to me to be exegetical of the phrase "not under command," the reading therefore being "not under command and so unable to get out of the way of an approaching vessel." I am unable to hold that the "Bogota" was in this helpless condition. The Clyde Trustees, in my opinion, evidently consider that the provisions of bye-law 18 are in themselves sufficient to regulate the occasion of a vessel emerging from a dock.

If, then, bye-law 3 did not apply, the situation was ruled by what I may call the common law of the sea, or the rules of good seamanship, that is, those considerations of comity which should regulate seamanship in circumstances of stress. The same considerations and obligations seem to apply to the use of a highway on land. The points I have already alluded to when dealing with bye-law 19, fall to be given effect to if that bye-law does not apply, with the important consideration in favour of the "Bogota" that her freedom of action was not trammelled by any regulation. The "Bogota," in my opinion, was at the time of the second warning blast, if not of the first also, and certainly after her position in the channel was observed by the "Alconda" and her head tug, so plainly in possession and thus in right of the whole channel to complete a manœuvre already more than half accomplished that she was entitled to go on to finish her manœuvre, and the "Alconda" was bound to slacken speed or stop and reverse to allow the "Bogota" to do so. I am unable to hold that the "Samson" could have done anything beyond what she did to avert a collision. The Sheriff-Substitute's twentieth finding expresses my opinion on this part of the case.

On the whole matter I reach the conclusion that the "Bogota" has not been proved to have been guilty of any negligence in connection with the collision, and that to this extent the judgment of the Sheriff-Substitute must be reversed.

The Court pronounced an interlocutor in which it sustained the appeal and recalled the interlocutor of the Sheriff-Substitute appealed against, dated 22nd July 1922, and after the findings in fact *ut supra*, found in law that the loss and damage resulting from the collision fell to be borne by the "Alconda," and remitted the cause back to the Sheriff to proceed as accords.

Counsel for the Appellants (Pursuers)—Solicitor-General (Fleming, K.C.)—Carmont. Agents—Webster, Will, & Company, W.S.

Counsel for the Respondents (Defenders)—Dean of Faculty (Sandeman, K.C.)—Normand. Agents—J. & J. Ross, W.S.

Thursday, February 22.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

LORD ADVOCATE *v.* MACALISTER.

Revenue—Succession Duty—Rate of Duty—Succession Arising under a Disposition—"If the First Succession under the Disposition Arises"—Succession Duty Act 1853 (16 *and* 17 *Vict. cap.* 51), *secs.* 2, 10, *and* 20—*Finance* (1909-10) *Act* 1910 (10 *Edw. VII, cap.* 8), *sec.* 58 (1) *and* (4).

The Finance (1909-10) Act 1910, section 58, enacts—"(1) Any legacy or succession duty which under the . . . Succession Duty Act 1853 or any other Act . . . is payable at the rate of five per cent. or six per cent. shall be payable at the rate of ten per cent. on the amount of the legacy or succession. . . . (4) This section shall take effect in the case of legacy duty only where the testator by whose will the legacy is given . . . dies on or after the 13th day of April 1909, . . . and in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date."

A testator who was beneficial owner of heritable property held by marriage-contract trustees for behoof of his mother in liferent and the testator in fee died in 1900 leaving a testamentary disposition by which he disponed his estate to his mother in liferent and a cousin in fee. The testator's mother died in 1910. *Held* (*diss.* Lord Cullen) that the first succession to the heritable property, in the meaning of the sub-section (4), arose on the testator's death in 1900, and that succession duty was payable at the rate then current.

The Lord Advocate, on behalf of the Commissioners of Inland Revenue, *pursuer*, brought an action against Captain Norman Godfrey Macalister, Connel, Argyllshire, *defender*, for payment of £185, 11s. 2d., being the balance of succession duty alleged to be due and unpaid by the defender in respect of certain heritable property to which he succeeded on 6th January 1900, under the burden of a liferent which expired on 16th June 1910, by virtue of the will of the late Major Claude Charles Miller Wallnutt. The sum sued for represented the difference between the amount of duty calculated according to the rate introduced by the Finance (1909-10) Act 1910 and the amount calculated according to the rate prior to that Act.

