tion of the public undertaking with which they are charged. And if it would be *ultra vires* of them to make such an express grant, an effective grant could not be inferred from any such user by the pursuers and their authors as is alleged to have been permitted or tolerated in the present case. I further agree with the Lord Ordinary in thinking that even if a limited and qualified right of user of the canal banks had been acquired by prescription that right could not be allowed to come into competition with or to prevail against the rights possessed by the defenders and the statutory duties which are imposed upon them, and that consequently they could not be ordained to expend the funds with the administration of which they are entrusted in the execution of such works as the pursuers demand. For these reasons I am of opinion that the pursuers are not entitled to insist that the defenders should erect a bridge over the weir or to execute any other works for their convenience. I understand that the defenders are willing to allow the pursuers to construct a bridge over the weir at their own cost if they desire to do so, and it appears to me that nothing more can reasonably be asked of them.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers—W. Campbell, K.C.—Malcolm. Agents—John C. Brodie & Sons, W.S.

Counsel for Defenders and Respondents—Lord Advocate (Dickson, K.C.)—Blackburn. Agents—Hope, Simson, & Lennox, W.S.

Tuesday, February 2.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LORD ADVOCATE *v.* EARL OF MORAY'S TRUSTEES.

Entail — Revenue — Estate-Duty — Estate-Duty Paid by Heir of Entail in Possession and not Charged on Entailed Estate—Liability of Executors of Heir of Entail for Estate-Duty Paid by Him—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2 (1) (*a*), *sec.* 9 (2), (3), (5), (6), *sec.* 27 (2) (*a*).

An heir of entail on succeeding to the entailed estate availed himself of his statutory option to pay the estate and settlement estate duty which became due on the death of his predessors in respect of the entailed estate, in sixteen half-yearly instalments. During his life he paid out of his own funds eleven of these instalments. He did not apply, under section 9 (2) of the Finance Act 1894, to the Commissioners of the Inland Revenue for a certificate of the estate-duty so paid, and took no steps to make the instalments paid by him a burden upon the entailed estate.

In an action by the Crown against the trustees and executors of the heir of entail for payment of estate and legacy-duty, on the property passing to them, in respect of the payment of these eleven instalments, *held* that the sums of money so paid by the deceased, being neither assets in the hands of his trustees and executors nor property of which he was competent to dispose at the time of his death, did not constitute property passing on his death, and the defenders *assoilzied.*

The Finance Act 1894 (57 and 58 Vict. c. 30) enacts as follows—Section 2 (1)—"Property passing on the death of the deceased shall be deemed to include the property following, that is to say—(*a*) Property of which the deceased was at the time of his death competent to dispose." Section 9 (2)—"On an application submitting in the prescribed form the description of the lands . . . and of the debts and incumbrances allowed by the Commissioners in assessing the value of the property for the purposes of estate-duty, the Commissioners shall grant a certificate of the estate-duty paid in respect of the property, and specify the debts and incumbrances so allowed, as well as the lands or other subjects of property." Section 9 (3)— . . . "The certificate of the Commissioners shall be conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property after the debts and incumbrances allowed as aforesaid: Provided that any such repayment of duty by the Commissioners shall be made to the person producing to them the said certificate." Section 9 (5)—"A person authorised or required to pay the estate-duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof." Section 9 (6)—"A person having a limited interest in any property who pays the estate-duty in respect of that property, shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him." Section 22 (2) (*a*)—"A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both." . . . Section 22 (2) (*c*)—"Money which a person has a gene-

ral power to charge on property shall be deemed to be property of which he has power to dispose."

This was an action by the Lord Advocate for and on behalf of the Commissioners of Inland Revenue against the trustees and executors of the late Edmund Archibald Stuart Earl of Moray, acting under his trust disposition and settlement dated June 12, 1900, and recorded July 30, 1901. The action concluded that the defenders should be ordained to deliver to the Commissioners of Inland Revenue an account of the moneys paid by the late Earl of Moray by way of instalments in respect of estate-duty and settlement estate-duty on his succession to the Moray entailed estates, so that the estate-duty due and payable in respect of the said moneys as being property which passed on the said Earl's death might be ascertained, and that whether such an account was delivered or not the defenders should be ordained to pay to the pursuer the sum of £2500 sterling, or such other sum, more or less, as should be ascertained to be due and payable as estate-duty in respect of the said moneys, as being property which passed on the said Earl's death, with interest at the rate of 3 per centum per annum from 11th June 1901, the date of the said Earl's death, until payment.

