Counsel for Pursuer and Appellant—Ure—A. S. D. Thomson. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for Defenders and Respondents—Dickson — Salvesen. Agents — Ronald & Ritchie, S.S.C.

Tuesday, July 17.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

LORD ADVOCATE *v.* WILSONS.

Succession — Voluntary Settlement — Reserved Interest — Customs and Inland Revenue Act 1881 (44 *Vict. cap.* 12), *secs.* 38 *and* 39.

The Customs and Inland Revenue Act 1881 by secs. 38 and 39 enacts that with respect to "any property passing under any past or future voluntary settlement made by any person dying on or after 1st June 1881 by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor," a full and true account shall be delivered to the Commissioners of Inland Revenue upon the death of such person by the person who as beneficiary, trustee, or otherwise acquires possession of such property.

W. transferred his business to his sons by agreement, under which they were to enter into a contract of copartnery to be approved by him, were to relieve him of a certain debt, and were to grant a bond of annuity in favour of himself and his wife, the annuity to be equal to 5 per cent. on the value of the stock-in-trade ascertained by mutual valuation, he collecting for his own use the outstanding book debts due to the firm. No security for payment of the annuity was taken other than the personal security of the sons.

Held (following the case of *Crossman* v. *The Queen*, L.R., 18 Q.B.D. 256) that this was a voluntary settlement with a reserved interest in the sense of the Act.

By the Customs and Inland Revenue Act 1881 (44 Vict. cap. 12) it is enacted (section 38) that—"(1) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof. (2) The personal or moveable property to be included in an account shall be property of the following descriptions, viz. — (*c*) . . . Any property passing under any past or future voluntary settlement made by any person dying on or after such day" (that is, on or after 1st June 1881) "by deed or any other instrument not taking effect as a will, whereby an interest in such property for life, or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself, or to re-claim the absolute interest in such property." Section 39 provides that "Every person who as beneficiary, trustee, or otherwise acquires possession or assumes the management of any personal or moveable property of a description to be included in an account according to the preceding section, shall, upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased, deliver to the Commissioners of Inland Revenue a full and true account, verified by oath, of such property, duly stamped, as required by this Act."

By sub-section 1 of section 11 of the Customs and Inland Revenue Act 1889, sub-section 2 of section 38 of the Customs and Inland Revenue Act 1881 is hereby amended as follows:—"The description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression 'such property,' wherever the same occurs, included the proceeds of sale thereof.'

The following agreement was entered into on 4th May 1887 between George Washington Wilson, photographer, Aberdeen, and his sons John Hay Wilson, Louis Graham Oliver Wilson, and Charles Albert Wilson. "(Second) On said contract being executed, and a bond and bills granted as hereinafter provided, the whole stock-in-trade of the said firm of George Washington Wilson & Company, together with the goodwill of the business and the right to use the said company name of George Washington Wilson & Company (but not the book-debts of the firm) shall belong to the second parties' firm as their absolute property, and the first party hereby agrees to grant all deeds necessary for this purpose; (third) in consideration of the second parties' firm receiving the said stock-in-trade and goodwill of the business, the second parties, as individuals and as a firm, hereby agree to relieve the first party of the sum payable by him to the said George Brown Smith, under the aforesaid minute of agreement between the first party and the said George Brown Smith to the extent of seven hundred and fifty pounds; . . . and further, the second parties, as individuals and as a firm, agree to grant a bond of annuity in favour of the first party and his wife Mrs Maria Ann Cassie or Wilson, securing to the first party during his life, and after his death to his said wife during her life, if

she shall survive the first party, an annuity equivalent to five per centum on the value of the said stock-in-trade, which has been ascertained by mutual valuation to amount to the sum of Seven thousand two hundred and ninety-one pounds, seventeen shillings, and sixpence sterling, after deducting the said sum of Seven hundred and fifty pounds, which annuity shall be payable during the lives of the first party and his said wife, and of the survivor of them, the said Mrs Maria Ann Cassie or Wilson, if she shall survive the first party, being entitled to the whole half-year's annuity payable at the first term after the first party's death, and the representatives of the survivor of the first party and his wife being entitled to the proportion of the said annuity effeiring to the period from the last payment to the date of the death of such survivor. (Fourth) the first party shall be entitled to collect for his own use the whole of the debts due to the said firm of George Washington Wilson & Company prior to the thirty-first March Eighteen hundred and eighty-seven, when the business was agreed to be handed over to the second parties as aforesaid. (Fifth), The first party hereby agrees to grant, and the second parties, as a firm and as individuals, agree to accept a lease or leases of seven years' duration from and after Whitsunday Eighteen hundred and eighty-seven of the premises in Aberdeen belonging to the first party, now or lately occupied by the first-mentioned copartnership of George Washington Wilson & Company, and that at the following yearly rents . . . (Seventh), Further, it is also hereby agreed as part of the consideration for the first party entering into this agreement, that the second parties shall discharge and renounce, as they respectively do hereby expressly discharge and renounce, all claims which they or any of them have or may have by or through the death of the first party to any part or share of his estate, heritable or moveable, in respect of legitim, bairns' part of gear, or otherwise." . . .