The parties averred, *inter alia*—"(Cond. 1) On the occasion of the marriage of Mrs Eliza Maria Louisa Miller or Wallnutt (hereinafter referred to as Mrs Wallnutt) and Captain Thomas Wallnutt, an antenuptial contract of marriage was entered into dated 6th June 1860. . . . (Cond. 2) By the said antenuptial contract Mrs Wallnutt assigned, disponed, and conveyed to the trustees therein appointed 'all and whole her just and equal half *pro indiviso* of the

lands and estates of Monkcastle and Monkridden,' lying within the parishes of Kilwinning and Dalry in the county of Ayr, in trust for the purposes therein set forth. The said trust purposes were, *inter alia*, as follows:—(1) The trustees were directed to pay the whole free income of the trust estate to Mrs Wallnutt during the subsistence of the marriage; . . . and (3) if there should be issue at the dissolution of the marriage the trustees were directed to continue to pay the income of the trust estate to Mrs Wallnutt, if she were the survivor, during her life, and at her decease the eldest son should succeed to the heritable estate conveyed in the said marriage contract. (Cond. 3) Captain Thomas Wallnutt died in the year 1874. Mrs Wallnutt died at Moffat on 16th June 1910. There was one child of the marriage, Major Claude Charles Miller Wallnutt (hereinafter referred to as Major Claude Wallnutt), who died on 6th January 1900, thus predeceasing his mother. Major Claude Walnutt left a holograph will, dated 23rd July 1882, whereby he bequeathed and disponed his whole estate to his mother in liferent and to the defender in fee, and appointed him his sole trustee and executor. The defender is a son of a sister of the said Mrs Wallnutt. (Cond. 4) In virtue of a power contained in the said marriage contract, part of the heritable estate therein conveyed was sold before the death of Major Claude Wallnutt. In respect of the remainder of the said estate, succession duty became due and payable on the death of Mrs Wallnutt as a succession passing to the defender under the will of the said Major Claude Wallnutt. (*Ans.* 4) Admitted that in virtue of a power contained in the said marriage contract part of the heritable estate therein conveyed was sold before the death of Major Claude Walnutt. Admitted also that in respect of the remainder of the said heritable estate succession duty became exigible on the death of Mrs Walnutt. *Quoad ultra* denied. Explained that payment of the said duty became exigible at the time mentioned in respect that the defender then became entitled in possession to the succession which had previously been conferred on him under the will of the said Major Claude Wallnutt. (Cond. 5) By the Succession Duty Act 1853 (16 and 17 Vict. cap. 51), section 10, it is enacted that there shall be levied and paid in respect of every succession where the successor shall be a descendant of a sister of the mother of the predecessor a duty at the rate of £5 per centum upon the value of the succession. By the Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8), section 58, it is enacted that any succession duty which under the Succession Duty Act 1853 is payable at the rate of 5 per cent. shall be payable at the rate of 10 per cent. on the amount or value of the succession. Denied that defender's succession arose on 6th January 1900. Explained and averred that the said succession within the meaning of the said sub-section arose on 16th June 1910. (*Ans.* 5) Explained that by sub-section 4 of section 58 of the said Finance (1909-10) Act 1910 it is provided that that section shall take effect in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after 30th April 1909. The defender's succession in question was the first succession under the said will and arose on 6th January 1900. Accordingly in terms of the sub-section of the Act last mentioned the increased rate of duty (10 per cent.) was not chargeable in respect of the defender's said succession."

The Lord Ordinary assoilzied the defender.

Opinion. — "The defender succeeded to the fee of part of the estates of Monkcastle and Monkridden under the will of Major Claude Charles Miller Wallnutt, who died on 6th January 1900. At the date of the testator's death his mother Mrs Wallnutt was in enjoyment of a liferent interest in the estate under her marriage contract dated in 1860. This terminated with her death on 16th June 1910, and not till then did the defender come into the full enjoyment of the estate to which he had succeeded and become liable in payment of succession duty—Act 1853, sec. 20. In the year 1900, when the testator died and the fee of the estate vested in the defender, the rate at which succession duty was payable was fixed by section 10 of the Succession Duty Act of 1853 at 5 per cent. Prior to 16th June 1910, when the liferentrix died, the rate had been increased to 10 per cent. by section 58 (1) of the Finance (1909-10) Act. The question in this case is at which rate does the succession duty now payable by the defender fall to be calculated. The Crown in June 1911 assessed the duty at the higher rate of 10 per cent. and demanded payment of £371, 10s. 5d., and the defender in June 1913 made payment at the lower rate of 5 per cent., leaving a balance unpaid of £185, 11s. 2d., which with interest is the sum now sued for.

