And the same was resolved in the affirmative.

Agent for Appellants—W. Wotherspoon, S.S.C.

Agents for Respondents—W. W. Millar, S.S.C., and John Graham, Westminster.

Thursday, February 28.

LORD ADVOCATE *v.* STEVENSON.
(4 Macph. 322.)

Succession-Duty—16 *and* 17 *Vict.* c. 51. The interest in heritage acquired by a successor who dies before making up titles, and so shortly after the predecessor's death as to derive no beneficial possession or other benefit, is not a beneficial interest either in possession or in expectancy, and hence is not a "succession" in the sense of the Succession Duties Act, by which succession duty is payable.

This was an appeal against a judgment of the Second Division of the Court in a special case presented for opinion in an Exchequer cause.

"1. On the 5th June 1862, Miss Janet Rebecca Finlay of Musselburgh died intestate, infeft in fee-simple in a dwelling-house, consisting of a flat and pertinents, in Duncan Street, Drummond Place, Edinburgh.

"2. The said Janet Rebecca Finlay was survived by a younger and only sister, Miss Williamina Rutherfurd Finlay, who was her heir-at-law.

"3. The heir in heritage of the said Janet Rebecca Finlay and of the said Williamina Rutherfurd Finlay is the defendant, Mr Walter Stevenson, the grandnephew of George Finlay, father of these two sisters.

"4. Miss Williamina Rutherfurd Finlay died on 22d September 1862 without having made up a title to the said dwelling-house.

"5. Three days before her death, and on the 19th September 1862, the said Williamina Rutherfurd Finlay executed a last will and settlement, whereby she named as her executor John Clunie, Esq. of Beaufort House, Stapleton, near Bristol, and disponed to him all and sundry lands and heritages belonging to her, or to which she might have right and title, and generally her whole heritable property, including the said house in Duncan Street, Edinburgh. The said deed was executed upon deathbed, and is admittedly ineffectual in law, as a conveyance of the said dwelling-house.

"6. After the death of Miss Williamina Rutherfurd Finlay, the said Walter Stevenson made up a title to the said dwelling-house, as nearest and lawful heir to Miss Janet Rebecca Finlay, in which character he obtained a writ of *clare constat* from the superiors, the magistrates of the city of Edinburgh, dated 9th December 1862, which was duly recorded in the Register of Sasines for the shire of Edinburgh.

"7. The rent of the said dwelling-house for the half-year from Whitsunday to Martinmas 1862, during the currency of which both sisters died, was personal property belonging to Janet Rebecca Finlay.

"8. The said Walter Stevenson entered to the beneficial enjoyment of the house in Duncan Street at Martinmas 1862, and at Whitsunday 1863 he received payment of the rent then due for the preceeding half-year. After the expiration of a year from that date, he lodged in the Inland Revenue Office in Edinburgh the proper schedule for settling the two first half-yearly instalments of duty payable to him, as successor to the heritable estate of Miss Janet Rebecca Finlay; and in December 1863 he paid, as the amount of the said two first instalments, £3, 3s. 2d. When, however, the schedule was returned from the office of the Board of Inland Revenue in London, it was accompanied with a claim for duty in respect of the said dwelling-house, as having formed part of the heritable succession of Miss Williamina Rutherfurd Finlay.

"9. It is agreed that this case shall be decided on the assumption that the provisions of the Apportionment Act have no application to its circumstances.

"The questions upon which the opinion of the Court is desired are,—

"1. Whether the instalments of succession-duty, declared payable by the Act 16 and 17 Vict. cap. 51, sec. 21, are due to the Crown by the said Walter Stevenson, in respect of a succession to the said dwelling-house having, in the sense of the said Act, been conferred on Miss Williamina Rutherfurd Finlay upon the death of her sister, Miss Janet Rebecca Finlay?

"2. Whether, under the Act 16 and 17 Vict. c. 51, succession-duty is payable to the Crown by the said Walter Stevenson, in respect of a succession to the said dwelling-house having, in the sense of the said Act, been conferred upon him on the death of Miss Williamina Rutherfurd Finlay?

