Defenders' counsel were not called upon.

At advising—

LORD YOUNG—We do not think it necessary to call for any answer in this case. It has been very distinctly and ably stated by Mr Shaw; and I am of opinion that no negligence has been established against the defenders. I am not disposed to proceed on the ground of contributory negligence inferring legal liability for this unfortunate accident on the part of the pursuers. Railway companies are, as a rule, reasonably attentive to the safety and convenience of their passengers; they provide platforms and other luxuries and conveniences previously unknown, and they are usually very attentive to see that a train stops at the platform in order that their passengers may have the benefit of the convenience which they have provided. On this occasion the train overshot the platform, and, as always happens in such cases, passengers meaning to leave the train then immediately proceeded to descend. I suppose experience has taught those in charge of trains that it is better to let them do so than to bring the train back to the platform, for the latter course involves putting the train in motion when the people are getting out. The female pursuer here saw no danger in alighting—and apparently there was none—and her husband, who was with her, saw none, but unfortunately in doing so she miscalculated the distance and sprained her ancle. But it is possible to do that in descending from a railway carriage in circumstances of quite reasonable safety without fault on the part of the railway company, and the pursuers must show that she did so in circumstances which were not those of reasonable safety. But it is the case that they appeared so to herself and her husband. I should be the furthest in the world from saying that railway companies should not continue to do as they have been doing in taking care that trains do stop at the platform, so that the safety and convenience of passengers may be provided for, and accidents, if possible, prevented, for I think it only reasonable that they should do so. The question before us is, Is there here negligence leading to liability on the part of the company under these circumstances? I am of opinion that there is not, and in arriving at the same conclusion as the Sheriff-Substitute—that is, liberating the defenders from liability—I would put it, not on the ground of contributory negligence, but on the ground that the accident was not attributable to fault on the part of the defenders.

LORD RUTHERFURD CLARK and LORD KINNEAR concurred.

The LORD JUSTICE-CLERK and LORD CRAIGHILL were absent.

The Court pronounced this interlocutor—

"Find that the injuries sustained by the pursuer are not attributable to the fault or negligence of the defenders: Therefore assoilzie the defenders from the conclusions of the action, and decern," &c.

Counsel for Pursuer (Appellant)—Brand—Shaw. Agent—David Barclay, Solicitor.

Counsel for Defenders (Respondents)—Comrie Thomson—MacWatt. Agents—Millar, Robson, & Innes, S.S.C.

Friday, July 4.

FIRST DIVISION.

[Lord Fraser, Ordinary.

THE LORD ADVOCATE (ON BEHALF OF THE COMMISSIONERS OF INLAND REVENUE) *v.* TAYLOR AND OTHERS (MILLER'S TRUSTEES).

Revenue—Legacy—Duty Free—Special Fund—Act 36 Geo. III. cap. 52, sec. 21.

A testator directed the whole of the legacies bequeathed by his settlement to be paid free of legacy-duty. There was no special fund out of which he directed legacy-duty to be paid, and the estate did not prove sufficient, after meeting all claims, to pay the legacies in full. There was thus no residue. The trustees in settling for legacy-duties, paid duty on the amount of the composition available for legacies after deducting the duty itself, but the Crown maintained that the duty ought to have been calculated on the whole composition available for legacies, without deducting the amount paid for legacy-duty, and therefore claimed legacy-duty on the sum deducted for legacy-duty. *Held* that the principle contended for by the Crown was *right*, and that the claim must therefore be *sustained*.

Legacy-Duty—Evasion of Duty.

A widow whose husband had made certain provisions for her by his settlement claimed her legal rights, but ultimately agreed to discharge them on the footing of receiving the testamentary provisions and a sum in addition thereto. The amount she thus took was less than her legal rights. *Held*, that while all the widow took was free of duty, the benefit of her transaction with the estate was not available, in a question with the Crown, to relieve the legatees from any of the legacy-duty payable on the remainder, since the legatees took by the bequest and not by any gift from the widow.

Crown—Plea in Bar.

The Crown is not exposed to a plea in bar founded on the error of its officers.

This was an action at the instance of the Lord Advocate on behalf of the Commissioners of Inland Revenue against Henry Taylor and others, trustees and executors of the late Dr Hugh Miller, Helensburgh, to recover (1) a sum of £228, 12s. 6d. with interest from 28th October 1879; and (2) a sum of £208, 5s. with interest from 15th June 1883, these sums consisting of legacy-duty alleged to be due by the defenders as trustees.

Dr Miller died on 11th February 1879. He left a widow but no children. He left personal estate given up in the inventory thereof as £74,475. He left heritage consisting of a villa called Broomfield. By his trust-disposition and settlement he conveyed his whole estate, heritable and moveable, to the defenders as trustees. To his widow he bequeathed, besides interim aliment till the first term after his death, his household furniture and plate, and an annuity of £1000. He also directed that she should, if she chose, occupy Broomfield for her life, unless the trustees should decide

on selling it, as he gave them power to do. He also directed the trustees to pay numerous legacies, those to relatives and friends amounting to £24,634, 1s., and those to charitable and religious purposes to £40,850, in all £65,484, 1s. All the legacies were to be paid free of legacy-duty. The residue of the estate, if any, was to be devoted to a certain religious purpose.

