pray alternatively for an order on the Keepers "to appear before your Lordships and exhibit" the deeds; and this being done, the Lord Ordinary pronounced the following interlocutor:—

"The Lord Ordinary having advised with the Lords of the First Division of the Court, as authorised by them, grants warrant to and authorises the Lord Clerk-Register and the Deputy-Keepers of the Records to exhibit in Court before the Lord Ordinary on Thursday next, at o'clock, the two principal dispositions and deeds of entail mentioned and referred to in the petition, and appoints a copy of this interlocutor to be immediately served on the said Lord Clerk-Register and his deputies.

"DAVID MURE."

Mr Robertson, one of the Deputy-Keepers, having, in compliance with this order, appeared in Court and exhibited the deeds, the following interlocutor was pronounced:—

"*Edinburgh*, 13*th Dec.* 1866.—The Lord Ordinary, in respect Mr George B. Robertson, one of the Deputy-Keepers of the Records, has exhibited in Court the two principal dispositions and deeds of entail mentioned and referred to in the petition and interlocutor of 11th instant, interpones authority and grants warrant to the said Deputy-Keeper of the Records to deliver the said two principal dispositions and deeds of entail to the Keeper of the Register of Tailzies; and this being done, grants warrant to the Keeper of the Register of Tailzies for recording the same, agreeably to the Act of Parliament 1685, c. 22, and authorises the said keeper to return the said deeds to Mr Robertson, the said Deputy-Keeper of the Records, when they shall have been so recorded in the said Register of Tailzies, and decerns.

"DAVID MURE."

Counsel for Petitioners—The Solicitor-General and Mr Shand. Agents—Tods, Murray, and Jamieson, W.S.

SECOND DIVISION.

LORD ADVOCATE *v.* LORD FIFE.

Succession Duty Act—Trust—Vesting—Deductions. Circumstances in which held—1. That where a party had executed a trust-deed under which his trustees were to denude in favour of his successor on his death, the succession opened at the date of the death and not of the denuding deed. 2. That deductions could not be allowed to modify the amount of succession duty due because they formed no part of the annual cost of the estates.

In 1863 an information was lodged by the Crown against Lord Fife, in consequence of which the following special case was prepared to obtain the opinion of the Court on the question with which it concluded:—

The Lord Advocate claims succession-duty on the Innes estates, on the ground that there was a succession to these estates on the death of James Duff, Earl of Fife, on 9th of March 1857.

Predecessor, James Duff, Earl of Fife, who died 24th January 1809.

Successor, James Duff, present Earl of Fife (fifth Earl).

Annual value, after allowance for all necessary outgoings, £9403, 17s. 7d.

Age of the successor when he succeeded, forty-two.

Value of his succession, £136,128, 5s.

Rate of duty, 3 per cent.

Amount of duty, £4083, 17s.

Penalty, £136, 2s. 6d., for having wilfully neglected to deliver, on the 9th March 1858, an account of the succession, and a like penalty for every month after the first month, during which such neglect has continued and shall continue.

(The value of the succession above inserted is not to be held conclusive, but subject to after-adjustment between the Crown and Lord Fife, who reserves right to object to the statement of the said annual value accordingly.)

The following are the facts as to which the parties are agreed, upon which the question arises for the decision of the Court:—

1. James Duff, second Earl of Fife, was proprietor in fee simple of the estates hereinafter called the Innes estates. He died on 24th January 1809, leaving the testamentary deeds and writings mentioned in the next article, by which the Innes estates were settled on the heirs, and in the terms therein mentioned.

2. The said deeds and writings consisted of—(1.) Three deeds of entail, the first dated 7th December 1789, and recorded in the register of tailzies, 18th November 1791; the second dated 29th January 1800, and recorded 30th June 1831; and the third dated 18th November 1801, and recorded 30th June 1831; (2.) Trust-disposition, which comprehended the Innes estates, and all his other heritable and moveable property, dated 28th November 1801, and recorded in the books of Council and Session 9th August 1814; (3.) Deed of declaration and obligation, dated 7th August 1802, and recorded in the books of Council and Session 9th August 1814; (4.) Holograph letter and directions, 23d November 1805, recorded in the books of Council and Session 9th August 1814.

3. These deeds and writings (along with two other writings, the first dated 17th April 1805, and the second dated 20th January 1806, which related merely to the nomination of trustees, and which accordingly need not be referred to) formed the will of the said James Duff, second Earl of Fife.