"The determination of this question depends upon the construction to be placed upon section 58 (4) of the Finance (1909-10) Act. This sub-section places some limitation on the cases in which the increased legacy and succession duties imposed by subsection (1) may be charged. The increased rates only take effect so far as legacy duty is concerned where the person through whose death legacy duty becomes payable has died after the 30th April 1909, and as regards succession duty 'in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date.' The part of this sub-section quoted above was considered in the case of *Lord Advocate* v. *Hamilton* (1918 S.C. 135, and 1919 S.C. (H.L.) 90), and the expression 'first succession' was held to mean first 'dutiable' succession. Now on the death of the testator in 1900 the defender was immediately vested in the fee of the estate. His title was absolute, and as it empowered him to alienate the estate it could not be described otherwise than as beneficial. Accordingly I have no doubt that a succession arose at that date which was 'dutiable' in terms of section 2 of the Act of 1853. It is true that owing to the existence of the liferent with which the fee was burdened the defender was not in a position to enjoy the full benefits of his

right of fee, and that therefore under section 20 of the Act of 1853 he had what appears to me to amount to no more than the option of postponing payment of succession duty until the determination of the liferent. But this very reasonable provision does not alter the fact that his succession became dutiable before the 30th day of April 1909, and accordingly I think he is entitled to be assoilzied from the conclusion of the summons. I may add that it appears to me that the recent decision of Mr Justice Rowlatt in the case of *Attorney-General* v. *Anderton* (1921, 1 K.B. 159), which was founded on by the Crown in the discussion before me, and in which case the learned Judge had to construe the meaning of the words 'a succession arising' in section 18 (1) of the Finance Act 1894, is not inconsistent with the decision of the House of Lords in *Lord Advocate* v. *Hamilton*, but even if it were I am bound to accept the latter decision as establishing the meaning of the words as used in the section here under consideration."

The pursuer reclaimed, and argued — A succession arose within the meaning of the Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8), sec. 58, only when the successor became entitled to possession. The section referred to payment, and "arises" was intended to refer to the time when the duty became payable. This was the only reasonable interpretation. Under the Succession Duty Act 1853 (16 and 17 Vict. cap. 51) liability for duty depended on entry into possession, and the valuation for duty was made as at the time of entry — Succession Duty Act 1853, secs. 14 and 21; Hanson's Death Duties, pp. 614, 615, and 686. Under the Finance Act 1894 (57 and 58 Vict. cap. 30) "arise" referred to the date when duty became payable — *Attorney-General* v. *Anderton*, [1921] 1 K.B. 159, *per* Rowlatt, J., at p. 169. On the defender's contention a succession might arise and the payment of duty be defeated—*Attorney-General* v. *Earl of Selborne*, [1902] 1 K.B. 388 — or in case of a bequest to a class it might not be possible to ascertain when the first succession arose. Again, in entails a succession could only be said to arise with entry into possession — *Lord Advocate* v. *Earl of Buchan*, 1907 S.C. 849, 44 S.L.R. 572. The Lord Ordinary's view that succession duty could be paid before entry was wrong. The amount could not then be ascertained. *Lord Advocate* v. *Hamilton*, 1918 S.C. 135, 1919 S.C. (H.L.) 90, 55 S.L.R. 163, 56 S.L.R. 524, was merely a decision on the meaning of "succession" and could not be applied here.

Argued for the defender and respondent — The reclaiming note should be refused. At the date of the testator's death in 1900 a right to the property vested in the defender, upon which succession duty then became chargeable. That was a succession in the meaning of the Succession Duty Act 1853, secs. 2, 10. The first succession under the settlement therefore arose in 1900, and was still in existence at the time of the Finance (1909-10) Act 1910 — *Wilcox* v. *Smith*, 1857, 4 Drewry 40, *per* Kindersley, V.C., at p. 50; *Duke of Northumberland* v. *Attorney-General*, [1905] A.C. 406. The fact that under the Succession Duty Act the liability depended on the date of entry into possession, and the valuation took place and the duty then became payable, did not help the pursuer. Under the Finance Act 1894, secs. 7 (5), 18, and 23 (12), the amount of the duty was ascertained according to the value of the estate at the date of the testator's death. The crucial date was when the duty became chargeable. The decision in *Lord Advocate* v. *Hamilton* (*cit.*) was fatal to the pursuer's contention. The decision in *Attorney-General* v. *Anderton* (*cit.*) did not touch upon the point at present in issue.

At advising—

LORD PRESIDENT—Section 58 of the Finance (1909-10) Act 1910 deals with both legacy and succession duties. The general effect is to increase the rates and extend the application of those duties. Of necessity the commencement of the incidence of the increased and extended duties must be precisely defined, and sub-section (4) is intended to fulfil this purpose.

In the case of legacy duty, sub-section (4) enacts that the new duties are to take effect only where the testator or intestate, as the case may be, dies on or after 30th April 1909. This date is—in the peculiar circumstances of the Finance Act 1910—equivalent to the date of the commencement of the Act; and apart from the special reasons which led to the selection of that date, the idea obviously is to avoid imposing the increased and extended rates retrospectively. In any case (and the remark applies to the construction of the section as a whole) a Court is slow to construe an enactment as having a retrospective effect, or as affecting rights which have come into being at the date named for its commencement—*Gardner* v. *Lucas* ((1878) 5 R. (H.L.) 105, 3 App. Cas, 582) unless the enactment clearly requires it.

