With regard to procedure, the warrant for removal of an action of this sort from the Sheriff Court to this Court for jury trial is found in section 30 of the Sheriff Court Act 1907, and the warrant which this Court has for refusing the jury trial that is sought is to be found in the proviso to that section. By that proviso this Court is empowered to do one of three things—it may retransmit the case to the Sheriff Court for proof before the Sheriff, or remit to a Lord Ordinary for trial, or remit for proof before a judge of this Division. The section is silent as to the procedure to be followed when retransmission is sought, but that procedure is prescribed by the Act of Sederunt which has been referred to, viz., D, iv, 5 of the Codifying Act of Sederunt. The scheme of the procedure which is there prescribed seems to me to be plainly this—that this matter of retransmission is treated, although it is not described, as a point of competency, and it is suggested by the Act of Sederunt that that point of competency should be broached and decided at the outset in the Single Bills. There is good reason for that, because the only ground upon which, according to the decisions, retransmission has been sought when a case has been brought here for jury trial is that the case is of insufficient value for consideration in the Court of Session—that the real value of the case is less that £50, although the conclusions of the summons may be for more than £50, and therefore it is an action in which the Sheriff has privative jurisdiction. Accordingly it is proper, in my opinion, that that point of competency, which is really a matter of the jurisdiction of this Court, should be decided at the outset before any other question is considered. And it seems to me that the procedure prescribed is that the matter should be not only mooted but disposed of in the Single Bills. As no motion was made in the Single Bills to have the case retransmitted, we must hold that the defender's challenge of the jurisdiction of this Court is now too late.

As regards the question of relevancy, therefore, if the defender wishes to raise it after the case has been removed to this Court for jury trial, he must, in my opinion, make up his mind to assume the value of the case to be above £50, and refrain from moving in the Single Bills to have the case retransmitted in respect of its value. Only by following that course of procedure, as it seems to me, can he raise at this stage the question of relevancy.

As to the mode of trial, no reason has been assigned for refusing the pursuer the jury trial which she claims.

The Court refused the defender's motion, and approved of the proposed issue.

Counsel for the Appellant (Pursuer)—Aitchison, K.C.—Gibson. Agents—W. G. Leechman & Company, Solicitors.

Counsel for the Respondent (Defender)—Gentles, K.C.—Gilchrist. Agents—Manson & Turner Macfarlane, W.S.

Friday, June 27.

FIRST DIVISION.

[Court of Exchequer.

CORMACK'S TRUSTEES *v.* INLAND REVENUE.

Revenue — Stamp Duty — Discharge by Widow of Legal Rights in Return for Annuity—Conveyance on Sale or Bond for the Security of an Annuity—Stamp Act 1891 (54 *and* 55 *Vict. cap.* 39), *secs.* 13 (3), 54, 56 (3), 60, *and First Schedule.*

A widow whose testamentary provisions made for her by her husband were of much less value than her legal rights made a claim for the latter. Thereafter she came to an agreement with her husband's testamentary trustees under which she discharged her "whole rights of aliment, mournings, terce, and *jus relictæ*," and in consideration of this discharge agreed to accept (1) an annuity of £4100 for her life free of income tax and super tax; (2) the liferent of a dwelling-house to be provided by the trustees; and (3) the liferent of certain furniture. Questions having arisen as to the amount of stamp duty exigible on this deed, *held* that the transaction embodied therein was not a release or renunciation upon a sale, but was the only security for an annuity for the term of life and was therefore chargeable under the heading of "Bond, Covenant," &c., in the First Schedule to the Stamp Act 1891.

On 16th August 1923 the testamentary trustees of the late James Cormack, shipowner, Leith, presented an instrument to the Commissioners of Inland Revenue and required them to express their opinion as to the stamp duty with which it was chargeable. The Commissioners being of opinion that the instrument was liable to conveyance-on-sale duty assessed it accordingly, and at the request of the trustees stated a Case for the opinion of the Court. The instrument embodied an agreement entered into between the trustees of the said James Cormack and Mrs Fanny Campbell Begg or Cormack, his widow. The terms of the agreement are sufficiently set forth in the opinion of the Lord President as follows:—"The question is as to the assessment of stamp duty upon an agreement entered into between the late Mr Cormack's testamentary trustees (appellants) and his widow. The circumstances, as these may be gathered from the agreement itself, were as follows:—By his trust-disposition and settlement Mr Cormack had provided his widow in (1) £200 in name of mournings and aliment, (2) the liferent use of his house and furniture (subject to certain burdens), and (3) an alimentary annuity of £500 a year. He also secured her right to a sum of £700 (covered by two policies of insurance) which had originally belonged to his wife but fell under his *jus mariti*. Subject to certain legacies the whole residue of the estate was settled on the children of