On the same day the sons granted a bond of annuity for a yearly sum of £364, 12s. in terms of said agreement, which was also otherwise implemented. This annuity was not secured upon the property, but on 1st March 1893, when the business was converted into a limited liability company, shares and cash to the value of £7296 were debited to G. W. Wilson as nominee of his three sons.

Mr G. W. Wilson died on 9th March 1893, and in December 1893 an action at the instance of the Lord Advocate on behalf of the Commissioners of Inland Revenue was brought against his three sons to have them decerned and ordained to deliver "to the pursuer a full and true account, verified by oath and duly stamped, of the personal or moveable property of the deceased George Washington Wilson, photographer, Aberdeen, which passed to and was acquired by the defenders under an agreement between him and them dated 4th May 1887."

The pursuer pleaded—"(1) The personal property acquired by the defenders from the deceased having passed to them by voluntary settlement within the meaning of the said statutes they are bound in respect thereof to pay stamp-duty on account. (2) The said property being liable to be included in an account chargeable with stamp-duty, the pursuer is entitled to decree as concluded for, with expenses."

The defenders pleaded—"(3) Said property not having passed to the defenders by voluntary settlement, in terms of said statutes, they are not liable in payment of the duty sued for. (4) The deceased George Washington Wilson not having retained an interest for life in the property condescended on, nor having reserved power to re-claim the absolute interest in said property, the defenders ought to be assoilzied with expenses. (5) The said property not being liable to be included in an account chargeable with stamp-duty, the defenders should be assoilzied."

After a proof the Lord Ordinary (WELLWOOD) pronounced decree in terms of the conclusions of the summons.

"*Opinion.*—[*After quoting the provisions of the statutes*]—I have to decide whether the agreement between the late George W. Wilson and his sons, the defenders, was or was not a 'voluntary settlement' in the sense of the statutes, and whether by that agreement an interest in the property made over was reserved to him for his life. In considering those questions it must be kept in view that under the statute the reservation may be either express or by implication, and also that an instrument constitutes a 'voluntary settlement, whether it is made for valuable consideration or not.

"It will be seen that the net is spread very wide and that the meshes are small.

"My opinion is that the agreement in question was a voluntary settlement in the sense of the statutes, as distinguished from a transaction or bargain for substantial consideration. It was in substance simply a family arrangement. It does not bear to be a sale; it proceeds on the narrative that the father had arranged to 'hand over' the whole of the business to his sons, including the stock-in-trade and good-will, but not the book-debts of the firm. No cash was paid down, but the second parties undertook to pay out a former partner of their father George Brown at the price of £750. On the other hand they received goods and stock-in-trade to cover that sum, in addition to the value (£7291, 17s. 6d.) upon which the annuity to be afterwards mentioned was calculated. In return the second parties undertook as individuals, and as a firm, to grant a bond of annuity in favour of their father and mother and longest liver of them, equivalent to five per cent. on the value of the stock-in-trade (£7291, 17s. 6d), after deducting the said sum of £750. Lastly, in respect of the provisions in this deed the second parties renounced all claims which they had or might have through the death of their father, to any part of his estate, heritable or moveable.

"It seems to me that this is simply a voluntary settlement, under which the

settler reserved to himself for his life an interest in the property settled. It is true that the interest was not secured upon the property itself. But this, I think, is not material, because the statute says the reservation either may be express or by implication. The interest reserved was simply the interest on the value of the whole concern handed over; and it was secured by a bond which bound not merely the sons as individuals, but also the firm. The intention and understanding of parties is made clear by this, that when the business was converted into a limited company, shares and cash to the value of £7296 were alloted to G. W. Wilson, as nominee of his three sons, manifestly for the purpose of securing the annuity in question.