Succession duty is dealt with under two heads—(first) "in the case of a succession arising through devolution by law," and (second) "in the case of a succession arising under a disposition." It was decided by the House of Lords in *Lord Advocate* v. *Hamilton*, 1919 S.C. (H.L.) 90, [1920] A.C. 50, that the word "succession" occurring in this sub-section has the same meaning as in the Succession Duty Act 1853, viz., "property chargeable with duty under this Act" (section 1).

Dealing with the first of these heads, and substituting for the word "succession" its statutory equivalent, I read the enactment thus—"In the case of *property chargeable with duty* arising through devolution by law," the new duties take effect "only where the *property chargeable with duty* arises on or after" 30th April 1909. The awkwardness introduced by the collocation of the words "arising" and "arises" with the pregnant word "succession" (or its statutory equivalent) is great. But to say that "property chargeable with duty arises" seems to me to be the same thing as to say that "property becomes chargeable with duty." Accordingly I think it becomes clear that the true meaning is—*In the case*

of property becoming chargeable with duty through a devolution by law, the new duties take effect only where the property becomes chargeable with duty on or after 30th April 1909. If that is right, then it would seem that (as might be expected) the avoidance of retrospective taxation, which characterises the leading part of the sub-section with regard to legacy duty, is maintained with respect to succession duty, at least in the case of devolution by law. For under section 2 of the Succession Duty Act the devolution of any beneficial interest in property, whether in possession or in expectancy, is "deemed to confer a succession"—that is to say, is deemed to confer "property chargeable with duty"—on the person in whose favour it operates. If the interest is in expectancy it may be some time after the date of conferment before the successor or anyone in his right is liable to pay the duty (section 20), notwithstanding that the property has been "property chargeable with duty" ever since that date. But provided the successor's interest had come into being before 30th April 1909—provided, in other words it had become chargeable with duty in respect of its conferment prior to that date—it is protected from the incidence of the increased duty, no matter how long it may be thereafter before the successor becomes entitled to it in possession, and liable to pay the duty on it.

If I may deal with the second head in the same way as I have already done with the first, the "case of a succession arising under a disposition" must be construed as referring to the "case of property becoming chargeable with duty by reason of it being dealt with by disposition." And it seems to me to follow that the case of "the first succession under the disposition arising" must be construed as referring to the case of "property first becoming chargeable with duty for the same reason." If that be so, then the enactment would read as follows—*In the case of property becoming chargeable with duty (by reason of it being dealt with by disposition) the new duties take effect only if the property first becomes chargeable with duty (by reason of it being dealt with by disposition) on or after that date.* Now such property first becomes chargeable with duty by reason of the disposition, when the disposition first comes into effect—on the death of the testator in the case of a will. For under section 2 of the Succession Duty Act every disposition of property by reason whereof any person becomes beneficially entitled on the occurrence of a death—even though only *ex intervallo*, or only contingently, or only by way of substitutive limitation—is "deemed to confer a succession" (*i.e.*, property chargeable with duty) on such person. The interest thus conferred may be a vested interest, or it may not; and it may be long before the successor, or anyone in his right, becomes entitled to it in possession, and actually liable to pay the duty (section 20). But provided that the interest of the successor had come into being before 30th April 1909, he is protected from the incidence of the increased duty. The difficulty is created by the circumstance that under the same disposition a plurality of "successors" may be simultaneously "conferred," some of which may never be actually productive of duty owing to the "successors" never becoming "entitled to possession." The construction which I think the true one, preserves the avoidance of retrospective taxation throughout the whole section, and it seems to me to harmonise with the provisions of subsections (2) and (3)—particularly the latter—upon which, however, no argument was presented to us.

It is true, no doubt, that the protection thus afforded to interests in property created by disposition is generous to the successor who is ultimately called upon to pay, perhaps more so than was strictly required, for it embraces interest conferred on such successor which, to use the expression employed in section 2 of the Succession Duty Act, may (when first conferred on him) have been neither immediate, certain, nor the subject of original gift. It might have been a fair method of regulating the commencement of the incidence of the increased and extended duties to restrict their application to interests becoming vested rights prior to 30th April 1909. The Lord Ordinary in his opinion seems disposed to invoke such principle. But I have not found myself able to reconcile this with the frame of the enactment, which makes everything depend on the relation of the date just mentioned to the date when the "first succession under the disposition arises." Whether the date at which the successor's property becomes chargeable with duty be taken to be that of "conferment" or that of "entitlement in possession" it cannot be identified with the date when the property becomes a vested right in the successor, for this latter date need not coincide with either of the former. But it should be kept in mind that the rate of duty chargeable is fixed at the date of conferment with reference to the state of the property at that time—charges by a prospective successor are dealt with in section 42—and to the then existing connection between the predecessor and successor. Moreover, however contingent the successor's interest, he may at any time between the date of "conferment" and that of "entitlement in possession" commute the duty presumptively payable by him (section 41). This duty will be taken at the rate fixed when the succession was "deemed to be conferred" upon him, and it would be strange if such a commutation were made liable to be brought into question by an increase of duty made after its date but before the successor became entitled in possession.