There were also conclusions for the delivery by the defenders to the said Commissioners of an account of the said moneys as being part of the personal or moveable estate of the said deceased Earl of Moray, for the purpose of ascertaining what legacy-duty was due and payable in respect of said moneys, and for payment of £1100 or such other sum as should be ascertained to be the amount of legacy-duty due and payable in respect of said moneys, with interest.

The deceased Earl of Moray, who was institute or heir of entail of the Moray entailed estates, died on June 11, 1901. By his trust-disposition and settlement he disponed to his trustees the whole estate, heritable and moveable, which should belong to him, or of which he should have the power of disposal at his death, excepting the said entailed estates and some lands held along with them. The trustees were appointed executors. He succeeded to the Earldom of Moray and the entailed estates in 1895.

As heir of entail in possession he was, in terms of section 8 (4) of the Finance Act 1894, accountable for the estate duty on the property, and as he was not entitled to disentail without consents, both estate duty and settlement estate duty then became payable on the value of the estates under section 23 (16) of the Act. These duties being exigible on real property were, under section 6 (8), payable at his option in eight yearly or sixteen half-yearly instalments, and he having preferred the latter course, had at his death in June 1901 paid out of his own funds eleven out of the sixteen instalments due. The moneys which he paid by way of instalments amounted to about £37,740. He had not obtained a certificate from the Commissioners under section 9 (2) of the Act (quoted *infra*) in respect of these payments, and had taken no steps to make them a burden or charge on the entailed estate.

By his trust-disposition and settlement the said Earl directed his trustees to pay any instalments of the duty which might remain unpaid at his death, and to apply to the Court for an order on the succeeding heir of entail to grant bonds in their favour for the amounts so paid by them. He made no provision with regard to the instalments paid in his lifetime.

The pursuer averred (Cond 4) that under the Finance Act 1894, section 9 (6) (quoted *supra*), "the said Earl, who was a person having a limited interest in the Moray entailed estates, had a statutory charge thereon for the amount so paid by him, and was placed by statute in the same position as if he had actually held a bond over the estates for the amount. At the time of his death he was a creditor of the entailed estates for the moneys he disbursed in name of duty, and the payments he had made formed part of the property passing from him to his trustees and executors at his death. (Cond. 5) Section 9 (5) of the said Act provides (quoted *supra*). In terms of section 22 (2) (*a*) a person is deemed competent to dispose of property if he has a general power enabling him to dispose of it; and under section 22 (2) (*c*) money which he has a general power to charge on property is deemed to be property of which he has power to dispose. Under section 2 (1) (*a*) property passing on the death of the deceased is deemed to include property of which he was at the time of his death competent to dispose. The said Earl was at his death competent to dispose of the amount of the instalments in question. (Cond. 6) Estate-duty is due under the said Act in respect of the said amount as part of the property which passed on the said Earl's death. Section 6 (2) provides that the executor of the deceased shall pay the estate duty in respect of all personal property of which the deceased was competent to dispose at his death; and section 8 (3) provides that the executor of the deceased shall to the best of his knowledge and belief specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate-duty is payable upon the death of the deceased, and shall be accountable for the estate-duty in respect of all personal property of which the deceased was competent to dispose of at his death. . . . The amount due in name of estate duty comes to about £2500."

The defenders denied liability for the sums sued for. They explained "that the late Earl never exercised any of the rights or powers alleged to have been competent to him, and that none of these rights or powers was either transmitted or transmissible by him to the defenders. Further explained that even on the assumption that said rights or powers were transmissible, the said Earl did not intend to convey, and in fact did not convey, any such rights or powers to the defenders, but on the contrary intended to discharge and believed that he had effectually discharged the same

in favour of the entailed estates. No property or asset of any kind has passed to the defenders on his death in connection with or consequent upon his payment of the said instalments. In any view, by refraining from the exercise of said alleged rights or powers the said Earl effectually discharged the said entailed estates of all claims competent against them in respect of said instalments."

The pursuers also claimed legacy-duty to the amount of £1100, with interest, under the Legacy-Duty Act 1796, and of Schedule, Part III. of the Stamp Act 1815, in respect of the said asset as part of the deceased Earl's personal estate falling under the administration of the defenders as trustees and executors. This claim also the defenders disputed.