The estate would have, as above shown, yielded sufficient to meet the widow's provisions and (apart from interest) all the legacies, and leave a balance. The widow's legal rights, however, were not discharged, and she, by an arrangement with the trustees, took in place thereof a sum of £11,600 in addition to the provisions of the settlement, and she also occupied Broomfield. She then formally discharged her legal rights. The trustees retained £25,000 to meet her annuity. After retaining that sum and expenses of administration there remained £33,078, 11s. 10d., available during the widow's life to meet *pro tanto* the legacies, which, as above stated, amounted to £65,484, 1s. in all.

The trustees on 17th October 1879 rendered to the Inland Revenue Department a residue account with schedule of legacies. This account brought out the amount of composition on legacies at £30,613 13 11
and legacy-duty thereon at . 2,464 17 11

£33,078 11 10

The legacy-duties (£2464, 17s. 11d.), which were partly ten per cent. and partly three per cent., were paid to the Department on 28th October 1879, and a receipt granted.

On 17th March 1882 the Department wrote to the trustees stating that the principle on which this settlement had been made was erroneous. That principle was that duty had been calculated in the case of each legacy, not on the true amount of the instalment of the legacy, but on the amount of the instalment after deducting the legacy-duty—the result being that duty had been paid, not upon the whole £33,078, 11s. 10d. available for distribution on 28th October 1879, the date of the settlement, but only on £30,613, 13s. 11d. The difference was the £2464, 17s. 11d. paid for legacy-duty, and on that the Department claimed legacy-duty amounting to £228, 12s. 6d. The trustees refused payment thereof.

The widow died on 29th December 1882, and the remainder of the estate, Broomfield being sold for £5000, was set free for distribution among the legatees. On 11th June 1883 the trustees rendered a second residuary account, embracing the balance of the estate now available, amounting to £30,133, 5s. 4d., with relative schedule of legacies. This account brought out the second composition on legacies at £27,887 18 9
and duty thereon at . . 2,245 6 7

£30,133 5 4

The account was made up on the same principle as the previous one, and the Department contended that the duty ought to be paid on the whole £30,133, 5s. 4d. without deducting the £2245, 6s. 7d. of duty. The legacies, as before, being partly chargeable at ten per cent. and partly at three per cent., the amount of additional duty claimed was in this instance £208, 5s. This sum also the trustees declined to pay.

This action was then brought for the two sums in dispute—£228, 12s. 6d. with four per cent. interest as payable on 28th October 1879, and £208, 5s. with four per cent. interest from 15th June 1883, as payable then.

The defenders denied that the principle of calculation was erroneous. They also stated that the whole matter of the first account had been before the Department for several months, and that the settlement was final, and was made in full knowledge of the facts, and that they had thereafter made certain arrangements with parties interested in the estate, which arrangements could not now be recalled.

In answer to this the pursuer denied that the settlement was final, and averred that it was merely a settlement to account.

It appeared from letters produced by the defenders that in 1879 the trustees had proposed, and the religious and charitable institutions to which legacies had been left had agreed, that the legacies to a number of relatives and friends of the testator who were in need of the money should be paid in full, preferably at once, and payment of the legacies for religious objects should be paid when the trustees were in funds sufficient for payment of the same. Many of the persons thus paid their legacies at once in full were within the category of persons whose legacies were only subject to three per cent. duty. In settling the duties the defenders maintained that they had a right to pay the three per cent. legacies in full, and that to the extent of the sum paid on account of them no higher duty could be claimed. The result of this principle would be that the total amount that the Department could recover, assuming it to be right on the main contention above explained, would be £340, 7s. 6d.

It also appeared that the reason for which the widow had called on the trustees for legal rights and compounded with them, as above explained, was that she was desirous of being able to help sundry relatives and friends who were sufferers by the failure of the City of Glasgow Bank.

The statutes regulating payment of legacy-duty are 36 Geo. III. c. 52; 45 Geo. III. c. 28; 55 Geo. III. c. 184; 31 and 32 Vict. c. 124, by sec. 9 of which last Act interest at four per cent., being the rate sued for, is due on legacy-duty in arrear.

The pursuer pleaded—"(1) The defenders having failed to pay the full legacy-duties due in respect of the legacies in question, the pursuer is entitled to decree for the balance, with interest and expenses as concluded for. (2) *Separatim*, The interests of the Crown are not prejudiced by the neglect or omissions of its officers."

The defenders pleaded—"The defenders having paid the full amount of duties under the Legacy Duty Acts, ought to be assoilzied." They also pleaded that the duties paid in 1879 having been adjusted, settled, and accepted at that time as applicable in principle to the whole estate, the Crown was barred from suing the action.