Or,

"1. Whether the interest of the said Walter Stevenson in the said dwelling-house is, in the sense of the Act 16 and 17 Vict. cap. 51, the interest of a succession to the late Miss Janet Rebecca Finlay?

"2. Whether, in the event of its being held that the late Williamina Rutherford Finlay had, in the sense of said Act, an interest in said dwelling-house, as successor to the late Janet Rebecca Finlay, the said Williamina Rutherfurd Finlay, was not, at or prior to her decease, in the sense of said Act, competent to dispone by will of a continuing interest in the said dwelling-house?

The Lord Ordinary (ORMIDALE) pronounced this interlocutor:—

"Finds, in answer to the first two questions in the special case, (1) that the instalments of succession-duty, declared payable by the Act 16 and 17 Vict. c. 51, sec. 21, are not due to the Crown by the defendant Walter Stevenson in respect of a succession to the dwelling-house, referred to in the information and special case, having, in the sense of the said Act, been conferred upon Miss Williamina Rutherfurd Finlay upon the death of her sister, Miss Janet Rebecca Finlay; and (2) that under said Act, succession-duty is not payable to the Crown by the defendant Walter Stevenson in respect of a succession to the said dwelling-house having, in the sense of said Act, been conferred upon him on the death of Miss Williamina Rutherfurd Finlay: Finds, in answer to the last two questions in the special case, (1) that the interest of the defendant Walter Stevenson in the said dwelling-house, is, in the sense of said Act, the interest of a succession to the late Miss Janet Rebecca Finlay; and (2) that, even supposing the said Miss Williamina Rutherfurd Finlay had, in the sense of said Act, an interest in the said dwelling-house, as successor to the said Janet Rebecca Finlay, the said Williamina Ruther-

furd Finlay was not at or prior to her decease, in the sense of said Act, competent to dispone, by will, of a continuing interest in the said dwelling-house: Finds that parties were agreed that the duties charged in the information are correctly stated, and that no penalties were to be insisted for: Therefore, in respect of the preceding findings,—Finds the defendant liable in the sum of £6, 6s. 6d. of succession-duty, as charged and payable in the second count of the information, for which sum, under deduction of the two first instalments, amounting together to £3, 3s. 2d. already paid, decerns against him accordingly, and, *quoad ultra*, assoilzies him: And, in respect that the defendant never disputed his liability to the extent to which he has now been subjected, finds him entitled to expenses of process; allows him to lodge an account thereof, and remits it, when lodged, to the auditor to tax and report."

The Second Division of the Court, on 23d January 1866, pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for the Lord Advocate against Lord Ormidale's interlocutor of 14th November 1865, recall, as unnecessary, the finding in the said interlocutor, 'that even supposing the said Miss Williamina Rutherfurd Finlay had, in the sense of the said Act, an interest in the said dwelling-house, as successor to the said Janet Rebecca Finlay, the said Williamina Rutherfurd Finlay was not, at or prior to her decease, in the sense of the said Act, competent to dispose by will of a continuing interest in the said dwelling-house;' refuse the prayer of the reclaiming note: Find the respondent entitled to additional expenses, and remit to the auditor to tax and to report."

The Lord Advocate presented this appeal.

Lord Advocate (MONCREIFF) and AGNEW for appellant.

ANDERSON, Q.C., and MILL for respondent.

At advising—

LORD CHANCELLOR—My Lords, in this case two interlocutors are complained of, one pronounced by the Lord Ordinary, and the other by the Court of Session, by which it has been determined that, under the circumstances of the case, no succession-duty is payable "in respect of the succession of a lady of the name of Williamina Finlay."

The circumstances of the case are these,—Janet Finlay, the sister of Williamina, died, and upon her death Williamina was entitled to certain property on which the succession-duty would be payable. Her sister Williamina survived her a short time, only a few months. She did not make up her title, nor did she incur representation in respect of her sister's property. In that state of circumstances, before having in any way taken possession of the property, or by receipt of the rents or profits, or by any other act done anything to show that she had either incurred representation or made up her title, she herself died; and thereupon the respondent in this case, Mr Stevenson, made up his title as heir to Janet, and as such he became liable undoubtedly to succession-duty in respect of his succession to Janet. The question here is, whether he also became subject to succession-duty in respect of his being treated under the act as successor to Williamina?