The trust-disposition and settlement of the deceased Earl of Moray contained the following clause—"I hereby direct my trustees in the event of there being due at the time of my death any estate or settlement estate-duties which became payable on the passing to me of said entailed estates, to pay said unpaid duties, and to apply to the Court of Session for an order or orders ordaining the heir of entail who shall succeed to me in said estates to grant bonds and dispositions in security in their favour for the amount of said unpaid duties paid by them."

The pursuers pleaded, *inter alia*, as follows—"(1) In virtue of the provisions of the Finance Act 1894 the deceased was a statutory creditor for the amount which he paid by instalments, and the debt thus due to him was a charge upon the entailed estates as if a mortgage had been granted in his favour. (2) The right to be reimbursed for the payments he made formed part of the deceased's estate, and was therefore property for the passing of which on his death estate duty is due. (3) The amount paid by instalments was property of which the deceased was competent to dispose, and is therefore chargeable with duty. (4) Legacy-duty is due by the defenders as trustees and executors in respect of the deceased's personal estate, including the moneys for which at his death he had a claim against the entailed estates."

The defenders pleaded, *inter alia*, as follows—"(3) The defenders are entitled to absolvitor in respect that on a sound construction of the Finance Act 1894 no right to charge the instalments condescended on was capable of passing to them on the death of the said Earl of Moray. (4) The said Earl of Moray having declined to exercise any power competent to him to charge the said instalments, *et separatim*, having discharged the same, the defenders are entitled to absolvitor. (5) The defenders are entitled to absolvitor in respect that the said instalments did not form property of which the said Earl of Moray was competent to dispose. (6) In any event the defenders, having no valid and effectual charge on the said entailed estates for the said instalments, and being unable to obtain the same, are entitled to absolvitor."

On 25th November 1903 the Lord Ordinary (STORMONTH DARLING) repelled the pleas of the pursuer and assoilzied the defenders from the conclusions of the summons, and found the defenders entitled to expenses.

Opinion.—"The late Edmund Earl of Moray succeeded to the title and estates in 1895. As heir of entail in possession he was in terms of section 8 (4) of the Finance Act 1894 personally accountable to the Crown for the estate-duty on the landed property. He availed himself of his statutory option to pay the duties in sixteen half-yearly instalments, and at his death in June 1901 he had paid out of his own funds eleven of these sixteen instalments, being a sum of £37,740. By his settlement in favour of the defenders as trustees he directed them, in the event of any instalments remaining due at his death, to pay the same, and to apply to the Court for an order on the succeeding heir of entail to grant bonds in their favour for the amount so paid by them. But he gave no similar direction with regard to the instalments which he himself had paid, and his trustees say that he intended these to go for the benefit of his successors in the entailed estates.

"The Crown now claims estate-duty and also legacy-duty on this sum of £37,740. It is manifestly a claim of the most artificial kind. The money which the Crown seeks to treat as an asset, and to tax as such, is money which Lord Moray was bound to pay, and did pay, to the Crown itself years ago, and the only pretence for treating it as an asset is that the same Act which made it a debt also enabled the debtor to recover it out of the entailed estate. If that meant nothing more than a right which Lord Moray was free to exercise or not as he chose, it is certain that he never exercised it, for he did no act while he was heir in possession to lay the burden on the estate, and he abstained from directing his trustees to take any steps for that purpose, assuming such steps to have been competent. The success of the Crown's claim must therefore depend on its being able to show that the statutory right conferred on Lord Moray was an asset vested in him and transmitted by him to his trustees whether he wished it or not.

"The Crown attempts to make this out in two ways. In the first place, it founds on section 9 (6) of the Finance Act, which provides that 'a person having a limited interest in any property who pays the estate-duty in respect of that property shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him.' This, says the Crown, means that an heir of entail like the late Lord Moray shall be in exactly the same position as if he had obtained a bond over the entailed estate for the amount of the estate duty which he has paid.