The chief argument for the Inland Revenue was founded on the supposed necessity for adopting a construction which would admit of a series of "successions arising" from time to time whereof one could be identified as the "first." The "successions deemed to be conferred" under a disposition—if there are more than one—are in most (if not in all) cases conferred simultaneously. At one stage I was much impressed with the force of this argument. It was said that otherwise

the section was meaningless, and the conclusion supported was that in this part of the section at least a "succession arising" meant *property chargeable with duty becoming actually subject to duty in the hands of a successor entitled to it in possession.* This reading would of course involve retrospective taxation in the case of a "succession deemed to be conferred" (before 1909) under a disposition in which the successor took a vested right, though his right to possession was postponed until, say, 1910. The argument was illustrated by reference to the "successions" conferred on a series of named heirs under a registered entail, and it was justly pointed out that in such a case the measure of protection afforded by the section as I have construed it might be considerably wider than strict justice would require. On the whole, however, I prefer a construction which attributes to the section consistency in principle, and does not—as it appears to me—do any greater violence to the language employed than that contended for by the Inland Revenue.

I therefore reach the same conclusion, if by a somewhat different road, as the Lord Ordinary.

LORD SKERRINGTON—Succession duty is not exigible unless and until the successor becomes entitled in possession. That is assumed by section 58 of the Finance (1909-10) Act 1910, which in sub-section (4) defines the cases in which succession duty at the higher rates introduced by sub-section (1) of the same section "shall be payable," and also the cases in which the further succession duties mentioned in sub-section (2) "shall be levied and paid" on the "taking" of a succession. The purpose in view was to avoid the injustice of retrospective legislation by differentiating between successions according to their respective dates. If I may state in my own words what I understand to be the effect of sub-section (4) it is as follows:—"In the case of a succession by devolution section 58 is not to take effect if the date of the succession was before 30th April 1909, but in the case of a succession under a disposition the test is not necessarily the date of the succession, the duties on which are in process of assessment, but it is the date of the first succession under the disposition." Opinions may differ as to what constitutes a first succession, but the sub-section does not seem to me to give any support to the suggestion which lies at the root of this action to the effect that by a fiction of law a succession, in respect of which duty has become exigible, must be deemed to have had no existence and therefore no date prior to the time when the successor became entitled in possession. If one now reads sub-section (4) exactly as it was enacted, and if one gives all due significance to the word "arise" as applied to a succession within the meaning of the Succession Duty Act 1853, I do not think that anything material is either added to or substracted from my paraphrase. In particular it seems to me to be fanciful to suggest that the word "arise"—a popular expression with no defined meaning—has any connection either in ordinary or in legal language with the idea of vesting in possession. The argument addressed to us proceeded on the assumption that the testator Major Claude Wallnutt was the beneficial owner of heritable property which was held by the trustees of his mother's marriage contract for behoof of her in liferent and of the testator in fee; and that by his will or "disposition," which became operative by his death on 6th January 1900, he transferred this beneficial right of property to the defender absolutely and indefeasibly and exactly as it stood in his own person and of course under burden of his mother's life interest. Upon what principle of law or good sense is the existence of this transfer, which took place many years prior to 30th April 1909, to be ignored in fixing the date of the succession the duties on which have now to be assessed? Moreover, seeing that counsel on both sides agreed that the apparent or abortive succession in liferent which the Major conferred upon his mother by his will must be disregarded in so far as the heritable property was concerned, it necessarily follows that as regards that property the defender's succession was the only succession and therefore "the first succession" under the disposition in question.