The circumstances of this case are extremely peculiar; and in asking your Lordships to affirm the interlocutors which have been pronounced in the Court below, I apprehend that it will not be supposed that we are in any way dealing with any other case than the precise case which is immediately before us, namely, the case of an heir having died before in any way making up his title or incurring representation.

In that state of circumstances the question is, whether or not the immediate heir, Williamina, can be said, under either the 2d or 21st, or I may add the 20th, section of the Succession-Duty Act, to be a person whose successor Mr Stevenson can be held to be, so as to render him liable to duty in respect of that succession?

The act distinctly provides in the 2d section, "that 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 from 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 devolution or succession."

But the case does not rest there; because in the 21st section the Act more clearly expounds what is meant by a beneficial interest actually devolving on a successor, by declaring "That the interest of every successor (except as herein provided) in real property shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life." So again it directs that the instalments shall be payable at the end of the year after the successor becomes entitled in possession.

Having regard therefore to these two sections of the Act, it appears to me that we must construe the Act as enacting that the "beneficial interest" mentioned in the second section must be regarded as a beneficial interest to which the successor has become entitled in possession. And we have to ask ourselves whether or not Williamina was a successor of that description? It appears to me, my Lords, that it cannot be predicated of Williamina that she was a successor having a beneficial interest in possession in this property.

It appears that there are certain acts which an heir who has not made up his title may perform, and which, in a certain sense, may be considered (as the Lord Advocate has strongly argued) as entitling us to consider Williamina in this case as having a beneficial interest, but such acts as have been referred to do not seem to me to render it such a beneficial interest in possession as we have to look to under the Succession Duty Act.

In what way can we say that Williamina had any such interest under the circumstances that have occurred. She had a year in which to deliberate whether she should or should not make up her title; in other words, to deliberate whether or not she would desire to become the owner of the property and so become entitled to its possession. During that year she died, and nothing having been done by her, the property of Janet was an *hæreditas jacens*. That being so, and she having died without any intimation of intention one way or another, the respondent Mr Stevenson became, upon making up his title, the successor of Janet, and therefore the successor to the *hæreditas jacens*, and was entitled to it as claiming under Janet. My Lords, if we were to hold otherwise, the difficulty, and also the hardship, would be very great in a case of this description, because, in assessing the duty on Williamina, she would become personally liable in

respect to the duty due to the Crown, yet at the same time she would have the right, within a year, of renouncing the succession. And on one of your Lordships asking the Counsel who have argued this case at the bar in what manner she could free herself if made liable to the duty, from having personally to pay that duty, or from having it made a charge on her estate in the hands of her executors, no answer was given to that question. It was admitted that there was no mode in which she could be freed from the consequences of becoming a successor in the sense of being liable to duty under the act. Surely that would be a very unfit construction to put upon the Act, unless the words of the statute are so peremptory as to impose upon us the duty of so construing it. It appears to me, I confess, that there is nothing in the Act which leads to such a conclusion, but that there is everything in the Act to lead us to the contrary construction. It is possible, indeed I may say probable, that this particular case was not contemplated by the Legislature. It is a case which probably will not very frequently occur.

The Lord Advocate contended that if we were to hold, as I am now suggesting that your Lordships ought to hold, that the duty is not payable under the circumstances of the case now before the House, we should be obliged to extend that construction to this case also, namely, the case of an heir remaining for several years without making up his title. The answer to that is, that the heir must during that period have done some acts which would manifestly confer upon him a beneficial interest in possession. He must have possessed himself of rents, and done other acts of that description which would render him liable within this construction of the Act. The case therefore which was suggested in argument, of a person beneficially entitled in possession remaining for several years without making up his title, has no application to the singular case which the House has now before it, of a person dying within the year during which the heir has the choice of accepting or rejecting the succession, without having done any act to express the determination to which she intended finally to come, and leaving therefore those who have to construe the 21st section of this Act in a position in which I think it is not possible to say that there is any mode consistent with justice in which the duty could be collected according to the Act.