"The first criticism on this argument made by the defenders is that an heir of entail is not within the purview of the section at all, because he does not answer the description of 'a person having a limited

interest in the property.' That, they say, may be a popular description of his legal position, but it is not legally accurate, because he is a fiar, and he is treated in another part of this very Act, section 23 (15) 'as competent to dispose' of the estate. The Act, they say, must be read consistently with itself, and if a person is to be treated as competent to dispose of an estate, he cannot be held as having merely a limited interest in it. Perhaps there is some force in this criticism, but undoubtedly in the case of *Laurie*, 25 R. 636, which was a petition under the 11th section of the Entail Act 1868 brought by an heir of entail for authority to grant a bond over the fee of the estate for the amount of estate-duty which he had paid, the petitioner was treated as a person having a limited interest in the property, and therefore as coming within section 9 (6) of the Finance Act. The proceeding was of course *ex parte*, and this particular point was not raised. But I do not find it necessary to form any opinion upon it; for the Crown's argument on section 9 (6) seems to me open to a much more substantial objection, with which the observations in *Laurie's* case are entirely consistent. Both Lord Pearson in reporting the case, and Lord Adam in delivering the judgment of the Court, pointed out that the provisions of the Finance Act could hardly be held as superseding the ordinary requirements of our system of land rights. The idea of an actual and operative charge on land being created automatically, without granter or grantee, and without anything appearing on the records, is so entirely foreign to the principles of Scottish conveyancing that Parliament cannot be supposed to have intended such a result by the vague words of section 9 (6). The words on their just construction seem to me to do no more than to give the disburser of the estate duty a right to obtain a charge of the same kind as if the money instead of being paid out of his own pocket had been raised by means of a mortgage or bond. The leading word is, he is to be 'entitled' to the charge. If he is the heir in possession, he can create the charge by adopting the same procedure as the petitioner did in *Laurie's* case. If his interest in the property is so limited that somebody else must create the charge, he can demand that this shall be done. But I find nothing in the section to warrant the conclusion that the charge is to be complete without any deed at all. Such a conclusion is not in the least necessary for the security of the revenue, because, *ex hypothesi* of the section, the duty has already been paid; and it would be a strange perversion of a finance statute to hold that it upset the fundamental rules of conveyancing merely for the sake of enabling the disburser of the duty to operate his relief against the property. While I regard the answer to this part of the Crown's argument as complete on the terms of section 9 (6) itself, it seems to me to receive confirmation from section 23 (17). That is a section which entitles an heir of entail in the position of the late Lord Moray, if he disentails, to deduct from the value in money of the expectancy of subsequent heirs a rateable part of the estate duty which he has paid. Now, if the effect of section 9 (6) were to give him a bond for the amount, this provision would be unnecessary and unmeaning, because the amount of the bond would be deductible before calculating the value of the expectancy. On the other hand, the provision is quite intelligible and useful if the effect of section 9 (6) is merely to give the disbursing heir a right to charge which he has not exercised; and there is a corresponding provision in section 7 of the Entail Act 1882, with regard to improvement expenditure.

"The second argument for the Crown assumes the failure of its first argument. It falls back on section 9 (5), which is in these terms—'A person authorised or required to pay the estate-duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof.' The Crown admits that this section merely confers a power, for it would be manifestly impossible to know whether the property had been either sold, or mortgaged, or terminably charged, without something having been done to exercise the power. But then the Crown pieces together with section 9 (5) two other sections, viz., section 2 (1) (*a*) and section 22 (2) (*a*) and (*c*). From these taken together it draws the conclusion that all property of which the late Lord Moray was 'competent to dispose' passed at his death, and that he was competent to dispose of money which he had a general power to charge on property, the power not being exercisable in a fiduciary capacity. Accordingly (so runs the argument) Lord Moray had the power down to his death to charge this sum of £37,740 on the entailed estates; and if he did not exercise the power himself he could and did transmit it to his trustees by the general words of disposition in his settlement.

"Now this argument of course assumes that the power to charge the sum of £37,740 was transmissible. If neither the Finance Act nor the Entail Acts contain any machinery by which the defenders could validly have the charge created in their favour, it would be absurd to hold that anything 'passed' to them at Lord Moray's death. As regards the instalments of estate-duty paid by the defenders themselves, section 23 (18) of the Finance Act makes distinct provision. But that is a section limited to the case of persons who have actually paid the duty and in whom the property is not vested; it could never be used by persons who had not paid the duty but were merely representatives of a person who had, and in whom the property had been vested at the time of payment. Neither is there any enactment from begin-

ning to end of the entail statutes which would authorise such a proceeding.

