

have had occasion several times to remark that the evidence is allowed to be taken down at needless length.

LORD PRESIDENT—I concur in the opinion of your Lordships on the facts of this case. With regard to the question of expenses, I shall be glad to hear what parties have to suggest.

The defenders asked for their expenses, on the ground that their evidence, while it might no doubt have been considerably abridged, was not so long as that of the pursuer, and that they were obliged to meet the skilled evidence of the pursuer by skilled evidence on their side.

LORD PRESIDENT—The Court are of opinion that one-half of the cost of the proof should be disallowed. We wish it to be understood that this is a precedent that will be followed in similar cases.

Counsel for Pursuer (Respondent)—Balfour—J. P. B. Robertson. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for Defenders (Appellants)—Johnstone—Mackintosh. Agents—Hope, Mann, & Kirk, W.S.

HOUSE OF LORDS.

Tuesday, February 12.

THE LORD ADVOCATE v. EARL OF ZETLAND.

(Before Lord Hatherley, Lord Selborne, Lord Blackburn, and Lord Gordon.)

(*Vide ante*, Dec. 5, 1876, vol. xiv. p. 137,
4 Rennie 199.)

Succession—Succession-Duty Act 1853 (16 and 17 Vict cap. 51), sec. 2—Predecessor—Disposition—Devolution by Law—Entail.

An entailed estate, destined to A “in life-rent, and to the heirs-male procreated or to be procreated of his body in fee,” passed in terms of the destination to B, who was served as nearest heir-male of tailzie and provision to C, his uncle, the immediately preceding substitute. *Held* (*aff. judgment of Court of Session*) that in the sense of the Succession-Duty Act, B took not by disposition but by “devolution of law;” that accordingly C, and not A, was his predecessor, and that he was therefore liable to pay a duty of three per cent.

This was an action in which the Lord Advocate maintained that the Earl of Zetland, having succeeded his uncle as next heir-male to certain estates under entails executed in 1768 and 1823, was liable to pay succession-duty at the rate of three per cent. Lord Zetland maintained that the estates were not derived by him from his uncle, the previous Earl, as “predecessor” in the sense of the Succession-Duty Act 1853, but from the makers of the entails, who were his lineal ancestors, and that consequently he was liable in succession-duty only at the rate of one per cent.

On 5th December 1876 the Court of Session

(sitting as a Court of seven Judges) held that the “predecessor” of the Earl of Zetland was his uncle, and that he took from him by “devolution of law,” and that therefore he was liable to pay succession-duty at the rate of three per cent.

Lord Zetland appealed to the House of Lords.

The respondent was not called upon.

At delivering judgment—

LORD HATHERLEY—My Lords, in this case the question arises upon the amount payable by the Earl of Zetland as succession-duty under the Succession-Duty Act, regard being had to the mode in which the estate of which he is in possession, and which is undoubtedly a succession, came to the Earl as successor according to the language of that Act. The question is—What, under the circumstances of his being so possessed of the succession, is the proper duty to be paid? The last taker of the estate to which he succeeded was his uncle, and if that uncle was his “predecessor,” from whom the estate devolved upon him by law, according to the provisions of the Act he would have to pay three per cent. upon the value of the succession, ascertained in the way which the Act prescribes. If that was all, it would then be an ordinary succession to an uncle; but the peculiarity of the case is this, that he becomes such successor partly by virtue of an entail created in 1768 by Sir Lawrence Dundas, and partly by virtue of an entail created in 1813 by Thomas Lord Dundas, the liferenter under the original settlement of 1768 made by Sir Lawrence Dundas.

Now, my Lords, the title stands thus—The destination in the original deed of the 25th of May 1768, by Sir Lawrence Dundas, was in favour of his son Thomas, afterwards Lord Dundas, in liferent during the days of his life, and after his death to the heirs-male lawfully procreated or to be procreated of his body in fee, whom failing to certain substituted heirs who are specified in the deed. The deed of 1813, which was executed by Thomas Lord Dundas when he was in possession, and under the provisions of a certain private Act of Parliament granting him authority so to do, limited the estates in substantially the same manner—namely, to the same Thomas Lord Dundas in life-rent and then to the heirs-male of his body in fee, with remainder over.

My Lords, the question which arises in this case has been comparatively recently discussed in the case of *Lord Saltoun*, in your Lordships' House (April 1860, 3 Macq. 659), and the decision which was there come to is undoubtedly one which must have great effect, as it appears to me, in guiding your Lordships to a decision in the present case. In that case the question was, whether Lord Saltoun was entitled to say that he claimed the succession, as regarded his predecessor, through the medium of his immediate ancestor, or through the medium of the entail which had been created by, I think, his grandmother, and which entail pointed to him as the substitute *nominatim*, instead of including him, by virtue of the disposition therein contained, in the description of “heirs-male of the body” of either the institute or one of the substitutes? The question arose therefore, whether the author of the entail was the predecessor in that state of circumstances where the successor had been named in the instrument, and had taken the

succession in that manner from the persons who had been previously named in that instrument, or whether the successor's claim was not one in the direct line from the persons who were immediately anterior to him in the possession of the estate, and to whom, therefore, he by virtue of his position, was properly to be called, within the meaning of this Act, to which I am now about to refer, the successor, and entitled as such successor to the property?