4. The destinations, in the said deeds of entail, are to be taken for the purposes of this case as identical—viz., "to myself and the heirs-male of my body; whom failing, to Alexander Duff of Echt, my eldest brother-german, and the heirs-male of his body; whom failing, to George Duff of Milton, my second brother-german, and the heirs-male of his body," &c.

5. One of the said deeds of entail, and the other deeds and writings, are printed in the appendix to this case, and are here referred to, and held as repeated *brevitatis causa*.

6. Upon the death, without issue, of the said James, second Earl of Fife, on 24th January 1809, the said Alexander Duff of Echt became the third Earl of Fife. He died in 1811, survived by two sons—viz., James Duff, afterwards fourth Earl of Fife, his eldest son, and Alexander, afterwards General the Honourable Sir Alexander Duff. James Duff, fourth Earl of Fife, died on 9th March 1857, without issue. His brother, Sir Alexander Duff, predeceased him, and his nephew, the defender, succeeded him as fifth Earl.

7. Sir James Duff of Kinstair, one of the trustees under the said trust-disposition, and described in the said deed as Lieutenant-General Sir James Duff, Colonel of the 50th Regiment of Foot, died on 6th December 1839.

8. Before the death of James, fourth Earl of Fife, the debts due by the second Earl, his obligations and funeral charges, and all the legacies, donations, and provisions left by him under the

said writings, were paid, as set forth in the denuding deed of entail after-mentioned.

9. The trustees of the second Earl of Fife, who held the Innes estates under the testamentary trust-deed and other instruments before mentioned, denuded of the estates by deed of entail, dated 17th, 18th, 19th, 21st, and 22d December 1857, recorded in the record of tailzies 7th Jan. 1858, and in the books of Council and Session 1st February 1858, in favour of the present Earl of Fife, and the heirs-male of his body; whom failing, the series of heirs in the testamentary entail of 1801, which said denuding deed of entail is printed in the appendix to this case, and is here referred to and held as repeated. The present Earl of Fife (fifth earl) possesses the Innes estates under the said denuding deed of entail, and the said present Earl of Fife (fifth Earl) is a descendant of a brother of the said James Duff, second Earl of Fife, who died in 1809.

10. By the terms of the said testamentary deeds and writings, the trust was to subsist until the truster's debts, obligations, funeral charges, legacies and donations, provisions, and other purposes of the trust, were completely cleared, extinguished, and fulfilled, and, *inter alia*, during the lifetime of James Duff, last Earl of Fife, the truster's nephew, who was excluded from ever succeeding to the said estates. These estates were accordingly held by the said testamentary trustees until the death of the said James Duff, last Earl of Fife, on the 9th March 1857, and until they were conveyed to the present Earl (fifth Earl) and the heirs male of his body; whom failing, as above, by the denuding deed of entail above mentioned.

The question for the decision of the Court is, whether the present Earl of Fife became beneficially entitled to the Innes estates, in the sense of the Succession Duty Act, upon the death of James Duff, Earl of Fife, who died on 9th March 1857.

On 6th February 1864, the Lord Ordinary (Ormidale) pronounced an interlocutor affirming this question in the following terms:—"The Lord Ordinary in Exchequer Causes having heard counsel for the parties, and considered the argument and proceedings—Finds that, in the circumstances of this case, the defender, the Earl of Fife, became beneficially entitled to the Innes estates in the sense of the Succession Duty Act, upon the death of James Duff, the late Earl of Fife, who died on 9th March 1857; and appoints the case to be enrolled, that parties may be heard in regard to the amount of duty, interest, and penalties, for which decree is to be pronounced, as also on the question of expenses."

Lord Fife acquiesced in this judgment. Another information was then brought by the Lord Advocate to have it ascertained upon what sum Lord Fife should pay succession duty:—

The following is a general account of the estates referred to, and the rental of them on which succession duty is claimed:—

1. Rental of estates in Morayshire district, crop 1857	£13,100	4	2
2. Do. Delgaty, Down, and Auchintool, crop 1857	14,082	8	7
3. Do. Balvenie, crop 1857	1,060	3	4¾
4. Do. Braemar, crop 1857	1,525	2	5½
	£29,767	18	7¼

The following are the deductions—viz., ordinary outgoings, and the yearly sums payable by way of interest or otherwise on the prior principal charge on the succession, which are admitted and allowed on behalf of the revenue:—

Public burdens, per schedule	£3,317	3	5
Debt of Lord Fife's trustees at the close of the trust, and paid or undertaken by the present Earl, £139,674, 0s. 2d.			
Annual cost, being 5 per cent. on the principal	6,983	14	0
Allowance for maintenance of farm houses and buildings, &c., 6% on rental	1,786	1	5
Allowance for fire insurance	200	0	0
	£12,286	18	10

Also interest at 4 per cent. on the sums for meliorations to tenants which have actually been paid, previous to the date when the first instalment of duty became payable. Interest on the payments made afterwards would also be allowed by the Crown by way of repayment or abatement.