"If that be so, it seems to me to make an end of the Crown's argument. I am not concerned to find a meaning for all the sections of a complicated and not very clear statute. But I may say that the attempt to make section 22 (2) (*c*) apply to the case in hand ignores the fact that the power which the late Lord Moray undoubtedly had, and undoubtedly refrained from exercising, was a power to lay a charge on property which belonged to himself. Power to charge the property of somebody else is in a different category altogether, and it is to this, I rather think, that section 22 (2) (*c*) truly refers. There is a great deal in the first part of the late Lord Moncreiff's judgment in the case of *Maxwell*, 4 R. (at p. 1114), relating to improvement expenditure, which directly applies to the present case. The analogy of improvement expenditure to the payment of estate-duty by an heir of entail is as close as can be; and it must be remembered that before 1875 the right to charge improvement expenditure died with the heir of entail who had made it, and that his power to bequeath or assign such expenditure, introduced for the first time by section 11 of the Entail Act of that year, could only be exercised by express conveyance, so that a general disposition had no such effect. The reason of this is just what what Lord Moncreiff explains, viz., that money spent by a landed proprietor on his own estate is in its nature not an asset but the reverse, and that it never can become an asset except by the voluntary act of the proprietor. The fact that many proprietors may desire, or may be compelled by stress of circumstances, to rear it up into a debt against the estate would be (so the Legislature must have thought) a bad reason for forcing others who have no such desire and are under no such necessity into the same position. Exactly the same considerations apply to a case like the present, where the heir in possession of an old family estate had the means and the desire to hand it down unencumbered to his successor. I cannot construe the Finance Act in a way which seems to me so far-fetched and unreasonable as that for which the Crown contends, and I shall therefore repel the pursuer's pleas and assoilzie the defenders."

The pursuer reclaimed, and argued—The eleven instalments of estate-duty paid by the late Earl of Moray in respect of the entailed lands was a debt due to him which could have been recovered by him under the Finance Act 1894 out of the entailed estates. (1) The Earl of Moray was in the position of a person having a "limited interest" in such property, who paid the estate-duty in respect of that property, and who therefore under section 9 (6) of the Finance Act 1894 was "entitled to the like charges as if the estate-duty in respect of that property had been raised by means of a mortgage to him." The Commissioners of Inland Revenue were, under section 9 (2) of the Finance Act, bound to give a certificate of the estate-duty paid on property, and such certificate was declared by section 9 (3) of the Act to be conclusive evidence that the amount paid was a first charge on the property after existing debts. Accordingly, the late Earl of Moray could, by petition to the Court of Session under section 11 of the Entail Amendment Act 1868, have charged the fee of the estate by way of bond and disposition in security for the instalments of duty paid by him—*Laurie, Petitioner*, February 22, 1898, 25 R. 636, 35 S.L.R. 496. These instalments were made an existing "charge" on the estate, just as if a bond for the amount had been obtained, and that was enough to constitute the claim now made by the Crown. The provisions in section 23 (18) of the Finance Act were important as showing the *jus crediti* in the person who so paid estate-duty, and the very effectual means by an order of sale or an order to grant a bond and disposition in security by which the *jus crediti* might be made effectual. (2) By section 2 (1) (*a*) of the Finance Act 1894 all "property" of which the deceased was "competent to dispose" was subject to estate-duty. A person was by section 22 (2) (*a*) "competent to dispose" of property if he had such "general power" as would enable him to dispose of it. By section 9 (5) of the Act a person paying duty had power, whether the property was or was not vested in him, to raise the amount by sale or mortgage or charge on the property. The deceased Earl having this general power to charge these payments on the property was "competent to dispose" of the amount up to and at the moment of his death—sec. 22 (2) (*c*). That was all that was necessary for the pursuer's case. It was no part of the pursuer's case, as the Lord Ordinary seemed to suppose, that he should be able to transmit this power to his trustees.

Argued for the defenders and respondents—The argument of the pursuer proceeded on two inconsistent grounds—The first branch of the argument proceeded on the view that the deceased Earl had a *jus crediti* in these instalments, the second branch on the view that these instalments were free estate, which he had a power to charge against the entailed property though that power was not exercised—the latter view being clearly inconsistent with an existing *jus crediti*. (1) An heir of entail was not a limited owner within the meaning of section 9 (6) of the Act. He was a fiar and was treated in the Act, sec. 23 (15), as a fiar. The case of *Laurie* (*supra*) was an unopposed petition, and the point at issue here was not before the Court. Taking it that Lord Moray was "entitled" to charge these payments on the estate, he had taken no steps to obtain the necessary certificate from the Inland Revenue. The non-charging of the payments by Lord Moray was not an oversight but a deliberate intention to discharge these instalments of duty in favour of the entailed estate. This was shown clearly by the provision in his trust-disposition in reference to any instalments which