Now, the Act itself, in the second clause, contains all that is necessary for disposing of the present case, although reference has been made to the third and fourth clauses, which I will briefly notice before concluding; but that clause directs 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." Now comes the second head—"And every devolution by 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 any such disposition or devolution, a 'succession,' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote settler, disponent, testator, obliger, ancestor, or other person from whom the interest of the successor is or shall be derived."

Your Lordships had the advantage of a very full discussion of this section, and of its true intent and meaning, in the case to which I have referred—namely, *Lord Saltoun's* case, and there it appears to have been laid down very distinctly that the object of this section was to point out two classes of cases in which the succession might be claimed by the person who was to be affected by the duty—namely, a disposition by the instrument under which he claimed, or a devolution by law, such as by heirship or kinship in the case of personal estate (but here we are dealing entirely with real estate), in consequence of which heirship he might claim the property as coming to him by law. That was founded upon a careful examination of the provisions of the section, which seems in every possible form and shape to embrace all the cases which may arise from a disposition of property on the one hand and from a devolution by law on the other. The words which occur towards the close of the section appear to point to a devolution by law in opposition to a devolution by disposition, or "devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time" there mentioned.

The question which was considered in *Lord Saltoun's* case was, whether or not Lord Saltoun came into the estate as successor by the provisions of a disposition—namely, by a deed of tailzie—or whether he simply came in as heir of the last person who was in possession of the estate under that instrument? What was held in that case must, as it seems to me, guide your Lordships upon the present occasion. It was there pointed

out, in the first place, that, whether judiciously or not, at all events the Act was so framed as to embrace estates both in Scotland and in England, notwithstanding the great differences between the tenure of property in the two countries, and that therefore a construction must be found which would sustain the Act as applying either to an English or to a Scotch estate—that the same words must regulate the construction of the Act in the one case and in the other. Therefore it was held in *Lord Saltoun's* case that, in construing a Scotch instrument of tailzie, a difference should be made where any person was pointed out specifically and *nominatim* by the deed, in which case the deed, and the deed alone, regulated the succession, and the succession came by virtue of that deed, and by virtue of that deed alone, and therefore was to be traced to the author of the deed. It was held that that was to be distinguished from a case in which the deed had, as it were, launched the interest which was to be acquired by those who came successively into the possession of the particular property by describing it in the deed, and passed it in the form of a conveyance under the Scottish law—namely, a deed of tailzie. It was held that in the latter case you were to look into the deed, and that after the estate had been so created, which was afterwards to devolve according to the mode assigned by the deed itself, you were to find out, regard being had to that, who subsequently came in by virtue of a devolution by law, according to the mode prescribed in the deed and by the authority of the provisions contained in it. In the first case it was held that the deed named the person, and decided everything which had to be decided with regard to his interest in taking as a successor when the estate was created and was set out in the line of descent to heirs-special, either heirs-male of the body or otherwise. When the deed was set forth, it was held that it had performed its functions in creating an interest, and that it had left that interest afterwards to be disposed of by law. The whole reasoning of the decision in *Lord Saltoun's* case was to the effect that that which had been so left to be disposed of by law would fall under the second head of the second section of the Act to which I have referred, and would pass by a devolution by law upon death, and that although all the persons specifically named in that deed would take the property, in the first instance, by virtue of the gift, and by virtue of that gift alone, those who derived any title by operation of law upon the death of a predecessor would be held to be persons who would have (whatever might be the consequence of it) to pay, not as claiming a succession under the authority of the deed, but as claiming by operation of law, an interest in the property conveyed by the deed, which interest would be pointed out by the law and the law alone.

Now, here the argument has been that a difference exists between the point which was decided in *Lord Saltoun's* case and the point which has been argued—first by Mr Benjamin, and afterwards by his junior—as to the position of a person not named in the deed—that all that *Lord Saltoun's* case positively decided was, that if a person was named in the deed, and took the beneficial interest intended for him by virtue of the provisions of that deed, the author of the deed must be considered as the predecessor; but that

it did not determine anything with reference to those persons who came in a continual course, as it were, of substituted limitation, according to the description contained in the deed; and it has been argued before us that the heirs-male of the body of the first taker were all of them as strictly individuals designated and pointed out by the author of the deed as if he had been able to foresee who they would be, and had pointed out what the operation of the law upon the instrument would be, and had mentioned the different successors by name instead of saying those who shall be the heirs-male. It is quite true that the decision in *Lord Saltoun's* case does not decide expressly that point; but the whole reasoning of that case proceeds upon the ground of there being a distinct difference—as common sense shows that there is—between the case of a person who is named in an instrument and takes by virtue of being so described, and the case of a person who is not named in any way whatever in the deed, but is merely pointed out as the person who by law will be the successor, as in many cases he is. All those persons are taken by the counsel for the appellant as if they were picked out by the settler and named one after the other, as though that were the same as his summing them up in this way, and saying that they should be those who were the heirs-male of the body. It is said that they would take the estate by the Scottish law, not by operation of law, but by the deed, or, at all events, in the strongest way, by the joint operation of the deed and of the law, as pointing out the meaning of those words which have been used by the settler in his grant.