But Lord Fife maintained that he was entitled to the following additional deductions:—

Annual cost to the defender of the above debt of £139,674, 0s. 2d., consisting of—

(1) Interest thereon at 5 per cent. (6983, 14s., as above admitted).

(2) Premiums on the policies of insurance on the life of Lord Fife, as if such policies had been taken out at the time, on the non-participating or non-bonus scale for sums amounting to £139,674, 0s. 2d. £4441 1 5

Some of the policies assigned in security of the debt were old policies and some were bonus policies; but deduction is only claimed of sums for premiums, as if the policies were all non-bonus, and all effected at the time.

Meliorations payable to tenants at expiry of their leases, granted by trustees before they denuded of the estates, conform to schedule thereof herewith lodged at...£18,256 3 1

Value thereof at 22d December 1857.......... 12,772 13 7

Interest on above at 4 per cent. 510 17 10

£4951 19 3

The predecessor, James Duff, Earl of Fife, who died 24th January 1809.

The successor, James Duff, present Earl of Fife (fifth Earl), born 6th July 1814.

Age of successor when he succeeded, which, according to the views of the Crown, was on the death of the fourth Earl, on 9th March 1857—42. According to the views of the defender, the succession opened to him on the 22d December 1857, as stated in article VII., and his age was then 43.

Rate of duty, 3 per cent.

The questions for the decision of the Court are:—

1. Whether, in ascertaining the annual value of the succession in question, the defender is entitled to have allowed and admitted the deductions specified in article XIV., or any of the said deductions; and if any, what part thereof, over and above the interest on the meliorations which are referred to in article XIII.

2. Whether the defender's age, when he succeeded, is to be taken at 42 or 43.

RUTHERFURD (with him LORD ADVOCATE and SOLICITOR-GENERAL), for the Crown, argued—

The age of the defender must be taken at forty-two and not forty-three, because on the latter supposition the *beneficium* of the estate would not be vested in any one for the period between the death of the defender's predecessor and the time when the trustees denuded in his favour. The succession opened to the defender in March 1857; otherwise the trustees who did not denude till December of that year were holding for the defender. The deductions claimed by the defender cannot be allowed because they form a charge on the capital of the estate which was voluntarily taken upon himself not transmitted by his predecessor.

YOUNG and A. R. CLARK, for the defender, relied mainly on the application of the 34th, 35th and 38th sections of the Succession Duty Act.