should remain unpaid at his death. In fact and law Lord Moray had not transmitted to his trustees and executors any title to instalments he had paid or any right to raise these out of the entailed estate. (2) The same considerations must determine the question as to whether Lord Moray died "competent to dispose" of the payments he had made. The point to be looked to was whether this was a transmissible asset, and it clearly was not. It was admitted by the Crown that the so-called charge did not pass to his executors. The word "charge" had no meaning in Scotland unless it meant a practical and effective security. The provisions of section 23 (18) authorising the constitution of a mortgage did not apply to the defenders, inasmuch as the eleven instalments were not paid by them. No attempt had been made by the Crown to show that any security existed, or that by any means known to the law the eleven instalments paid by the late Earl could be recovered from the entailed estates for the benefit of his executry. This had always been regarded as the test of liability for estate-duty—*Earl Cowley* [1899], App. Cas. 198, *per* Lord Macnaghten p. 211; *Lord Howe*, [1903], 2 Ch. 69. There was an exact and detailed analogy between a case like the present and the case of an heir of entail who had expended money in improving his estate, and the representatives of such an heir of entail could not charge improvement debt—*Maxwell* v. *Latta*, July 17, 1877, 4 R. 1112, 14 S.L.R. 659, *per* Lord Moncreiff.

At advising—

LORD M'LAREN—This is an action at the instance of the Lord Advocate, on behalf of the Commissioners of Inland Revenue, against the trustees of the late Edmund Earl of Moray for payment of estate-duty in respect of the benefit supposed to have accrued to the personal estate of the late Earl by reason of his having paid eleven half-yearly instalments of estate-duty and settlement estate-duty which became due on the death of his predecessor, and which the late Earl was entitled to charge on the entailed heritable estate. The amount so paid and on which estate-duty is demanded is £37,740. Lord Moray took no steps towards making these instalments a charge upon the estate, and if his intention were of any weight in this question it is plain that he did not intend to make them a charge, because in his will, which is before us, he directs his trustees in the event of there being due at the time of his death any estate or settlement estate-duties which became payable on the passing to him of said entailed estates to pay said unpaid duties and to apply to the Court of Session for an order ordaining his successor in the entailed estate to grant bonds and dispositions in security in favour of the trustees for the amount of such unpaid duties paid by them. Lord Moray was therefore aware that the duties payable when he succeeded to the estate might be charged on the estate, and yet took no steps to make such a charge effectual in his lifetime. The direction which I have quoted is limited to the case of instalments of duty which might be payable after his death. The inference, I think, is clear, that in regard to the instalments which he had himself paid, the payments were intended to be for the benefit of the estate of which he was the proprietor, and which to this extent he desired to pass unencumbered to his heir. But I do not think that intention is of any weight in this case; the question is whether, according to the true meaning of the Finance Act 1894, the sum of £37,740 paid to Exchequer by Lord Moray was (1) assets in the hands of his trustees and executors, or (2) property of which Lord Moray at the time of his death was competent to dispose.

The first question is, I think, easily answered. Lord Moray's trustees have not in fact received the sum of £37,740; and the Finance Act does not provide any means whereby this sum can be recovered from the entailed estate or the heir in possession. Its value as an asset is nil. The Finance Act does indeed give certain rights to executors or personal representatives in the position of Lord Moray's trustees. By section 23 (18) it is enacted that "Where any person who pays estate-duty on any property, and in whom the property is not vested, is by this Act authorised to raise such duty by the sale or mortgage of that property, or any part thereof, it shall be competent for such person to apply to the Court of Session" (*a*) for an order of sale, or (*b*) for an order ordaining the person in whom the property is vested to grant a bond and disposition in security over the property in favour of the person who has paid the estate-duty. It is thus made a condition of any application of this nature by Lord Moray's trustees that they are able to say that they have paid the estate-duty, and the bond can only be granted in favour of the person who has paid the estate-duty. This enactment would apply to the case of the five instalments which were unpaid at Lord Moray's death, and which in terms of his direction the defenders are to pay, but would not apply to the eleven instalments paid by Lord Moray. Crown counsel were not able to point to any other provision in the Finance Act under which the money could be recovered from the entailed estate; and while they maintained that the money was a "charge" on the estate, I cannot hold that there is any substance in the contention. The mere name of a charge will not do, and unless it can be shown that the money can be recovered from the entailed estate for the benefit of the personal estate of the late Earl, I think it must be taken that there is in fact no charge, and therefore no asset subject to estate-duty.