If Major Claude Wallnutt had died intestate and if the defender had been his heir-at-law I do not think that the contention of the Inland Revenue would have been stateable. The date of the succession or of the "arising" of the succession could have been no other than the date when the law, as defined by section 9 of the Conveyancing (Scotland) Act 1874, devolved the Major's heritable estate from the dead to the living and vested it in the defender as his heir. The existence of a liferent burdening the inheritance would have been of no importance in any question as to the date of the succession thus devolved. There is, however, a question in regard to the meaning of the expression "the first succession arising under a disposition" which does not require to be decided in the present case, and fortunately so, because so far as I recollect little or nothing was said about it in argument. The question is this—In order that a succession may be counted as a first succession under a disposition (1) is it enough that it was conferred before 30th April 1909 though it proved to be abortive? For example, suppose that by his will, which became operative in the year 1900, Major Claude Wallnutt had directed the defender as his testamentary trustee to dispone the heritable property to A B "if the latter should survive the liferentrix, whom failing to the eldest child of C D born after the death of the liferentrix." If A B predeceased the liferentrix, could the Crown's claim against the child of C D for succession duty at the higher rate have been evaded upon the ground that the first succession under the will (being A B's abortive succession) had "arisen" in the year 1900? Or (2) must "the first succession" be one where the successor took an interest which was vested

at least in point of right? Or (3) must "the first succession" be one in respect of which succession duty became exigible? I express no opinion as to these questions.

The interpretation of section 58 of the Finance Act 1910 is of course largely a matter of impression. My own impression is that sub-section (4) cannot be read in the sense contended for by the Crown without doing violence to its language, and that the difficulties are equally serious in the case of sub-sections (2) and (3).

The only other matter to which it is necessary to call attention is the fact that section 58 of the Finance Act 1910 falls under Part III of the statute which is headed "Death Duties." By section 96 (3) it was enacted that Part III should be construed together with the Finance Act 1894, which in section 58 (2) is referred to as "the principal Act." Section 18 of the last-mentioned Act is the only section which seems to have to do with succession duty. It is interesting both because of the important change which it introduced into the method of valuing successions consisting of real property and also because (so far as I can discover) it is the earliest enactment in which a succession under the Act of 1853 is referred to as "arising." As in duty bound I have studied section 18 of the Act of 1894 with the view of obtaining the benefit of any light which it can throw upon the meaning of section 58 (4) of the Act of 1910 but without any useful result. Nor do I think it necessary to discuss the English decision upon section 18 (1) cited by the Lord Ordinary.

The pursuer cannot succeed in his action unless he shows that section 58 "takes effect," *i.e.*, applies to the circumstances of the case, and this in my judgment he has failed to accomplish. Taxing statutes are to be construed strictly, and the liability to pay a retrospective tax must depend upon something better than a metaphor of ambiguous or rather indefinite meaning.

LORD CULLEN—On the death of Major Wallnutt on 6th January 1900 the defender under his testamentary settlement acquired the fee of the lands in question which form the "succession" within the meaning of the Act 1853. There was, however, an existing liferent enjoyed by his mother Mrs Wallnutt under her marriage contract, the effect of which was that while the defender was in a position to alienate by sale or otherwise dispose of his acquired right and his expectant right to the enjoyment of possession of the lands after the cesser of the liferent, he was not then "entitled in possession" to the lands and had no present enjoyment thereof. As Major Wallnutt had died before the liferentrix, he never became chargeable with duty, never having become "entitled in possession." On the other hand, the defender on the death of the liferentrix on 16th June 1910 became entitled in possession under the transmission in the Major's settlement. He then, in the language of the Act of 1853, "took the succession," and in respect of such taking succession duty became due. The present question relates to the rate at which that duty falls to be estimated in respect of such taking. Under the scale in the Act of 1853 the rate would have been 5 per cent. By the Finance (1909-1910) Act 1910, section 58, sub-sections (1) and (4), the 5 per cent. rate under the Act of 1853 was raised to 10 per cent., but "in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after 30th April 1909.

The question here is when did the first succession under the disposition arise within the meaning of sub-section (4). The defender says it arose at 6th January 1900, when Major Wallnutt died and he acquired the fee without possession of the lands. For the Crown it is contended that it arose at 16th June 1910, when the liferentrix died and the defender in consequence became entitled in possession. The difficulty is caused by the difference between the language used in section 58 (4) and that used in the Act of 1853, which never speaks of a succession (*i.e.*, "property chargeable with duty") "arising."

Between the Act of 1853 and the Act of 1910 the Finance Act of 1894 had made a change in the mode of estimating succession duty in the case of real estate by enacting (section 18 (1)) that "the value for the purpose of succession duty of a succession to real property arising on the death of a deceased person shall, where the successor is competent to dispose of the property, be the principal value of the property," &c. The words "a succession to real property arising" were considered in the recent case of *Attorney-General* v. *Anderton* ([1921] 1 K.B. 159), where it was held by Rowlatt, J., that they refer to the period when a successor becomes entitled in possession.