At advising,

LORD JUSTICE-CLERK—The question formerly determined by the Lord Ordinary was, "whether the present Earl of Fife became beneficially entitled to the Innes estates in the sense of the Succession Duty Act, from the death of James Duff, Earl of Fife, who died on the 9th of March 1857." And the Lord Ordinary decided that question in the affirmative, and his judgment was acquiesced in. But the next question came to be what was the extent of this succession, and what was the precise date at which it opened, and these are the two questions that are raised by the present case. Now, the trustees were bound to convey to the present Earl of Fife the whole estates which they held under the trust, and any estates which they had purchased in terms of the directions given to them as trustees. But it appears that beyond their powers as trustees they had purchased a great quantity of land to the extent of no less than £139,000, without having any trust funds to pay for it, and to that extent they do not seem to have been justified, nor could they have called upon the heir of entail, the present Earl of Fife, to take over these lands. They had gone beyond the powers of the trust in purchasing the lands, I have no doubt for very pressing and good family considerations, and the Earl of Fife when he came to the succession entered on this arrangement with them. He said, There is £139,000 in excess, and that must be provided for. I will take that debt upon myself personally, and I will provide for its liquidation by using my own life interest in the entire estates as a fund of credit with policies of insurance, which, when they fall in, will pay off the debts. Now, the case presented to us is this—It is said that "the debt due and owing by the trust referred to in the said denuding deed and discharge, as contracted by the trustees in the execution and fulfilment of the trust settlements, amounted to £139,674, 0s. 2d. This debt affected, or might be made to affect, the lands contained in the trust, or some of them. The defender before he called on the trustees to convey the estates to him in terms of the trust deeds, and before he was vested with right thereto, relieved the trustees of these debts by payment and extinction thereof." The statements made by both parties with regard to the deductions to be allowed in settling the Succession Duty are these—The rental of the estate is stated in the first place, and then the Crown proposes to deduct from the amount of the actual rent, the public burdens, and 5 per cent. interest as representing the annual cost of the £139,000 which I have already mentioned, upon the footing of its being a prior principal charge upon the estate to which the Earl of Fife has succeeded. On the other hand, the Earl of Fife says—That is an insufficient deduction to represent the true annual cost of that prior principal charge; and I claim in addition to that the amount of the premiums which are payable by me, on the policies of insurance which I have effected and assigned to the creditors, who have advanced me this large sum of money, which will have the effect in the end of extinguishing the principal sum of that debt; and that is the only question presented to us under the first question at the end of the case for our determination. Now, I am quite willing to answer that question, and to determine it on the footing on which it is placed before us by the parties. But I cannot do so without protesting that we are here called upon to construe a clause of the Succession Duty Act in reference to a state of circumstances to which it is inapplicable. That is the doing of the parties themselves, and there is no help for it; because with this case before us, we can do nothing but solve that question according to the best light we can get for construing the statute as applicable to a case to which it is not applicable. I say it is not applicable to the case, because it appears to me as clear as possible that the transaction into which Lord Fife entered with the trustees did not give him the estates which were bought with the £139,000 of borrowed money as a succession, but, on the contrary gave these estates to him by way of sale and purchase, just as clearly as anything can be. But we are to assume in deciding the present question that this £139,000 was of the nature of a prior principal charge upon the entire estate conveyed by the trustees to Lord Fife; and, looking upon it in that light, the question is the simplest possible, because it is conceded upon both sides that we are only to deduct from the rental the annual cost of the prior principal charge. Now, the annual cost of the prior principal charge is just the interest that is paid upon the loan. The premiums of insurance are no part of the annual cost, although they are annually paid. But they need not be annually paid; they might be paid in one sum, or they might be paid in two, or in half-a-dozen sums, by instalments over a number of years. Premiums of insurance are not necessarily annual payments by any means. But even if they were in their nature necessarily annual payments, they still would not form any proper part of the annual cost of this debt, because they are paid for two purposes only—first of all to create a security for the creditor; not to go into the creditor's pocket, but to create a security for the creditor's ultimate payment; and secondly, to secure for the debtor a fund out of which, after his own death, the principal of the debt may be paid off. It appears to me that that affords a sufficient solution of this question for all the present purposes; and therefore I am for answering the first question appended to the special case in the same way as the Lord Ordinary has done.

Then, as regards the second question, whether the defender's age when he succeeded is to be taken at 42 or 43, that question depends upon whether he is to be held as having succeeded or the succession as having opened to him upon the death of the last Earl of Fife, when the obligation to denude certainly arose, or at the time when the denuding actually took place, which was some months afterwards. I am humbly of opinion with the Lord Ordinary that his age is to be taken as 42, because the succession clearly opened to him in March 1857; and therefore, in the result my

opinion is in accordance with that of the Lord Ordinary on both points.

Lord COWAN concurred.

Lord BENHOLME—The trustees have acted here, I have no doubt, with the very best intentions in adding to the entailed estate, and I think it may be said in justification of the large excess of land purchased that it was uncertain when this trust would come to an end. It depended upon the life of the fourth Earl, so that it might very well have happened that the accumulations of the trust-estate would have enabled them to liquidate the price of these lands before the trust came to its termination. I merely suggest that as one reason for not hastily condemning them as guilty of an excess of power, because they only anticipated the funds which they thought might come into their hands. And had the fourth Earl lived for a certain time longer, they might have liquidated the debt, and all this additional estate would have come into the family without any charge. But however that may be, we see clearly that the Crown have taken an indulgent view of the position of the present Lord Fife. Had they taken the view that this was a sale, he would certainly have been far worse off than he is, taking it as a succession. But I think the Crown are entitled to say—If you take this as a succession, you must take it under the ordinary burdens that such a succession would be liable to; if these estates were now to be entailed for the first time, this would be a debt upon the estate, good against this part of the entailed estate, and you cannot take on any other footing except that this is a primary charge upon the estate. That leads to our holding, in terms of the joint case, that this formed a primary charge upon part of the succession.