On this subject I conclude by noticing the difference of phraseology in the different heads of section 9. Under the first sub-section estate-duty is declared to be a first charge on the property in respect of which duty is leviable. This is a provision in favour of the Crown, and it is quite intelligible, because Government duties by law take precedence of all other claims,

and may be enforced by known methods. But in sub-section 6 of the same section, which deals with the right of a person having a limited interest in property, and who pays the estate-duty, the language is different. It is said that such person is "entitled" to the like charge as if the estate-duty had been raised by means of a mortgage to them. Lord Moray accordingly was entitled to charge the estate with the instalments which he paid. But he did nothing to make his right effectual, and the statute had not furnished his successors with the means of getting payment out of the estate. Therefore, as already said, I consider that the personal estate of Lord Moray in the hands of his executors has taken no benefit from Lord Moray's payments to account of estate-duty, and that they neither have nor are able to acquire any right to a sum of money corresponding to the sum for which estate-duty is demanded. While there is no very direct authority on the question, I may refer to the case of *Earl Cowley*, 1899, App. Cas. 198. In that case all the Lords were of opinion that the equity of redemption was the measure of the value of the estate for the purposes of estate-duty taxation, because that was the value of the estate which passed at death. It follows, as I think, that estate-duty cannot be charged against Lord Moray's trustees on a fund which in certain events might have passed to them, but which in the actual case never came into their possession.

The second ground of action is that this sum of £37,740 was money of which Lord Moray was competent to dispose. The argument in support of this claim deserves careful consideration, because it is undoubtedly true that Lord Moray by going through certain forms might have come into the position of being able to dispose of such a sum of money. But I have not been able to satisfy myself that Lord Moray at the time of his death was competent to dispose of such a sum, or, in other words, that his will (if he had professed to dispose of it) would have been effectual in favour of the trust disponees.

The argument for the Crown must rest mainly if not entirely on the 9th section of the statute. That section, after declaring that the duty shall be a first charge on the property in favour of the Crown, provides (sub-section 2) that on an application in the prescribed form (*i.e.*, prescribed by the Commissioners of Inland Revenue) the Commissioners shall grant a certificate of the estate-duty paid in respect of the property, and specify the debts and incumbrances allowed in settling the duty, and then by sub-section 3 the certificate of the Commissioners is to be "conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property after the debts and incumbrances allowed as aforesaid. These provisions are perfectly general as regards their application, and would cover the case of an executor paying the estate-duty for the heir (secs. 6 and 2), as well as the case of a limited owner of real or heritable estate, being the person accountable for the duty (secs. 8 and 4). It is hardly necessary to consider how they would apply to the case of a proprietor in fee-simple, because he would not need any authority to charge his estate with the duty if so minded.

If Lord Moray had applied for and had obtained such a certificate, the question whether he had a disposable charge on the estate would have arisen in a different form; for obvious reasons I express no opinion regarding it, except that I think the question would be then as now whether the holder of the certificate was able to confer any active title in favour of his personal representatives. The conditions of the question would of course be different from those of the present case.

I pass to sub-section 5, which has a more important bearing on the case. By this enactment a person authorised or required to pay the estate-duty is empowered, whether the property is or is not vested in him, to raise the amount of the duty by the sale or mortgage of or a terminable charge on that property or any part thereof. It is not explained how or by what form a person in whom property is not vested is to create an effectual security over it; but in the case of *Laurie*, 25 R. 636, the Court, making use of its general statutory powers, authorised an heir of entail to charge the fee of the estate by way of bond and disposition in security with the amount of estate-duty specified in the Commissioners' certificate. This mode of charging the estate would have been open to Lord Moray if he had obtained a certificate and had made the necessary application to the Court. I may add that I think that an heir of entail in possession who should attempt to grant a bond and disposition in security over the estate without judicial authority might be in some danger of incurring an irritancy of his right, supposing he could find a lender who would accept the security; because although the statute empowers him to grant a bond, it does not, at least not in express words, relieve him from the consequences of an act which is *ex facie* a breach of the conditions of the entail. But in view of the decision cited, it is a safe construction of this enactment [9 (5)] that it empowers an heir of entail who has paid estate-duty to raise the money by bond and disposition in security under the authority of the Court, and such a power is given in express terms [23 (18)] to a person who pays estate-duty, and in whom the property is not vested.