The words in section 58 (4) are "the first succession under the disposition arises." They have already been the subject of consideration by this Court and the House of Lords in the case of *Lord Advocate* v. *Hamilton*, 1918 S.C. 135, 1919 S.C. (H.L.) 90, [1920] A.C. 50. Relating as they do to the Act of 1853, they are unhappily chosen. A "succession" as defined by the Act of 1853 is not an event but "property chargeable with duty" under the Act. And the Act, which is careful in the use of its own terminology, never speaks of a succession as "arising." Moreover, as the succession in a particular case is the whole property chargeable with duty, it is not appropriate to speak of "the first succession" as if there were or might be a series of properties so chargeable.

In the case of *Lord Advocate* v. *Hamilton* the disposition—a deed of entail—had been made in 1823, and the first succession in a general sense — that is to say, the first occasion of a person succeeding as heir of entail — occurred in 1829. The claim for duty related to the event of the defender Miss Hamilton succeeding under the entail in 1910. She was the first heir to succeed after 19th May 1853. It was held that the word "succession" in section 58 (4) of the Act of 1910 carried with it the meaning

attached to it by definition in the Act of 1853. Viscount Finlay, after referring to the definition of a succession in the Act of 1853, said (at p. 94)—"I think that the term 'succession' under sub-section (4) of section 58 of the Act of 1910 must be read in the same sense as referring to a succession dutiable under the Act of 1853." Viscount Haldane said (at p. 96)—"I think that the true inference from the language of sub-section (4) of section 58 is that the legislation refers to the same kind of succession as is referred to in the Act of 1853, that is, to such a taking under a disposition as makes the property subject to duty."

The word more especially under consideration in that case was the word "succession." Here the words directly in controversy are "first arising." *Esto* a "succession" is a succession within the meaning of the Act of 1853, when does the first succession under a disposition arise? Or, with a paraphrase which I think is legitimate, when does a succession under a disposition first arise?

As I have already said, the Act of 1853 never speaks of a succession as "arising." As, however, section 58 of the Act of 1910 is ancillary to the Act of 1853 in raising the rate of duty, and falls to be read along with it, and as it does not define its terms, I think that when it speaks of a succession "arising" it must be regarded as referring to some well-marked phase or landmark in the history of the succession which under different language is to be found dealt with in the Act of 1853. The word "arise" is used in section 58 (4) in the abstract. It is I think the more natural reading to take it as importing the "arising" of the succession to some person as successor. What is the equivalent in the Act of 1853? It appears to me that the most natural equivalent is what is spoken of in that Act as the "taking" of a succession by a successor. The Act of 1853 speaks repeatedly of a succession being "taken," meaning thereby, as I construe it, being taken in possession so as to raise a claim for duty—(see sections 3, 11, 12, 37, and 38). It also speaks of a succession being "obtained," in the same sense. The taking of a succession whereby a successor becomes entitled in possession and chargeable with duty is the working point of the duty-levying machinery of the Act. In this connection I may, perhaps, refer to the decisions relating to dispositions made before 19th May 1853 to the effect that a claim for duty made in respect of a successor becoming entitled in possession on a death occurring after 19th May 1853 was not elided by his having before that date acquired a vested right in the property without possession. Short of a successor becoming entitled in possession, interests more or less remote may be conferred by the disposition, and these interests may be alienated and dealt with, and there are various provisions in the Act relating to such transactions as bearing on the ultimate exaction of duty. But for the levying of duty, which is the purpose of the Act, the phase of a succession which puts its machinery in motion is the taking of the succession in the sense of a successor becoming entitled in possession. Prior phases of a succession, when the interest of a successor is more or less remote from his becoming entitled in possession, are subordinate phases dealt with in the Act of 1853 for their bearing on the persons chargeable and the rates of duty leviable when the succession ultimately falls in and is taken by a successor in possession and a claim for duty emerges.

An alternative way of construing the word "arises" is, perhaps, to read it as meaning arises into chargeability. Now there may be said to be two senses in which a succession (the property) becomes chargeable. There is the general or "inchoate" chargeability which is created "as soon as the disposition is made by which a succession is conferred" (*per* Lord Herschell in *Wolverton* v. *Attorney-General*, [1898] A.C. 535, at p. 548. Then there is chargeability in the sense of the emergence of a present charge or liability for duty when the succession is taken or obtained by a successor becoming entitled in possession. I think the words "first succession arises" must, from this point of view, refer to the period when the succession is first brought under actual charge or liability, inasmuch as the creation of the general or "inchoate" chargeability takes place once for all when the disposition is made, and does not recur a second time or more often.

Following these views I am of opinion that the claim of the Crown should be sustained.

LORD SANDS—By sub-section (4) of section 58 of the Finance Act 1909-10 it is provided that this section, whereby the rate of succession duty is increased, shall take effect in the case of a succession arising under a disposition only if the first succession under the disposition arises on or after 30th April 1909. The question to be determined in the present case is at what date within the meaning of this provision a succession "arises."