The Lord Ordinary (FRASER) pronounced this interlocutor—"Finds that the defenders are trustees and executors acting under the trust-disposition and settlement of Hugh Miller, Doctor of Medicine, Helensburgh, and as such have

intromitted with his estate: Finds that the defenders are directed by the testator to pay legacies to various persons, upon which legacy-duty was claimable, some at the rate of ten per cent., and others at the rate of three per cent.: Finds that the defenders have paid a certain sum to account of legacy-duty, but have failed to pay the whole legacy-duty claimable by the Crown, and in particular the legacy-duties claimed in this action: Therefore decerns against the defenders as concluded for, &c.

"*Opinion.*—The question in this case is as to the construction to be put upon the 21st section of the Act 36 Geo. III., cap. 52, which is in the following terms:—'That if any direction shall be given by any will or testamentary instrument for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy to or for the benefit of the person or persons who would otherwise pay such duty.' The point between the Crown and the defenders in this action has arisen in reference to the payment of legacy-duty upon bequests by Dr Hugh Miller, who died on the 11th of February 1879. He left a trust-disposition and settlement in favour of trustees, who are called as defenders. They were directed by the trust-deed to pay legacies to relatives, personal friends, and to religious and charitable institutions, amounting in all to £65,484, 1s. The widow was entitled to an annuity of £1000 per annum, and the trustees set aside the sum of £25,000 to meet this annuity. The widow died on 29th December 1882.

"The trustees on 17th October 1879 exhibited to the Revenue authorities a residue account with a schedule of legacies, bringing out the amount of composition on legacies at £30,613, 13s. 11d., and legacy-duty thereon at £2464, 17s. 11d. making in all £33,078, 11s. 10d. At the time when this account was rendered, it had been ascertained that the estate would be insufficient to pay the legacies in full, and hence only a composition upon them was paid—the remainder being to be paid, if the funds allowed it, at the widow's death, when the £25,000 set aside to meet her annuity would be available. The whole of the legacies were declared payable free of legacy-duty, which means, in other words, that the duty was to be paid out of the residue. But there was no residue, and as duty must be paid by some-one, the question comes to be, on what fund shall the burden be laid?

"The Crown demands that the settlement come to in October 1879, whereby duty was paid only on £30,613, 13s. 11d. should be rectified, so as to compel the defenders to make payment of duty upon the legacy-duty of £2464, 17s. 11d., which was then paid. In other words, the Crown claims legacy-duty upon the sum of £33,078, 11s. 10d., which was then available for distribution.

"The widow having died, the balance of the estate is now available for distribution, and it amounts to £30,133, 5s. 4d., upon which duty is claimed. But the defenders contend, as before, that if liability can be imposed upon them, it can only be for duty after deduction of the legacy-duty, £2245, 6s. 7d.—in other words, that duty is only payable on £27,887, 18s. 9d.

"The whole of the legacies being declared free of duty, it is contended that in whatever way the legatees must abate their legacies as between themselves in consequence of the deficiency of funds to pay in full, yet the Crown cannot demand duty upon the legacy-duty paid. The whole case turns upon a few words in the 21st section already quoted. What is the meaning of the words, 'if any direction shall be given for payment of the duty . . . out of some other fund'? It plainly means some fund other than the legacy or bequest, and it is a fund with which the testator has power to deal, for the clause assumes that he can dispose of it by will or testamentary instrument. Now, that fund can only mean the residue or the real estate, something in short apart from the legacy itself. But here there is no residue, and there is no direction to pay the duty from any other estate, and consequently the legatee whose legacy is to be paid free of duty cannot obtain the full legacy that was bequeathed to him. Chief Baron Richards in the case of *Noel and Others* v. *Henley and Others* (13th January 1819, 7 Price's Reports, p. 253), states the character of a legacy declared to be free of duty thus—'The legacy-duty is a charge upon the legacy, not upon the estate, but where the legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the same fund.'

"It is unnecessary to complicate the present case by considering how matters should be settled, if some of the legacies had been declared duty free and others not. The present is a case where all the legacies are duty free, although there are some of them in regard to which the duty is 10 per cent. and others only 3 per cent. How, then, in the case of a deficiency to meet the legacies in full, are the claims of the Crown and of the various legatees adjusted, for the claims of all must be abated and duty only paid upon the sum actually distributed. Thus, suppose the legacy is one of £100, upon which 10 per cent. is payable, and declared to be duty free. This is in reality a legacy of £110. But if the estate can only pay one-half of the legacies, the amount to this legatee would only be £55—10 per cent. on which must go to the Crown, or £5, 10s.—thus reducing the sum actually receivable by the legatee to £49, 10s. So, in like manner in the case in which 3 per cent. alone is exigible—this, if duty free, is a legacy of £103, but if the estate can only pay one-half of the legacies, then the nominal amount is £51, 10s., 3 per cent. on which is £1, 10s. 11d.—leaving the actual sum receivable £49, 19s. 1d. The Crown obtains its duty on the abated sum paid to the legatee, and the legacy-duty comes off the legacy itself, in respect that there is no other fund from which it can be paid.