Now, it is quite true that *Lord Saltoun's* case has not in so many words decided that point, and I state that more particularly on account of the observations of Lord Chelmsford in that case, in which I do not exactly concur, by which he has pointed out what he thinks may be taken to be the view of this particular settlement—namely, that this substitution of heirs of the body of the institute, or of a series of substitutes after the first substitute, is more to be compared with the case of the first and other sons in an English instrument than to be taken as an instance for succession, in the words of the Act, devolving by law upon the person who takes as successor. The distinction has been laboured very much by Mr Benjamin, and also by his junior to a certain extent. The reason of the difference has been said to be this, that the English law of entail allows the first taker—the institute or the first substitute, as you might call him in the Scottish arrangement—to dispose of the estate in such manner as he may think fit, and gives him the complete control over it by virtue of fine or recovery, which power he may or may not exercise, but which places in him the entire and absolute fee, so that if he does not dispose of it, it may be said to come as a succession devolved by direction of law upon the successor. My Lords, that does not appear to me to make any substantial difference in the case. The English law has imposed fetters of a certain class. The entail would be barred if certain formalities were gone through. In some cases, according to the English law, it could not be barred at all. Where the reversion was in the Crown it could not be barred. According to the argument of the appellant, the Crown would be considered as the settler from

whom the persons must be taken to have derived title for all time down to the time of the extinction of the estate. It would be a most unreasonable construction of the Act to suppose that any such matter was in contemplation, and that is of itself a considerable argument against any such construction being attributed to the Act.

Really, the truth is this, that the estate, when once created by the author of the deed of tailzie, or the author of the deed of entail in England, exists, being an interest which becomes a valuable interest, and which, under the terms of the second section of the Act—namely, “Property or the income thereof,”—comes to the successor upon the death of his immediate predecessor as an heir in the line of entail. For instance, in this case which we have before us, the first taker Thomas, afterwards Lord Dundas, taking a life-rent, would be in a different position of course from any of those persons who are subsequently dealt with. Then come in the heirs of Thomas, as they may be ascertained by law. His heirs who come in, being ascertained by law, proceed in a straight line down to, I think, the son and the grandson. Then there is a stoppage. The grandson has no child. The consequence is that another line is introduced, and the nephew comes in (being the son of the second son) of that grandson who has no issue. Now, how can it be said that the nephew does not derive title in that case from his immediate predecessor the uncle? I apprehend that the word “derived” at first created some sort of difficulty. That difficulty is adverted to in the case to which I have referred, namely, *Lord Saltoun's* case; but I do not think that, when you consider the case carefully, it presents any such difficulty as would prevent the conclusion which was come to in *Lord Saltoun's* case being come to by your Lordships on the present occasion.

With regard to this, my Lords, I think that the case is very clearly put by the Lord President in the printed papers, where he says this—“The entailer has selected the class he wishes to favour—heirs-male of the body—but he has left to the law to say what shall be the order of succession of the individuals within that class. The law, on the death of the eldest son of the *nominatim* substitute, prescribes that the son of that eldest son, and not his immediate younger brother, shall take as the next heir-male of the body of the *nominatim* substitute.” Then he goes on to state a case in which I do not follow him quite so clearly; it may be that I have not understood him quite so well as I ought to have done. He says—“But if the law of succession were altered, and an immediate younger brother preferred to the eldest son of a deceased proprietor, then a destination to heirs-male of the body would suffer a corresponding change of meaning.” I am not sure that I fully follow that; but, at all events, it is not necessary, I think, to the decision of the present case. But what he proceeds to say is this—“The will of the entailer, when he calls a class of heirs-male of the body, is that the law shall determine within that class who is the person to take on every occasion on which a death occurs among the class causing a devolution of the estate, and from this it seems to follow that on every such occasion the transmission of the estate from the dead to the living is a devolution by law.”