"It is said by the defenders that they gave an adequate value for the business because they came under an obligation to pay an annuity the capitalised value of which was £4331, 3s. 6d. But when we turn to the statement of the profits made by the second parties for the six years following the agreement, we find that they amounted on an average to about £2000 a-year. It is true that for a year or two immediately preceding the agreement the works had not been carried on to a profit; but there must have been some exceptional cause for this, which disappeared whenever the sons took up the business, because in the very first year the profits rose to £1605.

"There are two decisions which have a close application to the present case, viz. —*The Lord Advocate* v. *M'Kersie*, December 22, 1881, 19 S.L.R. 438; and *Crossman* v. *The Queen*, 1886, L.R., 18 Q.B.D. 256.

"The case of *The Lord Advocate* v. *M'Kersie* was a decision under section 7 of the Succession Duty Act of 1853, but the question was practically the same. There a father assigned and made over to his sons his interest in a business, the value being declared to be £28,750, as a payment to account of the share of residue of his estate provided for them in his settlement. In return the sons agreed to make payment to their father during his lifetime of an annuity of £1150, and the following observations of Lord Fraser show the nature of the question and the views which he took of it (p. 440)—'On the death of William M'Kersie, the father, the defenders undoubtedly obtained an increase of beneficial interest, in respect that their obligation to pay the annuity of £1150 then ceased. But this is not enough in all cases to entitle the Crown to judgment. There is one exception expressly specified in the Act, within which the defenders contend their case comes. If the transaction be a *bona fide* sale, then no duty is exigible, and there may be such a *bona fide* sale although the money may not be payable until the death of a certain person, as was decided by the Master of the Rolls in the case of *Fryer* v. *Moreland*, 3rd August 1876, L.R., 3 Chy. Div. 675. Now, was this a *bona fide* sale? Or was it, as the Lord Ordinary holds it to have been, simply a gratuitous transference by the father to his two sons, reserving to himself the interest of the value of the property which he conveyed? No doubt the transference was irrevocable, but still the transaction was one whereby the transferer reserved to himself, not in express words, the liferent of the estate, but he did so in effect. Dealing with this 7th section the Master of the Rolls in the above case of *Fryer* says of it—"The object is plain enough; it was to prevent a man conveying the fee reserving to himself a life interest." Now, this is as effectually done in the mode astutely adopted in the present case, by taking a bond from the transferees for the interest at the rate of 4 per cent. on the money value of the property conveyed. The defenders paid down nothing in the shape of money or money's worth, and therefore there is absent in this case the first characteristic of a sale, viz., a price paid out of the pockets of the purchasers.'

"On the facts I do not think that that case can be distinguished from the present.

"The case of *Crossman* v. *The Queen* was a case in the Queen's Bench Division under the Customs and Inland Revenue Act 1881. The circumstances were practically the same. The father Robert Crossman made over to two of his sons his interest in a partnership business, the sons in return covenanting to secure to their father during his life interest at the rate of 4 per cent. on the value of the shares appointed and assigned to them respectively, and also in the event of his death secure annuities to his widow and another son, the latter annunities to be paid out of the profits. As I have said, this was a suit brought in 1886 under the Act of 1881, and before the passing of the amending Act of 1889 quoted in record. It was strongly urged for the suppliants that the transaction was one for a valuable consideration and not a voluntary settlement in respect that the covenants to pay interest at 4 per cent. during the life of Robert Crossman were not dependent upon the future prosperity of the business, and were a good consideration for the transference of the business.

"Even without the aid of the amending Act, the Court held that this plea was ill-founded. Justice Hawkins in reading the judgment of the Court, said (p. 265)—'It is said however that the absolute covenant to pay to Robert Crossman during his life 4 per cent. interest on the value of the shares, regardless of whether the profits of those shares amounted to that sum or not, was in itself a sufficient consideration. We do not so regard it. We look upon that covenant in substance, though possibly not in form, as a mere mode of reserving to Robert Crossman a life interest in the shares transferred, to the extent of £4 per cent. on their value a sum in all probability far less than the actual annual nett profit they were yielding. In substance it was a gift of whatever annual profit (if any) beyond the £4 per cent. the shares might yield during his life, and an absolute gift of them on his death, subject only to the said annuities.'

"The judges in that case quoted with

approval Lord Fraser's remarks, which I have already quoted.