My Lords, under these circumstances, it appears to me that your Lordships ought to affirm the interlocutors which are complained of by the appeal, and dismiss the appeal with costs.

Lord Chelmsford—My Lords, I entirely agree with my noble and learned friend on the Woolsack. There are two questions in this case,—1st, Had Williamina Finlay a beneficial interest in the house in Duncan Street, Edinburgh, which devolved by law on the respondent so as to make him liable to the succession-duty payable by her, and remaining unpaid? And 2dly, Was Williamina a successor competent to dispose by will of a continuing interest in the property within the spirit and intention of the Act, so as to make the instalments unpaid at her death a charge on the interest payable by the respondent as owner? If, however, the first question is decided against the Crown, the second becomes wholly immaterial.

With respect to the first question:—upon the death of Rebecca Finlay it is clear that the beneficial interest in the house in Duncan Street devolved by law upon Williamina. She did not make up her title to the property, nor did she renounce the succession; but until she did so she was in the eye of the law an heir-apparent.

Now the definition of an heir-apparent is thus given in Bell's Commentaries,—"An apparent heir is a person to whom the succession to an inheritable estate has, on the death of the ancestor, opened, either by disposition of the law, or by the destination of the subsisting investiture, but whose feudal title is not yet completed."

The apparent heir has, as we have heard, what is called an *annus deliberandi*, he has a year and a day to determine whether he will take up the succession or not, and if he finds that there are debts of the ancestor which are likely to be an onerous charge, exceeding the value of the beneficial interest, he may renounce the estate. If the apparent heir has behaved himself in such a manner as to show that he has taken up the succession, although he has not made up his title, then he may be charged with the debts of the ancestor by the creditors who choose to take diligence against him. In this case Williamina did nothing whatever. There were no rents payable during her lifetime. Half a year's rent became due after her death, which happened four months after the death of her predecessor, Rebecca Finlay. The question then is, whether she did any act whatever to show that she intended to take up the succession? The only act that is attributed to her in that direction is, that there was found a will after her death, by which she professed an intention to dispose of this house to a person of the name of Clunie; but I think it is perfectly clear that that is not such an act as would make Williamina Finlay the heir in actual possession and enjoyment of the property.

Then the Succession Duty Act provides, by the 21st section, that "the interest of every successor (except as herein provided) in real property, shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto."

Now, whether that means actually in possession or in actual receipt of the rents and profits, appears to me to be immaterial, because by the subsequent part of the Act it is enacted that "the duty chargeable thereon shall be paid by eight equal half-yearly instalments, the first of such instalments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable."

It appears to me that Williamina never did become entitled to the beneficial enjoyment of this property. It is a very peculiar case; it is one not at all likely to occur again; but under the peculiar circumstances of the case, I entirely agree with the decision of Court of Session, that Williamina was not liable to the payment of any duty, and that, consequently the respondent is not liable to the payment of succession-duty in respect of Williamina's succession.

Mr Anderson—Will your Lordships allow me to mention that the *annus deliberandi* is now abolished, and that it is now only six months instead

of a year that is allowed. I think it is only right that that fact should be noticed before your Lordships proceed further.

LORD ADVOCATE—It does not make any difference.

LORD WESTBURY—It is a mere substitution of six months for twelve months. The principle of the law remains the same.

LORD ADVOCATE—Exactly, my Lord.

LORD WESTBURY—My Lords, I have very little to add to what has been said. The Succession Duty Act attaches upon interests in possession and interests in expectancy, but the duty payable on the value of an interest in expectancy is not payable until that interest becomes an interest in possession, with this exception, that if the interest in expectancy be in the successor a continuing interest, and capable of being transmitted by will (which definition is used for the purpose of denoting interests of which the successor in expectancy has the absolute ownership) then such continuing interest becomes in reality a new succession, and makes the duty attaching upon the interest in expectancy a debt of the successor who has that continuing interest.