That, I apprehend, is a very correct mode of putting it, and when you find the word "derived," which has somewhat of a metaphorical aspect, used in the section, you have to say that the donor points to so many fountain-heads; but he leaves it to the law to say which is to "derive" the title to the interest under the settlement. The settlement goes on to a certain point, when it is arrested, we will say, by the death of a person without issue, and nothing being left to the settler to do, he having done all that he had to do, and given all the directions that he had to give upon the subject in his original deed, the law then provides another channel, following the same course of the stream, going back a little way in the stream and drawing out a channel from thence, and bringing in the nephew as successor to the uncle, and so on. In the later period the title of the succession is derived by law in accordance with the settlement; but it is always derived from the immediate predecessor in the line of heirship, which is pointed out by the deed. It seems to me that the only function of the deed, and the only use of the deed, is this—You must go to the deed to find the fountain-head, the *stirps*, the institute, or the substitute, as the case may be. When you have found the institute or the substitute, who is given to you *nominatim*, it is left to the law to say how the property shall devolve. The law then takes upon itself that function, and says how it shall devolve. Though it be a fettered estate, it is to devolve to the heirs whom the law points out, and though in Scotland it may be fettered perhaps more strongly in some points, but less strongly in others, than an English estate tail, nevertheless, as was said in *Lord Saltoun's* case, you have to apply the Succession-Duty Act, and this second section of it, to the two classes of property—the Scottish class and the English class—and you must adopt such a construction of the Act (as was done in *Lord Saltoun's* case) as will best suit and harmonise with the two descriptions of property, so as to make the Act sensible in both countries, there being no reason whatever to be assigned for any distinction between the two countries in the amount of duty to be paid in a certain event by the taker of a property in the one country or in the other.

My Lords, taking that view, I do not think it necessary to go through the different authorities which have been cited upon this occasion.

Two other sections of the Act of Parliament have been referred to. One of them relates to the case of joint tenants, but that has, I think, been disposed of by my noble and learned friend now sitting on the opposite side (*Lord Selborne*). That matter was clearly explained in the course of the argument—each joint tenant has in him an interest together with the other joint tenant, and when one dies off, the estate of the other naturally and necessarily becomes enlarged. The other section of the Act, my Lords, is that in which the direction is contained as to an appointment made by a person who has a general power of appointment as contrasted with an appointment by a person who has only a limited power—a power of selection. In the case of an appointment by selection, the Legislature has very properly considered that the real author from whom the beneficiary takes his succession is the person who has given such limited power of selection to

another whom he only makes his conduit pipe—his instrument for conveying his bounty—his almoner who is to distribute his property—but who is in no respect the author of the property itself, and is not the person who, as having power over the estate, can do what he likes with it. Whatever he chooses to do with it is his own act, but the right of doing it is derived, and the succession of the person who takes the property is derived, from the author of the deed, who has the sole controlling power. But it is different with an estate tail and a deed of tailzie, and the reason of the difference in such a case as that is very obvious, which is this, that the author says—"I hand over the estate to you in this particular form, subject to certain conditions, but I tell you that if I give you the benefit at all, I give that benefit in the way which the law will point out. I do not give the benefit as a fee-simple. I give certain charges upon the estate." It would have been very much the same if it had been upon the quantity of the estate instead of the quality. He gives a certain portion of his property, and in so disposing of it he says—"I give it, but as to the devolution of it, that devolution shall be by law—that is to say, in the way which the law prescribes having regard to the particular words which I have used." Accordingly, it seems to me, as it did to the Judges who decided *Lord Saltoun's* case, that that devolution takes place which the law prescribes, and it is a devolution by law. The person who so takes the interest takes the interest by operation of law as the heir of the last taker who was his predecessor, and therefore in this case must pay the three per cent. duty.

An alternative case was raised, which was this, Whether the successor could not be said to take as claiming the first institute or substitute as the common ancestor from whom the title had been derived? If so, inasmuch as in this case that would be a lineal descent, it would give the appellant what he desires, namely, a duty of one instead of three per cent. But, my Lords, I think that it would be a very strained construction of the Act if we arrived at any such conclusion as that. In a case which I have mentioned—the case of gifts of estates from the Crown—there would under that construction be ten per cent. payable upon all successions to those estates. By such a construction of the Act we should get rid of the whole effect, I think, of the decision in *Lord Saltoun's* case, which points out the connection between that part of the Act which speaks of a "devolution by law," and that part of it which speaks of a settler, donor, ancestor, or other person from whom the estate is derived. The expression "ancestor" is perfectly accurate in a case of this kind. The word "ancestor" is properly assignable to the person who really preceded in the estate, although that person may not be the progenitor of the successor. He may be, as in this case, his uncle. I think that any other construction would lead to a very forced construction of the Act, and would be in direct hostility to the principles upon which *Lord Saltoun's* case was decided.

Upon these grounds, I propose to your Lordships that your Lordships should affirm the decision of the Court below, and dismiss the appeal, with costs.

LORD SELBORNE—My Lords, the main argument of the appellant's counsel has been, that under a strict entail in Scotland no beneficial interest is derived by any heir succeeding to a prior heir of the entailed estate from such prior heir, because the prior heir had no power of alienation, but was (in substance, though not technically) a mere life-renter, and therefore that the interest of such heir can only be considered as derived from the author of the entail, who in this case was a lineal ancestor of the appellant.

