. 4). It was, however, contended on behalf of the younger children that an examination of the different provisions of the deed showed that the entailor intended that the free rental should be ascertained, after deduction of public and parochial burdens payable annually, and without any deduction for interest payable on debt. This argument is founded mainly, if not exclusively, upon the circumstance that, in providing for a widow's annuity, free rent is to be computed 'after deduction of all annual, public, and parochial burdens and interests of debts and provisions,' while nothing is said about deducting 'interest of debts and provisions,' in the case of a provision for younger children. I do not, however, think that the mere absence of these words in the later part of the deed necessarily leads to what appears to me to be an unnatural construction of the actual word used. It has to be kept in view, as pointed out by the Lord President in the case of *Lovat*, 1885, 12 R. 1179, at p. 1185, 22 S.L.R. 786, that it would be difficult to suppose that the entailor used the expression free rent 'in a sense which would allow the whole rents of the estate to be covered by provisions to widows and children so as to leave nothing at all for the heir in possession.' After he has expressly provided for the deduction of interest of debts and provisions from the rental in computing a widow's annuity, the entailor speaks further on in the deed of 'annual burdens as aforesaid' as including the more detailed enumeration he had previously given. I think the same significance was intended to be given to the shorter expression when used in dealing with provisions to younger children. Besides, on the construction put forward on behalf of the younger children, I do not think there would be any necessity for the words 'but not of the existing liferents to wives or husbands.' These words are introduced as an exception from what has already been dealt with, and presumably because otherwise such liferents would have been deducted as annual burdens.

"The next question is whether interest on the amount of the estate duty (including settlement estate duty), payable in respect of Mrs Keith Mackintosh's succession, ought also to be a deduction from the rental on which the younger children's provision is calculated. The reporter thinks that it ought not, because the rental to be taken is that at the date of the deed granting the provision after deduction of annual burdens then affecting the same, and by section 6 (8) of the Finance Act 1894, the duty was not exigible for a year after Mrs Keith Mackintosh's succession opened, *i.e.*, subsequent to the date of granting the provisions in favour of younger children. I am unable to agree with the reporter. By section 9 (1) of the Finance Act the duty is, in a question with the Crown, made a first charge upon the estate in respect of which it is leviable. It was therefore a statutory burden upon the estate as at the date when the succession to Mrs Keith Mackintosh opened. Such a burden diminishes the annual value of an estate so burdened. The amount of the annual diminution is practically the interest that has to be paid to the heir of entail, his executors or others, who pay the duty and get a bond over the estate for the amount. I do not think the circumstance that the Crown postpones the demand for a year entitles the heir in possession to disregard the duty in providing for younger children. Under section 6 (6) of the Finance Act interest at the rate of 3 per cent. per annum falls to be paid from the date of the death up to the date of the Inland Revenue affidavit or account or the expiration of six months after the death. As pointed out in the late Mr Hanson's work on Death Duties (5th ed.), p. 160, the effect of sub-sections (6) and (8) of section 6 is to leave an interval of at least six months during which interest is not payable. Apparently, therefore, at the date when the bond of provision was executed interest was running. In calculating the annual rate perhaps some allowance ought to be made for the period in respect of which interest is not exacted; but I doubt if it is sufficient to make an appreciable difference upon the stipulated rate in the bond.

"The last question argued was as to whether the petitioner is entitled to a charge on the estate in respect of the bond or bonds to be granted. Upon this point I agree with the reporter that, in view of the decision in *Laurie*, 25 R. 636, and the opinions there expressed, the petitioner's claim cannot be allowed."

Thomas Mackintosh and Archibald Mackintosh, two of the younger children, reclaimed.

Argued for reclaimers—(1) *As to the Interest on Debt Charged on the Estate.*—Such interest was not deductible in ascertaining the "free rent," for the entail provided only for the deduction of "annual public and parochial burdens." Had the entailer meant otherwise he would have said so, as he had in fact done in the case of the widow's annuity. Where, as here, the

power to grant provisions was conferred by the deed of entail and not by statute, the expression "free rent" was not limited to the meaning ascribed to it by the Aberdeen Act (5 Geo. IV, cap. 87)—*Callander v. Callander*, May 21, 1869, 7 Macph. 777, 6 S.L.R. 506; *Lord Lovat v. Fraser*, June 30, 1885, 12 R. 1179, 22 S.L.R. 786; Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. cap. 84), sec. 6. (2) *As to Interest on Estate Duty.*—Such interest was not deductible, for at the time of the deed it had not been made a charge on the estate. *Esto* that the duty was due on 16th March 1909, the date of the deed of provision, it was not exigible till 1st February 1910 (being a year after the grantor's succession), and interest only ran from the date when payment was due—Finance Act 1894 (57 and 58 Vict. cap. 30), sec. 6, sub-sec. 8; Finance Act 1896 (59 and 60 Vict. cap. 28), sec. 18 (1). The reporter was therefore right in holding that it was not deductible.

Argued for respondents—(1) *As to the Interest on Debt Charged on the Estate.*—The reporter was right, for the entail clearly meant that the same burdens were to be deducted in calculating the provisions to younger children as in ascertaining the widow's annuity. (2) *As to Interest on Estate Duty.*—Interest on the duty was plainly deductible, for the duty was made a first charge on the estate—Finance Act 1894, sec. 1. It was immaterial that the duty had not been charged upon the estate at the date of the deed, for it was clearly a debt affecting the estate as at that date—*Laurie, Petitioner*, February 22, 1898, 25 R. 636, 35 S.L.R. 496; *Lord Advocate v. Earl of Moray's Trustees*, August 4, 1905, 7 F. (H.L.) 116, *per* Lord Dunedin at p. 123, 42 S.L.R. 839; *Hanson's Death Duties* (6th ed.), pp. 15-16.