"But it is said, on the other hand, that there is another fund, and that the direction in the 21st section is applicable to the case. Suppose, it is said, that there are two legacies of £100 each free of duty, one at 10 per cent., and the other at 3 per cent., which, as already said, is one legacy of £110, and another legacy of £103, making in all £213, but the estate is only sufficient to pay £200. Of course, therefore, there must be an abatement. The first legatee

of £110 would get . . . £103 5 8¾
The legatee of £103 would get . 96 14 3¼
That is, the second legatee, instead of getting a legacy of £100, and thus having free £97, contributes £3, 5s. 8¾d. to the *cumulo* duty, and only gets nett £96, 14s. 3¼d. In other words, in addition to paying his own duty he has to contribute 5s. 8¾d. to the duty of the other legatee. So that even when there is no residue there is thus a common fund gathered from the legacies themselves out of which the total legacy-duty is paid. This reasoning, however, proceeds upon a fallacy. It is not the case for which the 21st section provides. That has reference to a fund pointed out specifically by the testator, out of which the duty is to be paid, or (as has been construed by the Courts) where no specific fund has been pointed out, the testator is held to have meant the residue. The adjustment and equalisation of the rights of parties in the case of an insufficient estate to meet the legacies is only what must necessarily take place in order to do justice to legatees having equal rights, and does not in any way depend upon the direction of the testator.

"There are two other points that fall to be noticed. The first of these has reference to the settlement that took place in October 1879.

"That settlement proceeded upon the footing that duty was not due upon duty paid. Upon this settlement the defenders pleaded that 'the duties paid in 1879 having been adjusted and settled and accepted by the Revenue officials at the time as applicable in principle to the whole estate, and the defenders having acted on the faith of said settlement, the pursuer is barred from suing the present action.' The present is a very hard case, but not harder than what occurs every day in reference to these Government duties. It is the privilege of the Crown not to be bound by the omissions, neglect, and blunders of their officers. It is needless to inquire what was the reason or origin of this privilege. It is perfectly established, and in reference to these legacy-duties it is matter of daily practice to open up accounts that had been apparently settled with the Inland Revenue. See the *Lord Advocate* v. *Meiklam, &c.*, July 13, 1860, 22 D. 1427. In that case a residue account had been settled with the Revenue authorities in 1827. In the year 1859—thirty-two years afterwards—duty was claimed on a portion of the estate not included in the former account. The plea of bar was stated against the Crown but held ineffectual, with this remark from the Lord Justice-Clerk Inglis — 'Whether it would not be consistent with the spirit of recent legislation that the Crown should be exposed to pleas in bar as well as the subject, is not for us to inquire. All that we have got to do is to administer the law as we find it, and there can be no doubt that such a plea in bar cannot be maintained against the Crown.' No alteration has been made by subsequent legislation in regard to this privilege of the Crown, and the Lord Ordinary must follow the case of *Meiklam* by repelling the plea.

"The second point other than the main question as to the construction of the statute has reference to an arrangement effected by the trustees with certain legatees. When it was ascertained that the estate would not pay the legacies in full, the trustees proposed to the religious and charitable institutions to whom large legacies were left, that payment in full should at once be made to a class of persons who were described as relatives and friends of the testator, and who were said to be in circumstances requiring pecuniary aid. This proposal is embodied in a letter dated 13th November 1879, by the agents of the trustees, addressed to these institutions. It was agreed to by them. In consequence of this agreement, which was made without the knowledge of the Revenue authorities, the legacies to relatives and friends as set forth were paid in full, and among these legacies there was a large number (but not all) among the class on which only 3 per cent. duty was payable. In settling with the Crown for duty the defenders contend that they had a right to pay the 3 per cent. legacies in full, and that therefore to the extent of the sum paid on account of these legacies no higher duty can be claimed, and that all the abatement that must be made must come off the 10 per cent. legacies. This, however, is a view of the situation that cannot be taken. All the legacies must be abated proportionally in ascertaining the amount of duty payable, whatever be the arrangement between the legatees themselves. The Crown is entitled to duty upon the sum actually claimable by each legatee without reference to the sum actually paid to such legatee through the compassionate consideration given to their circumstances by the religious and charitable institutions."

The defenders reclaimed.

In the Inner House the following additional plea was added by them:—"The pursuer is not entitled to duty on the amount exigible by the widow of the deceased in respect of her legal rights."

Argued for the defenders—(1) If the new plea just added were sound, the Crown had received overpayment to a considerable extent. The widow had a right of option, and the Crown could not get more than duty on the value of the succession at the date of her death. The widow admittedly conceded a portion of her rights in accepting her provisions and a sum of £11,600 as in full of all she could claim under *jus relictæ*, but this concession was for the benefit of the legatees and not of the Crown. What she thus gave up could not in any sense be termed succession; the money by which the legatees received such part of their legacies as she liberated by discharging her legal rights of *jus relictæ*, came really not from the testator, but from the widow. She first claimed her rights and then abated them in favour of the legatees. (2) When it was provided that legacies should be paid duty free, the testator intended that the money necessary to clear them should be drawn from another fund, and this clearing fund should not pay duty, for that would be duty upon duty, which under sec. 21 of 36 Geo. III., cap. 52, was illegal. A fund necessary to clear these legacies was created by the difference of the rates upon the different legacies, as some paid ten per cent. and others only three per cent., and thus, as the total diminution was greater than it would have been, a clearing fund was provided. Had the testator directed that the clearing fund for the legacies was to be the residue, and had it then been discovered that no

residue existed, that would have been a serious difficulty, but here the fund existed.