With regard to this argument, I am, in the first place, unable to assent to the propositions that the existence or exclusion of a power of alienation over the fee, by the exercise of which the *spes successionis* of the next heir might be disappointed, makes any difference with respect to the question which we have here to decide. Were it so, it must follow equally in England that whenever there is any legal impediment to the power of an heir in tail to bar the entail (whether by special Act of Parliament, by the existence of a reversion in the Crown, or by reason of minority) the succession of the next tenant in tail ought to be taxed as if the preceding heir had been a mere tenant for life. But the estate comes to the next taker as much by descent (or "devolution by law") from an heir in tail who cannot alienate as from one who could do so by the use of means which he has not in fact used, and the estate which so comes to him is to all intents and purposes a beneficial interest, and not a dry legal title. It is the same estate in law which was in the preceding owner, which was not less a beneficial fee though the law placed fetters upon it so far as the power of alienation was concerned.

I have further to observe, that this argument is not only opposed to the views expressed in this House by those at least of the Judges who decided *Lord Saltoun's* case, but that it is at variance with the leading principle of that decision, which was to construe the Succession Act with respect to Scotch and English entails so as to produce in substance corresponding effects under both systems of law. The effect of the present argument would be that the succession duty would be assessed upon every English heir in tail as taking by devolution of law, and upon every Scotch heir in tail as taking by disposition of the author of the settlement, so that the original decision of the Scotch Courts in *Lord Saltoun's* case (which was justified if regard ought to be paid only to the technical rules of Scotch law) would have been reversed, and those technical rules set aside, merely to establish under this statute a new conflict between the two systems of law from the opposite direction.

Setting aside therefore this argument, and assenting (without any doubt) to Lord Campbell's opinion that under a Scotch entail a son succeeding as heir-substitute to his father derives his interest from his father by devolution of law, the only remaining question is, Whether a nephew succeeding to his uncle under a destination to the heirs of the body of a common lineal ancestor of both derives his beneficial interest (within the meaning of this Act of Parliament) from his uncle, the last preceding heir in tail, or from their common ancestor?

This is a question attended with no difficulty. The second section of the Act distinguishes between two classes of titles, viz., those in which

the interest of the successor comes to him by "disposition" (or in the terms of English law, by purchase), and those in which it comes to him by "devolution by law" (or in English technical phrase as to real property, by descent). The predecessor in cases of "disposition" (or purchase) is the "settler, disponent, testator, or obligor," "from whom the interest of the successor is derived;" in cases of "devolution by law" (or descent) he is the "ancestor from whom the interest of the successor is derived" (I omit the words "or other person," which seem to have been put into the Act only *ex abundanti cautela*). Devolution by law takes place whenever the title is such that an heir takes under it by descent from an "ancestor" according to the rules of law applicable to the descent of heritable estates, and in all cases of descent the estate of the successor is immediately "derived" from the "ancestor" from whom the estate descends. The word "ancestor" does not mean, either etymologically or technically, a lineal ancestor only—in illustration of which proposition I may refer to a passage in Comyn's Digest (vol. i. Assise, 705) as to the English writ of "Mort d'ancestor," which (it is said) "does not lie upon the death of any ancestor, except a father, mother, brother, sister, uncle, aunt, nephew, or niece, for upon the death of another ancestor an *aiel besaiel* or cosinage lies."

Can it then be said that the estate of the present appellant descended to him, not from his uncle, but from the common ancestor of himself and his uncle, to the heirs of whose body the estate was limited by the entail? It is plainly impossible to say so, for that ancestor was in this case a mere life-renter. Or can it be said that the estate descended to him from the institute under the entail, who was also a common ancestor? I think clearly not. Not only does the decision in *Lord Saltoun's* case require that as far as possible a generally consistent effect should be given to the Succession Duty Act under English and Scotch entails, but in truth there is very little even of technical difference between the law of England and that of Scotland with respect to heirs in tail taking under such forms of destination as that in the present case. In England, as well as in Scotland, the heir in tail, even if issue of the last taker, claims as what the Scotch law calls "heir of provision," or (as the English law says) "*per formam doni*." He is, to use the words of Mr Yorke (in his observations on *Lomley's* case in his book on Forfeiture), "as much within the view and intention of the gift or settlement, and as personally and precisely described in it as his ancestor." But he, nevertheless, though obliged to qualify himself as belonging to the special class of heirs designated *per formam doni*, is also obliged, both in English and in Scotch law, to claim as heir (whether lineal or collateral) to the last preceding heir in possession under the entail. In Scotland he must, as is admitted, serve himself heir; in England, if put to his right of action, he had his writ of *Formedon in Descender*, in which it was always necessary for the demandant to claim by descent either as son and heir or as cousin and heir to the person last seized.

Upon the same principle depended the effect of the English statutes as to fines, Crown debts, and forfeitures. The Statute of Fines (32 Henry VIII. cap. 36) made fines duly levied with proclama-

tions a bar and discharge for ever against the cognisors (being tenants in tail), and "their heirs claiming the lands only by force of entail." The words "their heirs" in this statute were held to include not lineal only but collateral heirs, such as the appellant is to his uncle in the present case.