At advising—

LORD PRESIDENT—In this case I agree with the Lord Ordinary, and I find it unnecessary to say anything more than he has said in his very careful note. I think that it is obvious that the expression "free rent" must be construed as the Lord Ordinary has construed it, and that in both branches of the case. Upon the second branch of the case—I mean the part of the case which deals with the estate duty, about which the Lord Ordinary has disagreed with the view that the reporter brought before him—I think the Lord Ordinary is clearly right. I add one remark, because his Lordship has not made it, that this decision is a necessary consequence of the view which will be found expressed in my opinion, which was concurred in by Lord Halsbury, Lord Davey, and Lord Macnaghten, in the case of the *Earl of Moray's Trustees* (1905), 7 F. (H.L.) 116. I think the views I expressed there as to the effect of the Crown charge of estate duty are right, and the necessary *sequitur* is that the Lord Ordinary's view in the present case is also right.

LORD KINNEAR—I also agree with the Lord Ordinary and with what your Lordship has said on the second point.

LORD JOHNSTON—I concur.

LORD MACKENZIE was absent.

The Court adhered.

Counsel for Petitioner (Respondent) —
D. Anderson. Agents—J. & J. Milligan,
W.S.

Counsel for Reclaimers—C. H. Brown.
Agents—Mackintosh & Boyd, W.S.

Wednesday, October 30.

FIRST DIVISION.

(EXCHEQUER CAUSE).

WYLIE v. INLAND REVENUE.

Revenue—Income Tax—Deductions—Balance of Profits—Expenses Incurred in Earning Profits—Rent Paid for Furnished House while Own House Let—Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Sched. D—Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2, Sched. D.

The owner of a house let it for two months and took a furnished house for four months—the period for which she let and endeavoured to let her own house—and made profit thereby.

Held that she was not entitled, in estimating profits for income tax purposes, to deduct the rent of the furnished house, it not being a necessary incident of earning the profit in question.

At a meeting of the Income Tax Commissioners for the County of Haddington, held there on 10th May 1912, Miss C. E. Wylie, Eastfield, North Berwick, appealed against an assessment on the sum of £60 (at the rate of 1s. 2d. per £1) for the year ending 5th April 1912, made upon her under the Acts 5 and 6 Vict. cap. 35, section 100, Sched. D; 16 and 17 Vict. cap. 34, section 2, Sched. D; and 1 and 2 Geo. V, cap. 48, section 14.

The Commissioners having confirmed the assessment, a case for appeal was stated.

The facts were as follows:—"The assessment was made on Miss Charlotte Ethel Wylie in respect of rent received by her for letting her house, Eastfield, North Berwick, furnished, for the months of August and September 1911.

"The rent received for said two months was £90 and the following deductions were allowed:—

Valued rent for two months	£14
Proportion of rates	3
Wear and tear of furniture	9
Cleaning	2
Agency	2
	— 30
	£60

"For the appellant it was contended (while the fairness of the above deductions

was not disputed) that the rent paid by Miss Wylie for a furnished house at Aberfeldy, during the period for which she let and endeavoured to let her house at North Berwick, is a proper deduction, and the assessor had not allowed anything for it. The house at North Berwick was the appellant's only house, and she had no other house to which to remove in order to vacate the North Berwick house and so render it a lettable subject. The address of the house so rented by her was Cuila-luinn, Aberfeldy, and the amount paid by her for the use of it for four months was £70 (seventy pounds).

"The Surveyor of Taxes (Mr W. J. Eccott) maintained that the rent paid by Miss Wylie for the house she occupied during the time her house at North Berwick was let is not a proper deduction for the following reasons:—The Income Tax Acts contemplate the assessment of profit and are not concerned with the application or destination of the profit when it is made.

"This principle has been repeatedly laid down, and particularly in the following cases:—Mr Justice Day in *Paddington Burial Board v. Commissioners of Inland Revenue* (2 T.C. 50), 1884; Lord Trayner in *Californian Copper Syndicate v. Harris* (5 T.C. 168, 1904, 41 S.L.R. 691).

"The Surveyor further argued that if the appellant contended that no profit could be said to be realised until she had actually returned to her house, and had set over her expenditure upon lodging against her receipts from letting her house, she was confusing two totally distinct things. What was sought to be ascertained were the expenses necessarily incurred in the process of letting the house at North Berwick furnished. Now, the expense incurred by Miss Wylie in taking another house elsewhere was not such an expense. She might have gone to stay with friends. Or again, supposing she had not let it, but she wished to take a holiday abroad or at Aberfeldy, she could not claim to set the expense so incurred against any other portion of her income."

The case was heard on 30th October 1912 before the Lord President, Lord Johnston, and Lord Cullen.

Argued for appellant—Profits were ascertained by setting against the income earned the necessary cost of earning it—Dowell's *Income Tax Laws* (6th ed.), p. 185, and cases there cited. The appellant had only one house, and in order to let it she had to take another, for she was entitled to a roof over her head. The rent of the second house therefore was a necessary incident of earning the profit in question—Hallett Fry on *Income Tax*, p. 20. *Esto* that the appellant would not be entitled to deduct the cost of maintaining herself, that was because the Income Tax Acts had expressly so provided. The appeal therefore ought to be sustained.

Argued for respondent—Taking a second house was not a necessary incident of letting one's house. The rent of the second