Authorities—Hansen's Succession Duties (3d ed.) 95; *Warbreck* v. *Varley*, 1861, 30 Bevan. 241; *Farrer* v. *St Catherine's College*, L.R., 16 Eq. 19.

Argued for pursuer—(1) The arrangement with the widow could not prejudice the Crown. If she had taken her legal rights this amount would have been free of duty, but she did not; she discharged them, and the legacies (and therefore the duty) was greater in consequence. (2) The arrangement that certain of the legatees should be paid preferably in full was one between the trustees and the beneficiaries, and could not in any way affect the interests of the Crown. The whole question arose on the construction of the 21st section of the statute. The normal state of matters was, that duty was paid upon duty, but the statute came in and made provision for a case where it was provided that the duty was to be paid out of some other fund. When a legacy was left duty free, the fund to clear it was an integral part of the legacy. To let in the benefit of the section referred to there must be a separate fund. That did not exist here. The claim was for duty upon sums available for distribution, upon which no duty had as yet been paid. The previous settlement was only temporary. The case of *Farrer* was one between legatees, and did not apply in the present case.

Authority—*Wilson* v. *O'Leary*, L.R., 17 Eq. 419.

At advising—

Lord President — This action is brought on behalf of the Commissioners of Inland Revenue to recover from the executors of the late Dr Miller of Bombay certain sums in name of legacy-duty,—one sum of £228, 12s. 6d., and one sum of £208, 5s., which constitute balances said to be due by these executors in consequence of the settlement on two different occasions of legacy or residue duty having been calculated on an erroneous principle. Upon the occasion of the first settlement on the 28th of October 1879, we are told in the condescendence that "the sums paid for legacy duties were in each case calculated, not upon the true amount of the instalment of legacy, but upon the amount of the instalment after deducting the legacy-duty in question. Legacy-duty was paid, not upon £33,078, 11s. 10d., the amount of the estate then available for legacies, but upon £30,613, 13s. 11d., the difference being £2464, 17s. 11d., the amount paid for legacy duties." And again, on the 29th of December 1882, a second settlement having been made in consequence of additional portions of the estate having become available for the payment of legacies, there was in reality a sum of £30,133 then available for legacies, but the duty was then paid only on the composition, £27,887, 18s., the amount of the legacy-duty itself, £2245, having been deducted from the total amount. Now, the principle upon which this claim is made by the Crown cannot, I think, be disputed. The amount of a legacy being once ascertained, the right of the Crown is to demand from the legatee a certain percentage upon that legacy in name of duty—a percentage varying according to the relation between the deceased and the legatee. If it be a near relative—a brother or sister—the rate is three per cent., and if it be a stranger in blood it is ten per cent. So that in the ordinary case the legatee simply receives payment of the amount of his legacy under deduction of the duty which is paid to the Crown. If he has a legacy of £100 left him, and the rate of duty is three pounds, he receives in full discharge of his legacy £97, and the balance goes to the Crown. And in like manner, if it be a ten per cent. duty, the legatee will receive only £90, and £10 will go to the Crown. In that way it is plain that if there was no specialty in this case at all, the settlement on the two occasions to which I have referred was made upon an erroneous principle. But then there are two peculiarities in this case. In the first place, the legacies were left by the testator free of legacy-duty; and, in the second place, the legacies cannot be paid in full, because there is a shortcoming of funds to meet the entire amount of the legacies, and of course there is no residue. Now, in these circumstances the question has occurred whether the ordinary principle which I have just explained is applicable to such a case. Of course where a legacy is left free of legacy-duty, that means that the testator binds his executry estate to relieve the legatee of the duty payable to the Crown; and there is a particular provision in one of the Acts of Parliament to the effect that if a legacy is left free of legacy-duty, then in certain circumstances the money which is employed by the executry estate for the purpose of relieving the legatee of the duty is not itself to be subject to duty; and it is contended that that provision in some way or other must be made applicable to the present case. The provision is—"That if any direction shall be given by any will or testamentary instrument for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy to or for the benefit of the person or persons who would otherwise pay such duty." Now, there can be very little doubt that but for this enactment, in every case where a legacy is given free of legacy-duty by the will of the testator, and the executry estate can afford to relieve, and does relieve, the legatee of the amount of the duty by paying the duty out of the executry estate, that portion of the executry estate so applied will itself be subject to legacy-duty. But in the case supposed, this enactment provides that that portion of the executry estate which is so applied to relieve the legatee is not itself to be subject to legacy-duty. And the reason for the enactment is plain enough. It appears to have been held in some cases between legatees that in such a case the amount applied to free the legatee of duty is, as between legatees, just in itself an additional legacy. Now, it does not appear to me to be possible to apply this enactment to the present case. In the first place, the enactment presupposes that there is a direction in the will that the duty shall be paid out of some other fund than the legacy. That may be liberally interpreted to mean, not a special fund provided and set apart by the testator in express terms for that purpose, but that it is to be payable out of