The Statute of 26 Henry VIII. as to forfeitures for high treason (on the analogy of the operation of which the opinion of Lord Hardwicke in the case of *Gordon of Park*, (1 Craigie & Stewart (Paton's ed.) 558; Kames' *Elucidations*, 368,) proceeded) forfeited to the Crown all the estates of inheritance of a convicted traitor, but saved all rights and titles of "every person and persons, their heirs and successors, other than the offenders in any treason, their heirs and successors." Under this statute it was determined that the Crown took all estates of which the convicted traitor was tenant in tail during the existence of all heirs of his body and of all such of his collateral heirs as would have been inheritable to the estate tail if there had been no attainer; while, on the other hand, all estates in remainder or in reversion expectant upon the estate tail were saved.

Lord Campbell in the House of Lords (3 Macq. 659) and Lord Ivory in the Court of Session (21 D. 145), justly, as I think, deemed the principle of the analogy acted upon in the case of *Gordon of Park* to be applicable to the construction, as to estates of the same nature, of the general untechnical language of the Succession Duty Act, which was plainly meant to have a similar and equal incidence upon English and Scotch titles, and that analogy, so far as it is applicable, points as clearly in the present case to the determination at which the Court of Session has arrived as it did in the case of *Lord Saltoun* to the conclusion adopted by the House of Lords.

I therefore agree with my noble and learned friend upon the woolsack that the present appeal should be dismissed.

LORD BLACKBURN—My Lords, I also agree that this appeal must be dismissed. The question, as I take it, all turns upon the true construction of the Succession Duty Act of 1853, and I think that the only portion of that Act which it is material to look to for the purpose of raising the construction is the second section, which I do not now read, because it has so frequently and so recently been put before your Lordships. Now, in that section the Act makes a distinction between the persons who take upon a death happening subsequently to the passing of the Act by a "disposition of the property" and those who take by "devolution by law of any beneficial interest in the property," and the great question which comes first is, What is meant by "devolution of law?" Devolving an estate, or devolution by law, is not a technical set of words either in England or in Scotland. It is used in this Act, which is meant to apply equally to English and Irish estates and to Scotch estates. Probably it was purposely chosen, as being a phrase which the law had neither appropriated nor to which it had given any particular meaning, and we have to arrive at its meaning by taking the whole context and looking at the subject-matter, and thus seeing what the words do mean.

Now, I think that upon that it is well, there being a difference between the law of Scotland and the law of England, first to see what that difference is. In England a person who is seized in fee-simple of an estate can settle it in a particular line of succession *per formam doni* or upon a particular class of heirs, but he cannot settle it in any succession which he likes; it must be confined to a class of heirs known to the law. A man might and may still settle his estate upon A and the heirs of A's body. He may, if he likes, settle it upon A and the heirs-male of his body, which would be a different line of succession. He would by that form of gift make the succession to heirs-male to the exclusion of daughters or these claiming through daughters, or if he pleases (which is very rarely done) he may settle his estate upon A and the heirs-female of his body, excluding males. All these would be inheritances which the law would recognise, and therefore an English donor of an estate might give it to a donee and the heirs in that particular line of inheritance which he might select, but in England he cannot make a line of inheritance of his own; he cannot say—"I will give the estate to A, and I desire that B shall be considered as A's heir." He may grant it to A and his heirs, and he may say—"After A and his heirs came to an end by the efflux of time, it shall go to B and his heirs" but that is not by making B heir to A, but by making the person who is to come in afterwards a fresh *stirps*; as was said in *Lord Saltoun's* case—making him come in as the remainder man.

Stopping there, and without at present saying what are the differences in Scotch law, What does "devolution" mean in such a case as this? I can put no other meaning upon it than this, that where the estate has come into the line in which the person is heir, and has come either to A or to some one who is the heir of A, so that it begins in that line of inheritance, then as soon as by death that estate devolves according to the law of inheritance, a devolution happens at that time. That is the only meaning which I can put upon the word "devolution" as making common sense or being what I think the word must mean. If the estate devolves by death on that person who is heir, if it is held in fee-simple, it devolves upon the death of the owner in fee-simple on the heir who according to the general rules of law would be the heir to the estate—the heir of the line, the general heir. If the estate has been settled, as it may be in England, to a man and the heirs of his body, then where the person who is seized of that estate tail dies it devolves upon the heir of the body, or if it be the heir-male it devolves upon the heir-male of the body, or if it be the heir-female it devolves upon the heir-female, but in each of those cases it devolves according to the line of succession which I have pointed out.