"In both these cases it will be observed the annuity was not secured on the property, but as here rested on the personal obligation of the transferees.

"Of course, if the owner of property makes an absolute disposition *inter vivos* for a price down, however small, putting the funds entirely beyond his control and reserving no life interest in them directly or by implication, they will on his death be free from any claim at the instance of the Crown. The latest case on the point is *Lord Advocate* v. *M'Court*, 20 R. 488, in which, although the First Division of the Court took a different view from myself in regard to the *bona fides* of the transaction, no doubt was expressed by the Inner House or myself of what was the legal effect of a *bona fide* absolute transference and divestiture *inter vivos*.

"But under the statutes with which I am at present dealing, it is sufficient to subject the parties taking such a settlement to account duty, that it is proved that the agreement was voluntary, and that the settler reserved to himself, in the way which I have explained, an interest for life in the property made over."

The defenders reclaimed, and argued—This was not a voluntary settlement but a business transaction by which the father transferred his business to his sons for an onerous consideration. Whether the price paid was adequate or not was immaterial if it was a *bona fide* and not an illusory price. The father had divested himself. The forming of a limited liability company was done without consulting him and the allotment of shares was purely gratuitous. He had reserved no interest in the sense of the statute. He had no security for the annuity beyond the personal security of his sons.

Argued for the respondent—The Lord Ordinary's interlocutor was right. This was plainly not a business transaction such as the father would have entered into with a third party but a voluntary and family settlement. He had reserved to himself an interest in the business in the form of an annuity to the longest liver of himself and his wife. That he reserved an interest was illustrated by his reserving the right to approve or disapprove of the copartnership into which the sons might enter. The case of *Crossman* referred to by the Lord Ordinary was entirely in point.

At advising—

LORD PRESIDENT—My opinion is in accordance with that of the Lord Ordinary.

The expression "voluntary settlement" is not one with which Scottish lawyers are familiar; and on this account I am disposed to attach an especial weight to the English decision in *Crossman* v. *The Queen*, where the facts were very similar to those now before us.

This is a handing over by a father to his sons of his whole business; and in respect of what the sons get they renounce all claims of succession to their father's estate. The father gives a very advantageous lease of the building in which the business was carried on. On the other hand, he stipulates for an annuity to himself and his wife successively, of five per centum on the value of the stock-in-trade.

On the face of the agreement this is not a commercial transaction. It cannot be imagined that if the father had been approached by a third party and offered this annuity he would have entered into such an agreement. The facts proved in evidence bear out the impression produced by the deed itself, that it was executed because the father was minded to bestow his business on his sons, contenting himself with some small annual return proportionate to the value of the stock-in-trade. This was therefore a settlement on his sons of this part of his estate, and it proceeded from his good will. I consider that it is a voluntary settlement in the sense of the Act.

I agree with the Lord Ordinary in thinking that the words in the section "expressly or by implication" entitle us to hold that this annuity was in the sense of the statute "reserved." It is a pretty direct implication by which we conclude that the annuity of 5 per cent. on the stock-in-trade was really reserved out of the business handed over. On this matter the case of *Crossman* is in point, for there the annuity was not expressly payable out of what was conveyed. The case of *M'Kersie* has a less direct bearing, for it is a decision on a different statute, and the section there founded on did not require that the consideration should be reserved, the words being "reservation or assurance of or contract for any benefit."

LORD ADAM—There appear to be two questions in this case—(1) Whether the agreement of 4th May 1887, whereby the defenders acquired right to the whole stock-in-trade of the firm of George Washington Wilson & Company, together with the goodwill of the business, was a voluntary settlement in the sense of the 38th section of the Customs and Inland Revenue Act 1881? And the 2nd is, Whether, if so, the settlor George Washington Wilson thereby reserved an interest in such for life, either expressly or by implication?

I concur with the Lord Ordinary that the agreement in question amounts in substance to a family arrangement. It is not alleged, and is not the fact, that any money was paid by the defenders for the property to which they thereby acquired right.

It is true that they thereby agreed to relieve their father of a sum of £750 due by him to George Brown Smith, a former partner, but value in the shape of goods was put into their hands by their father to enable them to meet this obligation. Further, it appears that the defenders by the agreement bound themselves to grant a bond of annuity in favour of their father and his wife, securing to him, and after his death to her, an annuity at the rate of 5 per cent. per annum on the value of the stock handed over to the defenders, and the defenders did of the same date grant

a bond of annuity in terms of this obligation.