the residue of the executry, the direction contemplated in the clause of the Act of Parliament being interpreted to mean merely the expression of the testator's intention that the legacy shall be paid free of duty, that importing that he intends his general executry estate to bear the burden. But where there is no residue, and therefore no fund out of which that sum can be provided, it appears to me that as in a question with the Crown, whatever may be said as to some questions between legatees, the section does not apply at all, and the legatee must just suffer the burden which is imposed upon him by Act of Parliament, without obtaining any relief from the duty, because there is nobody in a condition to relieve him. The executry estate cannot do it, the other legatees are not bound to do it, there is no special fund set apart for the purpose, and therefore he cannot obtain his relief. But in truth the Crown has nothing to do with that question, whether he can obtain his relief or not. If he can find a fund out of which the legacy-duty can be paid, then under the enactment which I have just read, that particular fund will not be chargeable with legacy-duty, or rather the part of that particular fund which is applied to relieve the legatees will not be chargeable with duty. But there being no such fund, and there being no fund whatever out of which this legacy-duty can be paid, except the legacy itself, that is not to defeat the right of the Crown, and not to give the legatee freedom from a public burden from which the testator could not free him in the sense of barring the Crown from claiming duty, but could only free him in the sense of relieving him out of the other executry estate. Here it appears that the funds in the hands of the executors are not sufficient even to pay the legacies themselves without considering the matter of legacy-duty at all, and that there must be abatements of all the legacies. Well, of course, the legatee will be chargeable only upon the amount of his abated legacy, and that is quite provided for in the claim that is now made. But as to the amount of the duty corresponding to the abated legacies it appears to me to be perfectly clear that the legatees and these executors as representing the legatees are liable in the duty here claimed.

This is the question which was decided by the Lord Ordinary, and apparently the only question which was argued before his Lordship. But there is another question which has been since raised by an amendment of the record, and it is expressed in the plea-in-law which stands first in order in the record as amended—"The pursuer is not entitled to duty on the amount exigible by the widow of the deceased in respect of her legal rights." Now, if the widow had claimed and obtained payment of her *jus relictæ*, probably that plea would have been a good one, because as between husband and wife there is no duty chargeable by the Crown. But that is not what occurred in the present case. What occurred was this; the widow was provided in an annuity of £1000 a-year, and some other provisions which it is not necessary to enumerate in the settlement itself. She was not satisfied with the provisions made to her in the settlement, and having it in her power if she chose to reject these provisions and betake herself to her legal rights she entered into negotiations with the executors, the result of which was this, that she discharged her legal rights by formal instrument, in consideration of obtaining from the executors the testamentary provisions in her favour, and in addition a sum of £11,600. The effect of that upon the executry estate, of course, was to leave the free executry just as it stands now in the hands of the executors, free for payment of the legacies so far as it will go. Now, the argument is, that as the widow might have claimed a much larger sum as *jus relictæ*, the portion of the estate which might have been carried off by her is not to be subject to any duty to the Crown, although in point of fact it is to go to legatees who are liable in duty. It appears to me that that argument cannot be sustained. If the lady had not claimed her legal rights at all, but had been satisfied with the provisions of the settlement, could it be maintained for one moment that the duty is to be calculated as if she had taken the opposite course and claimed her legal rights. I do not think anybody could maintain that. But then she has discharged her legal rights—formally discharged them—and has accepted of the settlement provisions *plus* the sum of £11,600; and the settlement provisions and the sum of £11,600 cannot be charged with duty, because they go to the widow. But nothing else goes to the widow. It is the widow that is favoured by the statute and left free of duty; and it depends entirely on who the recipients of a portion of the executry estate may be whether that portion of the executry estate is to be free of duty or not. Now, the recipient of the £11,600 is the widow, and that is free of duty; and the provisions in the settlement which are made for the widow are also free of duty; but everything else goes to the legatees, and the legatees are not free of duty. It was said, no doubt, that this might have been done in such a form as to have completely ousted the claim of the Crown. That is quite possible. There are a good many examples of devices by which the Crown is deprived of its statutory claim; and these devices are not at all illegitimate. Parties are quite entitled so to manage their affairs as if possible to exclude the application of taxing statutes, but if they do not do that they cannot claim the same benefit as if they had done it. Of course if this lady, instead of making the bargain she did with the executors, had claimed her *jus relictæ*, and had obtained full payment of her *jus relictæ*, that would have been entirely free of duty, and she might have done anything she liked with it afterwards. She might have made a present of such part of it as she thought fit to her husband's legatees, and then these legatees would have obtained that benefit not by the favour of the defunct, but by a gift *inter vivos* between the widow and themselves; and that gift could not have been subject either to legacy or residue duty as in a question with them. But that is not what was done. The lady did not obtain and did not ask for the whole of that sum, and it went direct from the dead to the living—from the testator to the legatees—and not first of all from the dead to the living widow, and then by gift from the widow to the legatees; and consequently there is nothing to prevent the application of the ordinary rule which makes this subject to legacy-duty. Upon that second question, therefore, which was not before the

Lord Ordinary, I am also of opinion that the defenders have failed to establish their plea.