Now, in Scotland, as I understand the law, the person who is settling the estate can both do more and do less than he can do in England. He cannot, as I understand, make it an estate tail cutting it down; he leaves a fee to the man and his heirs, fettered and restricted by proper irritant and resolutive clauses, but still each successive person who takes takes the fee subject to the restrictions; he is therefore not able to cut it down quite so much as he would do in England. Prac.

tically it comes to very little difference indeed (except as to the power of alienation, which is another matter) whether a man has the fee-simple without any power to alienate and it must go in a particular line of succession, or whether he has it as an estate of inheritance in that particular line of succession. However, there is a technical difference there; and further than that, as I take it the Scotch donor has power to make the provisions of the heir as he pleases. I have said that in England a man may leave his estate to an heir in any particular class of inheritance, but that he cannot make a stranger his heir; he must make a stranger a remainder man; in Scotland he may make that person an heir of provision, and consequently he is not a remainder man, but he comes in as an heir of provision. Now, it was upon that, as I understand, that the difficulty arose in *Lord Saltoun's* case. There Lady Saltoun had settled the estates upon her grandsons—one was Lord Saltoun, who died without issue, another was Major Fraser, who afterwards became and is the present Lord Saltoun. The first Lord Saltoun came into possession, and then he died after the Act, and the question in controversy was—Did the present Lord Saltoun (Major Fraser), who was named, come in as heir of provision to the first Lord Saltoun, or did he come in as taking a remainder—taking a fresh estate as we should call it in England—an estate by purchase or remainder direct from Lady Saltoun? That made a difference in the rate of duty to be paid. Now, the majority of the Court in Scotland, acting upon the principles of Scotch conveyancing law, said—“This is a devolution, and cannot be anything but a devolution, for Major Fraser comes in as heir to Lord Saltoun, having been made heir by the provision of Lady Saltoun, who settled the estates.” When it came to this House, I do not understand that that was found fault with, or that it was said that that would not be so if it was a question only of Scotch law, but it was said in substance—“The Act is an English Act as well as a Scotch Act; it is intended to make the estates in Scotland and the estates in England subject to the same duty, and inasmuch as in England it is quite clear that if Major Fraser had been named he would have been a remainder man, coming after the expiration of Lord Saltoun's estate tail, and not an heir of Lord Saltoun, we must construe the Act by analogy to the well-known case of *Gordon of Park*. We must construe this Act as meaning that such a named substitute, the first of a new *stirps*, shall be exactly in the same position as the remainder man would be in England—that is to say, he shall take from the donor by disposition, and not by devolution from that person.” That is convenient unquestionably. That point has been decided, and we cannot pass it by, as it seems to me to be a decided point.

We come now to what is the question in the present case. I cannot find that there is any difference between English and Scotch law. In the present case, when the last Earl of Zetland died, he being at that time seized according to the Scotch law, having an estate in fee in him, but subject to restrictions, and clauses resolute and irritant and other restrictions, which prevented him from alienating it, and at the same time made a provision that his heir should be his

nephew, the present Earl of Zetland—when he died, surely in every sense of the word the estate devolved, fell on, to his nephew. One cannot see how it would be otherwise than a devolution. The argument, so far as I can make it out (I put it in my own words), is this—that where you give an estate to A and the heirs of his body, it is a disposition in favour of A, the first taker—in which I agree; and then it is said—“When A dies it is a disposition in favour of his heir, and when that heir dies it is a disposition in favour of the next heir, and so is a series of dispositions.” But I do not think that either in England or in Scotland that argument would be tenable for a moment. In England it is an estate of limited inheritance; in Scotland it is an estate of absolute inheritance, but subject to restrictions against alienation and otherwise which practically very much cut it down; but in either case the person takes by devolution as heir.

Then comes the next question—as the person takes by devolution, which turns upon the last few lines of the section, it is said in that section that there shall be a succession to “the person entitled by reason of any such disposition or devolution”—“and the term ‘successor’ shall denote the person so entitled.” It is quite clear that the Earl of Zetland is the successor. According to my view of the matter, it is quite clear that he takes by devolution. The clause then says—“and the term ‘predecessor’ shall denote seller, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.” That brings us to a question which does not seem to have been raised in the Court below (I suppose because upon the Scotch principles of conveyancing it seemed so self-evident), namely, whether or not this estate coming to the Earl of Zetland in devolution, it can be said that his interest is derived, not from the last heir, the person last possessed of the estate in fee, but from the first institute, or from the first Earl of Zetland, who has taken it from the first institute—it matters not whether it was he or his father—in which case, if the estate was derived from that first, the Earl of Zetland would take as a lineal descendant, whereas if he took it from the last heir he would take as succeeding to a person by reason of whom he would pay a higher rate of duty. Now, upon that, is there a difference, in the first place, between England and Scotland. No, I think that there is not in that respect. There is no doubt whatever that there was a passage by Lord Wensleydale in *Lord Saltoun's* case which startled me when I first read it; but it was irrelevant and unnecessary, for it was not the point in that case. Lord Wensleydale certainly did state that in England when you had an estate tail the person who took as heir would derive his title from the first donee of the estate tail, and Lord Wensleydale was in general so very cautious, and accurate in his statements, even when they were not upon the exact point, that it made one think that it must be so. But upon looking at the authorities it turns out that that is not so at all. In the old times when it was done by actions real—when the matter was fairly and thoroughly brought out upon the pleadings—it was settled beyond all doubt that where the heir under an estate tail was bringing his action, he was always bound to make a title not to the first donee of the estate,