If one tries to regard the matter broadly as one of impression, one's conclusion may very well be influenced by the circumstances of the case which one figures. The intention of sub-section (4) of section 58 is to guard against the increased duty being retrospective. Now if one figures a case of a right of succession where the property has vested in the successor absolutely, though full enjoyment is suspended through the existence of a temporary interest, the position of this successor is that he has a right of property good against all the world under liability to the Crown in duty, according to the value of the property when the interposed interest flies off. It seems clear that in these circumstances the increase of the rate of duty savours of the retrospective. The case, however, does not seem so clear in this regard where when the death took place and a succession is held to have been conferred, the right to the succession was contingent and nobody took a vested interest.

But to turn from considerations of impression to the exact words of the statute as these may be interpreted by the statute

itself. Section 58 (3) contains the expression "the first succession thereunder arises." It would be very difficult to reach the conclusion that a different meaning has to be given to the words "the first succession under the disposition arises" in sub-section 4. Now I take sub-section (3) in the first case. The section increases the duties, but it provides, (2) (*a*), that the increases are not to operate "where the principal value of the property passing on the death of the deceased in respect of which duty is payable does not exceed fifteen thousand pounds." The deceased, in the case of property passing by disposition, is defined as "the person on whose death the *first* succession under the disposition arises." But for this latter provision the word "deceased" might have occasioned doubt, in view of the provisions in regard to the meaning attached to estate passing in the statutory provisions in regard to estate duty, under which an estate passes on the death of the person holding a limited interest. But under section 58 (3), in the case of a legacy, the test is whether the testator's estate passing at his death was of a value exceeding £15,000, and in the case of a disposition the test concerns the person who corresponds with and generally is the testator, viz.—the person upon whose death the deed became operative and a succession opened, be it a succession in liferent or a succession in fee, or a succession in liferent, or for a more limited period, to one person and in fee to another. I do not think it necessary to suppose that the Legislature contemplated successions as numbered first, second, and third. The thing to be made clear was that the person to go back to in order to get the measure of the estate was the person on whose death the deed first became operative by the opening of a succession. The idea is clear enough. Small estates are to be favoured. A man with a small estate leaves it to his son subject to a liferent to his wealthy widow. The son is not to be deprived of the benefit of the estate being worth less than £15,000 because the widow happens to be wealthy. In the circumstances of the present case a question might well have arisen under sub-section (2) if less than £15,000 had passed on the death of either Mrs Wallnutt or Major Wallnutt. According to my view of the statute, the measure is not the estate of the liferenter but the estate of the disponer Major Wallnutt, in respect of whose death the estate became chargeable. But this can be so only if the first succession is held to have arisen on the death of Major Wallnutt, for the "deceased" is the person on whose death the first succession arises.

Turning now to sub-section (4). As already stated the primary object of this sub-section is to guard against retrospective operation. I leave out of account for the moment the complication introduced by the phrase "first succession" which I shall refer to later. The date fixed is 30th April 1909, a year before the statute was passed, but the month in which the measure was first introduced. The sub-section deals with three cases. The first, that of a legacy, presents no difficulty—the test is the date of the death of the testator or the intestate. The second case is that of a succession arising through devolution of law. Here the test is that the succession arises after 30th April 1909. The same question as is raised in the present case might arise here where a property had been disponed to B subject to a liferent to A, and B died before A and before 30th April 1909, the estate devolving upon B's heir-at-law. The estate became chargeable with duty on B's death. Was that the date when the succession arose? The third case is the present one, that of succession under a disposition, and again the test is the date when "the succession arises." I am of opinion that in cases 2 and 3 the same construction must be put upon the expression as seems to be necessary under sub-section 3.

It is suggested that a difficulty arises owing to the provision dealing with "the first succession." In order to understand this provision it is necessary to have regard to the history of the death duties. At the date when this statute was passed, the view, since departed from, of special treatment as regards duties of successions under settlement still obtained. As regards estate duty a whole series of transmissions under a settlement was franked altogether for duty by payment of a small additional duty, "settlement estate duty," on the occasion of the first succession. In this view it was thought when the Act of 1909-10 was passed that it would be too severe to charge the additional succession duty on each transmission under dispositions already operative and that it would be enough if it were charged only when succession under a disposition took place for the first time after 30th April 1909. It may be that the expression "first succession arises" is not an altogether happy one. But under no circumstances can the question whether a succession was the first or the second succession occasion difficulty. If a succession has arisen before 30th April 1909 the first succession cannot arise thereafter. A second cannot arise before the first.

I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

The Court adhered.

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