Lord Mure—I have come to the same conclusion as your Lordship on both points. On the question decided by the Lord Ordinary I cannot see on what ground the defenders can resist the claim of the Crown in the condescendence; for on ordinary principles the legatee is bound to pay the legacy-duty now sued for, and it was not paid here; and the question is, whether in the special circumstances the Crown can have the matter rectified? The legacies are declared by the testator to be free of legacy-duty, and consequently if there is a fund out of which the legacy-duty can be paid, the legatees are to get their legacies clear. But that is not a question between the legatee and the Crown; it is more a question between the legatee and the estate of the testator. In this case the legacy-duty is not expressly appointed to be paid out of any other fund, and therefore the case is clearly not touched by the 21st section of the Act 36 Geo. III., cap. 52. In these circumstances the executors can only carry out the direction of the testator by paying the legacy-duty out of the residue or some other fund in their hands intended for that purpose. But here there is no surplus residue, and no special fund charged with the duty. That being so, I can see no other way but that the legatees must suffer the abatement to the extent of the legacy-duty. They must settle with the Crown just as if there had been nothing in the settlement declaring that the legacies were to be free of legacy-duty.

On the second point, which is that raised under the amended record, I concur in the opinion which your Lordship has expressed.

Lord Shand—I am of the same opinion upon both points. It appears that on the settlement of the residue account on two occasions, and which was only a settlement for the time, the parties deducted the legacy-duty before making the settlement; and as I understand, the duty that is now asked is legacy-duty on the sum that was formerly deducted, which brings the duty up after all only to the duty on the amount of the legacies, as these legacies had to be reduced in consequence of the estate being insufficient to give every legatee the full amount of his legacy. I agree with your Lordships in thinking that section 21 of the Act 36 Geo. IV., cap. 52, of the statute quoted has no application whatever to the case, and that the judgment of the Lord Ordinary should be adhered to.

On the second point, the view I take of what occurred with the widow is simply this, that the widow on obtaining a certain advantage agreed to confirm her husband's settlement—to consent that her husband's estate should be distributed among his legatees as he directed. The result of that arrangement, as it appears to me, was that she waived her right of challenge, and that the legatees now take their various legacies as gifts, not of the widow but of the testator, to which the widow has made no objection. These legacies are therefore now, as they were when the testator died, testamentary bequests by him, and as such they are liable to legacy-duty. I can quite well see that the widow might have put matters in a different position. She might have said, "I insist on vindicating my *jus relictæ*, and I shall take a large part of my husband's estate out of the settlement," and she might have presented the legatees with sums of money equivalent to their legacies, and so the payment of legacy-duty on the amount which she treated in that way might have been avoided. In that case the legatees would have taken the money, not as a gift from the testator, but as a gift from the widow—as a *de præsenti* gift by her. But that is not the state of matters. The legatees take their legacies as *mortis causa* legacies from the estate of the deceased, and so it appears to me there can be no question that they are liable for legacy-duty. I therefore concur with your Lordship on that point also.

Lord Adam—It has all along appeared to me that the rights of the Crown as regards the duties payable upon legacies are not at all doubtful. Suppose a legacy of £100 to be left to a stranger, what takes place is this, that the legatee gets £90 and the Crown gets £10. In one sense that may be said to be a payment of duty on duty, because the legatee pays more than 10 per cent. on the £90, which is all that he puts in his pocket. But there is no doubt that in the case I put these are the respective rights of the legatee and the Crown. And so, if the legacy is left to a relative by whom 3 per cent. legacy-duty is payable, the legatee will get £97 and the Crown £3. The right of the Crown is clear. Now, supposing a legacy to be left free of legacy-duty, I think that as regards the Crown that makes no difference at all; the Crown in that case, assuming that there are funds to pay everything in full, gets 10 per cent. in the case of a stranger, and 3 or 1 per cent. as the case may be if the legatee be a relative. If there be a direction by the testator to pay the duty out of some particular fund or out of the residue, the statute of Geo. III. comes into play, and provides that no duty shall be payable on the £10 or the £3 paid to relieve the legatee from payment of the duty. It is in that case only that the statute comes into play. In this case there was no direction to pay out of any particular fund, and though that may be inferred as being a direction to pay out of residue, there was here no residue; and therefore in my opinion the case does not fall within the 21st section of the Act of Geo. III. I do not think that it has any application to the case, and the Crown, as in the case I put, would just take its 10 or 3 per cent. What actually took place was this—On 17th October 1879 there was a residue account exhibited, which showed £33,078, 11s. 10d. as available for the payment of legacies, and of that sum £30,613, 13s. 11d. was paid to the legatees, and £2464 odds to the Crown as the duty on that £30,613, 13s. 11d. What the Crown now say is, You must pay us the duty on that £2464, or, in other words, you must pay us the duty on the whole £33,078, 11s. 10d. Now, to revert to the illustration of the legacy of £100, what the Crown has got is duty on £90, or £9, whereas they should have got £10. In my humble opinion the Crown are entitled to payment of duty on the £2464. And the second claim is in exactly the same position.