but to show it from the donee *per formam domi*; it came down to the person last seized of the estate tail, and then he was bound to show his title upon the record—upon his count, not as son, or grandson, and heir of the first donee, but as cousin and heir, *secundum formam domi*, to the person last seized of the estate tail. I need hardly refer to the authorities for that, but they are to be found in *Buckmere's* case, in the 8th part of Coke's Reports, 86, and in Fitzherbert's *Natura Brevium*, and in Comyn's Digest, title "Pleader." They are uniform upon it. He took as heir *secundum formam domi*, as we should say in England; in Scotland he takes as heir of provision. When once you have got that, it is precisely the same in both countries; he comes in from the donor, the original settler having had the power to a certain extent (more extensive in Scotland than in England) of saying who shall be the provisional heirs, and who shall be the heirs *per formam domi*. He who takes as heir under such circumstances as those derives his title from the last person possessed, and consequently the amount of duty which he has to pay must be regulated according to his blood relationship to that person; and it seems to me obvious that this must have been the intention and wish of the Legislature, for, taking the ordinary case of a man purchasing an estate either in England or in Scotland, and making no particular settlement about it, but dying leaving two sons, the eldest son of course takes it—the eldest son dies leaving a son, that eldest grandson therefore takes it—then if the eldest grandson dies without issue it goes to the uncle or the uncle's son; it is obvious that the succession duty there would be regulated by that uncle, or that uncle's son succeeding as uncle and heir or cousin and heir to the person last seized; he would succeed as heir to the person last seized because he was the son and heir of the original purchaser, of the grandfather, who, upon the supposition, had bought the land, but he would pay duty because he succeeded to the heir who was last seized; and I cannot myself see any reason in the nature of things, or any reason either technical or substantial, why it should be in the least different when the whole of the inheritance is made by provision in the settlement in Scotland, or in England *per formam domi*. My own private opinion (which I should perhaps hardly state) is that it is excessively harsh, and not very just, to say that a person who succeeds to his nephew should pay a higher rate of duty than a person who succeeds to his father. I do not much like that notion, but I cannot help thinking that it is not a whit more harsh or unjust to say that a man who succeeds to an entailed estate under a provisional order of succession, and succeeds to his nephew, shall pay an extra duty, than it is to say that he shall pay an extra duty when he succeeds by the ordinary rule of law.

Taking the whole matter, therefore, it seems to me that the decision of the Court below was perfectly right, and should be affirmed with costs.

LORD GORDON concurred.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Counsel for Appellant—Benjamin, Q.C.—H. J. Moncreiff—Simpson. Agents—Frere & Company.

Counsel for Respondent—Lord Advocate (Watson)—Nicholson. Agent—David Crole, Solicitor of Inland Revenue.

COURT OF SESSION.

Tuesday, February 12. *

SECOND DIVISION.

SPECIAL CASE—REID (M'WALTER'S TRUSTEE) AND M'WALTER.

Husband and Wife—Heritable and Moveable—Conjugal Rights Act 1861 (24 and 25 Vict. c. 86), sec. 16—Question between a Wife and Trustee on her Husband's Sequestered Estate as to Right to Annuity.

A wife was in right of an annuity to which she had succeeded before her marriage, and which continued to be paid to her on her own receipt. On her husband's sequestration she intimated a claim for payment of the fund under the 16th section of the Conjugal Rights Act 1861, before any termly payments, fell due or were attached by the trustee on the estate. In a question with the trustee—held (1) that the fund itself was heritable, and did not fall under the *jus mariti*, the termly payments alone being moveable; and (2) that as regarded the termly payments the claim under the Conjugal Rights Act had been timeously intimated, and fell to be given effect to.

Observed (per Lord Gifford) that in such a case the wife's claim will subsist for future payments so long as the circumstances of the spouses remain the same.

This case was decided on the same day with that of *Ferguson v. Jack*, ante p. 343.

The estates of Robert M'Walter, builder in Glasgow, were sequestered on 27th April 1877, and on 11th May following Robert Reid, accountant there, the first party to this case, was confirmed trustee on the sequestered estate. Ann Dougall or M'Walter, the second party, was Robert M'Walter's wife. They were married on 11th July 1873. No antenuptial or postnuptial marriage-contract had been entered into between them. By the trust-disposition and settlement of George Barker, who died on 2d December 1869, his trustees were directed to pay to the second party, then Ann Dougall, a free liferent annuity of £20, by equal portions, at Whitsunday and Martinmas, and interest from each respective term until payment. This annuity was not excluded by the settlement from her husband's *jus mariti* and right of administration, nor protected from the diligence of his creditors. After Mr Barker's death, the trustees, acting under the trust-disposition and settlement, paid the annuity to the second party half-yearly as provided, the first payment being made at Whitsunday 1870, and the last at Whitsunday 1877, always upon her own receipt alone. On 18th May 1877, an intimation was made on behalf of the trustee in the sequestration to the trustees' agents, that the trustee claimed the annuity as part of the bankrupt estate. Upon 30th May 1877 the agent for the second party, as instructed by her, wrote to the agents for the trustees that she claimed the annuity as a reasonable provision for her support and mainten-

* Decided Feb. 5, 1878.