It will be observed that this annuity is not in any way secured over the property specified in the agreement, and if the question had been open it might very well have been doubted whether the settlor had thereby reserved an interest in such property for life, seeing that the property had passed out of his hands and might have been dissipated next day. But I think that the question was in terms decided in the Queen's Bench in England in the case of *Crossman* v. *The Queen*, and that we ought to follow that case.

I therefore think we should adhere to the interlocutor reclaimed against.

LORD M'LAREN and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer and Respondent —Asher, Q.C.—Young. Agent—Solicitor of Inland Revenue.

Counsel for the Defenders and Reclaimers —Dickson — Glegg. Agents — Dalgleish, Gray, & Dobbie, W.S.

Tuesday, July 17.

FIRST DIVISION.

[Lord Low, Ordinary.

TINNEVELLY SUGAR REFINING COMPANY, LIMITED *v.* THE MIRRLEES, WATSON, & YARYAN COMPANY, LIMITED.

Contract—Privity of Contract—Agent for Company about to be Formed—Relevancy —Title to Sue.

A firm acting in the interests of a company about to be formed, contracted with an engineering company for the supply of certain machinery, to be used by the new company when formed. Delivery was to be f.o.b. in Glasgow harbour. The company was incorporated while the machinery was being made, and thereafter tried to use the machinery which was fitted up for them in India by a person sent out by the engineering firm, and worked by a manager selected by said firm, but it was not alleged that they had done anything to constitute a direct contractual relationship between themselves and the engineering firm. Subsequently, with the concurrence of those who had acted on their behalf, they brought an action of damages against the said firm, on the ground that the machinery supplied was not conform to contract.

Held that they had no title to sue, seeing that the firm who had contracted with the engineers could not act as agents for a non-existent principal, and that the company had set forth no relevant statement instructing privity of contract between themselves and the defenders.

By offer dated 26th November 1889 and acceptance dated 11th July 1890 the Mirrlees, Watson, & Yaryan Company, Limited, Glasgow, contracted with Messrs Darley & Butler, London, to supply the machinery and ironwork for a building at Tuticorin, Madras Presidency, India, for a non-char sugar refinery capable of turning out 10 tons per day of twelve hours. Delivery was to be given f.o.b. in Glasgow harbour.

The Tinnevelly Sugar Refining Company, Limited, was incorporated on 29th July 1890 for the purpose of refining sugar at Tuticorin, where the said machinery was fitted up. The machinery having failed to give satisfaction, the Tinnevelly Company in January 1894, with consent and concurrence of Messrs Darley & Butler, brought an action of damages for £23,000 against the Mirrlees, Watson, & Yaryan Company.

They averred, *inter alia*, that "Messrs Darley & Butler, who have all through the negotiations transacted for the Tinnevelly Sugar Refining Company with the defenders, are large shareholders in the pursuers' company. The contracts for the machinery were made by them for behoof and on behalf of the pursuers the Tinnevelly Sugar Refining Company. The defenders knew before the contract was given to them for the machinery that it was for the pursuers' company's use, and that Messrs Darley & Butler were acting, in making the said contract, for behoof of or as agents for the pursuers' company. Messrs Darley & Butler have from the beginning of negotiations with the defenders acted for behoof of the Tinnevelly Sugar Refining Company, and the defenders have treated and transacted with Messrs Darley & Butler on that footing. The machinery was paid for out of the capital of the Tinnevelly Sugar Refining Company. . . . The said machinery and ironwork was manufactured by the defenders, and early in 1891 was erected at works at Tuticorin, which had been specially constructed for its reception on plans approved by the defenders. The work of erection was effected under the superintendence of an engineer sent out by the defenders. . . . The manager was a well qualified sugar refiner, selected and approved by the defenders on behalf of the pursuers. . . . After the refinery was started the defenders were always fully informed of how it was working, and continually assured the pursuers that the machinery was quite adequate, and would, when everything was in full working order, produce what was stipulated for."

The pursuers pleaded, *inter alia*—"(3) The defenders having negotiated and contracted on the footing that Messrs Darley & Butler were acting for behoof of or as agents for the Tinnevelly Sugar Refining Company, are barred from questioning the pursuers' title. (4) The defenders having admitted by their actions as condescended on their obligation to make the machinery perform the work required of it by the