I concur with your Lordship on the other part of the case, and have nothing to add.

The Court adhered, with expenses since the date of interlocutor of the Lord Ordinary.

Counsel for Pursuer — Trayner — Lorimer. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Defenders—Mackintosh—A. Mitchell — Guthrie. Agents — Macandrew, Wright, Ellis, & Blyth, W.S.

Friday, July 4.

SECOND DIVISION.

A. B. *v.* C. B.

(*Ante*, p. 598.)

Process — Appeal to House of Lords — Execution pending Appeal—Husband and Wife.

The Court of Session having in an action for nullity of marriage by a wife against her husband found and declared the pretended marriage to be null, given expenses to the pursuer, and ordained the defender to pay her the taxed amount thereof, and the defender having appealed to the House of Lords, the pursuer presented a petition for interim execution pending appeal, to the effect of enabling her to recover payment of the expenses. The Court *allowed* interim execution to that effect, and refused to ordain her to find caution for repetition in the event of the judgment being reversed.

The defender (C. B.) having appealed to the House of Lords against the judgment of the Second Division (*ante*, p. 598) of 4th June finding his marriage with the pursuer to be null and void, and also against a subsequent interlocutor of 13th June approving of the Auditor's report on the pursuer's account of expenses, and ordaining the defender to pay to her the taxed amount thereof, £319, 12s. 10d., the pursuer presented this petition for interim execution of these decrees, "to the effect of enabling the petitioner to recover payment of the said expenses." The defender did not object to the prayer of the petition being granted, but moved the Court to qualify it by ordaining the pursuer to find caution to repeat the amount of the expenses in the event of the judgment being reversed.

The pursuer objected to the qualification, on the ground that if the defender succeeded in the appeal the pursuer would be declared to be still his wife.

The defender argued—Meantime the marriage was declared null, and the order should therefore be granted. Besides, the wife had separate estate, which was liable for her expenses.

Lord Justice-Clerk—I think we should act here, not as if the matter were settled, but on the footing that it is still in dependence. That is the true footing.

Lord Young, Lord Craighill, and Lord Rutherfurd Clark concurred.

The Court authorised extract of the decrees of 4th and 13th June, and allowed execution to proceed thereon to the effect of enabling the pursuer to recover payment of the expenses decerned for in her favour by the decree of 13th June, and dispensed with reading in the minute-book.

Counsel for Pursuer—D.-F. Macdonald, Q.C.—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Defender — Trayner — Armour. Agents—Beveridge, Sutherland, & Smith, S.S.C.

HOUSE OF LORDS.

Monday, June 23.

(Before Lord Chancellor, Lords Blackburn, Watson, and Fitzgerald.)

MACLAREN AND OTHERS *v.* THE COMPAGNIE FRANCAISE DE NAVIGATION À VAPEUR, *et e contra.*

(In Court of Session, December 5, 1883, *ante* p. 177.)

Ship—Shipping Law—Liability for Collision.

Circumstances in which it was *held* (*reversing* judgment of Second Division) that for a collision happening on a clear night where the lights of the vessels were mutually seen, both vessels were to blame.

Maclaren and others, owners of the "Thames," appealed.

At delivering judgment—

Lord Chancellor—My Lords, in this case I agree generally with the reasons which have led the Second Division of the Court of Session to the conclusion that the "Thames" cannot be exonerated from blame for the collision which happened, and I do not think it necessary to repeat those reasons.

But the question remains, whether the "Lutetia" was free from blame? It does not follow because there was not a proper look-out on board the "Thames," that there was a good look-out on board the "Lutetia," or that credit should be given to all the statements of the witnesses for that vessel. I find it very difficult to satisfy myself where the real truth lies as to the relative courses of the two vessels from the time when they first saw each other down to that of the collision, and as to the precise length of that interval of time; but there is one point on which the burden of justifying her conduct seems to me to be cast upon the "Lutetia" by facts which are beyond serious question. The 18th sailing rule under the Order in Council of the 14th August 1879, agreed to by France and all the other nations mentioned in the second schedule to that Order, is that "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse if necessary." Did or did not the "Lutetia" comply with the rule? If she did not, was her omission to do so a contributory cause of the collision or of the damage which followed?

It is proved to my satisfaction that on board the "Thames" at all events the danger of collision was perceived in sufficient time to enable the engineer to receive and act upon the necessary orders to reverse the engines and stop the ship, and that the "Thames" was actually stopped before the collision took place. Cameron, her first mate says, "When I saw the 'Lutetia's' green light opening to us, I saw that it was impossible to avoid a collision then, and I sang out at once to put the engines full speed astern to avoid being struck amidships. That was sung out to the officer on the bridge, the second mate. To the best of my knowledge that order was carried out, because the vessel was stopped." Gordon