The question whether the premiums of insurance are to be added to the interest, appears to me to be very clear indeed. Take the ordinary case of an unentailed proprietor succeeding to his father's estate of £10,000 a year, which is burdened to the extent of £5000 a year of interest. That £5000 of heritable debt is a proper deduction in the question of succession; but if that heir was to say to the Government or to the Revenue, "I have raised money by premiums of insurance to pay off this debt—I have opened policies which I have assigned to my creditors, and in calculating my life interest you must allow me these premiums"—the result would be that there would be hardly anything to the Crown at all. That is his own doing. It is a charge which he makes upon the estate voluntarily, and I think it comes very fairly under that sort of charge which the successor himself has created. Nothing he can do can get rid of the interest of the money, which is a proper charge to be made as a principal charge against the succession; but the operation by which he proposes to pay off that by policies of insurance is a burden which he makes upon himself, and he has no right to take it into account in this question. I am, therefore, of the same opinion as the Lord Ordinary.

Lord NEAVES—I think we have no alternative here as the case is presented to us. The question is whether the additional claim made by Lord Fife shall be allowed. I quite agree that the case has been made up on a totally wrong principle. I am far from saying that the trustees did anything wrong. I think everything they did was done with a view to the welfare of the family whom they were protecting; but supposing it were to be held as a kind of implied condition of the trust, as it came to be constituted, that Lord Fife was only to succeed upon his paying off these debts, it would really come to be virtually the same thing as a purchase, because it would just come to this, that the £139,000 would be paid off by twenty-five years' expectation of life, or whatever that might be, about £5000 or £6000 a year, and what he is allowed is merely £7000 a year, at 5 per cent. on the sum; and the allowing of the 5 per cent. is a very curious stretch, for it is not the interest that is paid by Lord Fife, but it is a supposed interest. But how premiums of insurance could ever be introduced into the question, I cannot conceive. The value of the money itself would have been an intelligible thing to take, but that would not have answered the purpose. Therefore, I don't think this interest has been made a charge; and I don't think it would have been in fulfilment of the trust for the trustees to set agoing an entail covered with debt to the extent of £139,000, for which these lands might have been evicted. We have no alternative but to act on the materials before us, and as the Crown are willing to allow this, I have nothing to say.

The interlocutor of the Lord Ordinary was therefore adhered to.

Agent for the Crown—Solicitor of Inland Revenue.

Agents for Lord Fife—H. & A. Inglis, W.S.

Wednesday, Dec. 12.

FIRST DIVISION.

DONALD *v.* DYCE NICOL.

Obligation—Property—Road—Personal Bar. Circumstances in which held (alt. Lord Barcaple) that a person was not barred from enforcing implement of an obligation to pay the price of ground which had been thrown into a public road.

Title to Sue. Observed (per Lord Ardmillan) that where a party has at the raising of an action a substantial right to sue, the formal title may be completed *pendente processu.*

In this action Mrs Jane Robertson or Donald, residing at Bishopston, in the parish of Banchory-Devenick and county of Kincardine, relict of the deceased James Donald, was pursuer, and James Dyce Nicol, Esq., of Badentoy, M.P., was defender. The summons concluded that the defender should be ordained to make payment to the pursuer of the sum of £82, 10s. sterling, with the legal interest from the term of Whitsunday 1853, being the date when the defender entered upon the possession and occupation of the ground hereinafter condescended upon, for the purpose of forming the road hereinafter mentioned: And farther, should be ordained duly and sufficiently to fence the lands of Bishopston, the property of the pursuer, in so far as this has been rendered necessary by the intersection of the said lands by the said road, and that at sight and to the satisfaction of a skilled person to be named by our said Lords: And also to make payment to the pursuer of the sum of £1 sterling per annum as the expense of herding the cattle on the said lands of Bishopston, rendered necessary by the intersection of said lands, and the defender's failure or neglect to fence the same, and that from the term of Whitsunday 1854, for the year preceding that term, and so forth yearly thereafter until the defender shall duly and sufficiently fence the said lands as aforesaid.

The pursuer's late husband was, when he died in 1852, in possession of the lands of Bishops-