The question here is, whether Williamina had a continuing interest capable of being transmitted by her as her absolute property? The facts are, that she held upon an apparency; that the beneficial interest would not arise until the expiration of six months after the death of her sister Janet; that she died before those six months expired; and that she did nothing either to incur representation or to make up the title to the estate. I think it is clear, therefore, that she had no continuing interest, either in the sense of those words in the Scotch law, or in the meaning to be attached to those words under the Succession Duty Act.

Well, now, had she a beneficial interest in possession? My Lords, I think it abundantly clear, if you look at the 21st section, and take the words about the time when the duty shall arise and become payable, for the purpose of applying them by way of test or criterion as to what is the meaning of the words "beneficial interest" in the section, you must come to the conclusion that what is meant is a beneficial interest in actual enjoyment and possession. If that be so, it is clear that the apparency of Williamina never came within that category, and never was an interest of a nature to which the words "beneficial interest in possession" can be properly applied.

Upon these grounds, my Lords, which I believe are the grounds which were taken by the Court below, I entirely concur with my noble and learned friend on the Woolsack in advising your Lordships to affirm these interlocutors. Undoubtedly we felt some anxiety at first, because the learned Lord Advocate stated that this case would probably be an authority for many others. I can hardly imagine that that will be so; because the present case depends upon the combination of a set of circumstances which are very singular and very peculiar, namely, an apparency which determined within the six months during which the right to the estate of the deceased sister's property extended without anything having been done to constitute an act of ownership on the part of the apparent heir. I think, therefore, my Lords, this is a case which cannot often occur; it is governed by its own peculiar circumstances, and it will add nothing to the law as it has been already ascertained. The decision which has been come to in this case is a mere consequence of the meaning which has been attached to the words of the Succession Duty Act; therefore I have no apprehension of this being a precedent for other cases, which must be dissimilar on account of the peculiar circumstances of the present case.

LORD COLONSAY—My Lords, I have arrived at the same conclusion in this case, and I do not think it necessary to go over the grounds which have been already stated. I particularly concur in the views which have been last delivered. It appears to me that the two sections of the Act which have been referred to must be read together. It must be made clear that the interest contemplated by the statute exists, and that it exists under the circumstances in which the provisions of the statute levying the duty will apply. My Lords, it appears to me, in the first place, that the interest which the statute contemplates did not exist in this case The interest here is too limited to have applied to it the provisions of the 21st section, as to the levying of the duty. Therefore, the conclusion which the Court below arrived at, is, in my opinion, the one suitable to the circumstances of this case.

LORD CAIRNS—My Lords, I concur in the opinions which my noble and learned friends have expressed.

Interlocutors complained of affirmed, and Appeal dismissed, with costs.

Agents for Appellant—Solicitor of Inland Revenue, and W. H. Melvill.

Agents for Respondent—Grant & Wallace, W.S., and Holmes & Co., Westminster.

Thursday, March 18.

LEE AND OTHERS *v.* JOHNSTONE AND OTHERS.

Teinds—Valuation—Titular and Tacksman—Agreement. Circumstances in which a valuation *sustained*, against objections that it had been obtained in absence of the titular, and without proof of the value of the stock or teind.

The defender, Mr Johnstone, is proprietor of a portion of the lands of Over and Nether Ballialies, in the parish of Kirkhope; and the other defenders, Mr Brown's Trustees, are also proprietors of a portion of these lands, and of the lands of Helmburne, in the same parish. The teinds of all these lands were valued by a decreet of valuation of the High Court of Commission of Teinds, dated 28th July 1647, and the present action was brought to reduce that decree, and to have it declared that the pursuers are entitled to exact the teind at a fifth of the actual rental of the lands.

The Lord Ordinary (BARCAPLE) having assoilzied the defenders from the whole conclusions of the summons, the pursuers reclaimed, and, after a full argument at the bar, the Court ordered cases on the whole cause. The parish of Kirkhope, in which the defenders' lands are situated, was, along with the parish of Yarrow, and a portion of the parish of Ettrick, originally included in the ancient parish of St Marykirk of the Lowes, the teinds of which were, with various other endowments, annexed to the Deanery of the Chapel Royal, originally founded and erected by James IV. in the year 1501, under