To complete the examination of section 9 it is only necessary further to refer to sub-section (6), which is in these terms—"a person having a limited interest in any property who pays the estate-duty in respect of that property shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him."

This enactment, I think, exactly defines Lord Moray's position in relation to the estate-duty which he had paid. He did not have a charge on the entailed estate, because

he had not granted a mortgage, and had not even obtained the certificate which is declared to be evidence of a charge. But he was "entitled" to a charge, and the question is whether this is equivalent to a power of disposal of the creditors' right in the bond which Lord Moray might have granted after taking the necessary preliminary measures.

By section 2 (1) (*a*) property passing on the death of the deceased (and therefore subject to estate-duty) includes "Property of which the deceased was at the time of his death competent to dispose." By section 22 (2) (*a*) a person shall be deemed competent to dispose of property "if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property." There follows a definition of the expression "general power," but I cannot say that this further definition adds anything to that already given. This is all the light which we have from the statute on this important question; and from it I infer, first, that the point of time at which the existence of a power of disposal is considered is the death of the person to whom the power is attributed—in this case Lord Moray; and secondly, that to render the estate affected by the power liable to estate-duty the deceased person must have been able to dispose effectively of the money or property in question, because to be able to dispose ineffectively of property is just the same as not being able to dispose of it at all. Was Lord Moray at the time of his death able to give a title to his executors to uplift this money or to raise it out of the entailed estate? If he had professed to convey it to his trustees, would the will enable the trustees to obtain possession of a sum of £37,740, or to get a decree against anyone for payment, or a security over the entailed estate through which the trustees might operate payment? Now, this is just the question which I have considered with reference to the first branch of the argument, and the answer must be the same. I cannot find any machinery in the Finance Act by which such a gift would be effectual to executors when made by a person who had not himself taken the means of keeping up the instalments as a debt secured on the estate.

I do not think that this was an accidental or undesigned omission. I think it must have been foreseen that in many cases a proprietor who had the means of paying the estate-duty without having recourse to a mortgage would desire to leave the estate unencumbered to the heir; and I can understand that in such a case, where the payment was made for the benefit of the estate, it might be considered that there was no subject on which a second duty would be justly chargeable. Where the payment is kept up as a debt for the benefit of personal representatives, the case is altogether different, because the personal representatives are benefited to the extent of the *jus crediti* which they take by the will, or by operation of law, and it is according to the policy of the Finance Act that duty should be paid on the benefit accruing to them. In the present case Lord Moray's heir takes the estate free from any effective charge in respect of the duty already paid; and it is admitted that estate-duty cannot be charged against him because he is not in the position of being entitled to disentail without consents. While I cannot say that the Finance Act is a model of clearness, or that its construction is free from difficulty, I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Lord Advocate (Dickson, K.C.)—Solicitor-General (Dundas, K.C.)—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders and Respondents—Campbell, K.C.—Macphail. Agents—Melville & Lindesay, W.S.

Tuesday, January 26.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

STROMO BRUKS AKTIE BOLAG *v.* J. & P. HUTCHISON.

Contract—Breach of Contract—Contract of Affreightment—Charter-Party—Penalty Clause—Contract of Sale of Cargo by Charterers—Measure of Damages.

By a charter-party a firm of shipowners undertook to send a ship to the port of Stocka, Sweden, and there load a certain quantity of wood-pulp "in August-September—owners' option" (the captain having liberty to complete the cargo with other goods for the ship's benefit), and proceed therewith to Cardiff "either direct or *via* port or ports" and there deliver the wood-pulp. The charter-party contained a penalty clause in these terms—"Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith." The charterers, a Swedish company, had sold a corresponding quantity of wood-pulp to a firm in Cardiff, the mode and place of delivery being "c.i.f., Penarth Dock, Cardiff," and the time of delivery being August-September 1900, the vendees under the contract being entitled, in the event of the failure of the vendors to deliver within the contract time, to purchase against the vendors. The shipowners did not have special notice of this sale-contract by the charterers.

The shipowners failed to send a ship to Stocka either in August or September, as provided by the charter-party,