the marriage. The heritable portion of the estate was valued at only £3100 but the corrected total value of the moveables exceeded £557,000. It is obvious, having regard to the dimensions of the testator's moveable estate, that the widow's conventional rights under the settlement might reasonably be regarded as inadequate to meet the requirements of a suitable provision; and equally obvious, having regard not merely to the size of the estate but also to the natural interests of the children under the settlement, that the widow's *jus relictæ*—a capital sum of £136,000—might reasonably appear to be much in excess of what was necessary for that purpose. The force of this latter consideration is not diminished by the fact, elicited in answer to a question from the bench and not disputed at the bar, that the widow was over 80 years of age when her husband died in 1922. In this state of affairs the widow being separately advised elected in favour of her legal rights, namely, (1) suitable mournings and aliment, (2) terce, and (3) *jus relictæ;* but as the result of negotiations between her and the trustees she agreed—I quote the concluding words of the narrative clause of the agreement—'to accept the provisions after mentioned in full settlement and discharge of her legal rights subject to the conditions after mentioned.' The trustees' part of the agreement proceeds 'in consideration of the discharge and renunciation' (by the widow) 'aforewritten' and consists of (1) an obligation by the trustees to pay the widow a liferent annuity of £4100 a year free of income tax and super tax; (2) an obligation to buy such a suitable house as the widow might choose for her liferent use; and (3) an obligation to give her the use of such of her husband's furniture as she might select, and to buy whatever other furniture might be reasonably required for the foresaid house and to give her the liferent use thereof. The widow's part of the agreement proceeds 'in consideration of the foregoing obligations' by the trustees, and consists of a discharge of her whole legal rights of 'aliment, mournings, terce, and *jus relictæ* in the estate of her husband the said deceased James Cormack and all interest due thereon, and also the provisions made for her under said trust-disposition and settlement.'"

The Case set forth, *inter alia*—"By the First Schedule of the Stamp Act 1891 the following stamp duties are charged, viz.—'Release or renunciation of any property or of any right or interest in any property—

Upon a sale. See conveyance on sale.			
By way of security. See mortgage, &c.			
In any other case - - - -	£0	10	0
'Conveyance or transfer on sale of any property (except such stock as aforesaid) where the amount or value of the consideration for the sale does not exceed £5 - - - - - -	0	0	6
. . . . .			
'For every £50 and also for any fractional part of £50 of such amount or value - - - - -	0	5	0

'And see sections 54, 55, 56, 57, 58, 59, 60, and 61.'

"Section 73 of the Finance (1909-10) Act 1910 provides that—'The stamp duties chargeable under the heading "Conveyance or Transfer on Sale of any Property" in the First Schedule to the Stamp Act 1891 (in this part of this Act referred to as the principal Act) shall be double those specified in that schedule. . . .'

"Section 54 of the Act is as follows:—'For the purposes of this Act the expression "conveyance on sale" includes every instrument and every decree or order of any court or of any commissioners, whereby any property or any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.'

"Section 56 (3) of the Act is as follows:—'Where the consideration or any part of the consideration for a conveyance on sale consists of money payable periodically during any life or lives the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the amount which will or may according to the terms of sale be payable during the period of twelve years next after the day of the date of the instrument.'

"Section 4 (*a*) of that Act provides that—'An instrument containing or relating to several distinct matters is to be separately and distinctly charged as if it were a separate instrument with duty in respect of each of the matters. Deed of any kind whatsoever not described in the schedule, 10s. Bond, covenant, or instrument of any kind whatsoever (1) being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack. For a definite and certain perion so that the total amount to be ultimately payable can be ascertained:—The same *ad valorem* duty as a bond or covenant for such total amount. For the term of life or any other indefinite period. For every £5 and also for any fractional part of £5 of the annuity or sum periodically payable, 2s. 6d.'

"Section 13 of the Act is as follows:—'(1) Any person who is dissatisfied with the assessment of the Commissioners may within twenty-one days after the date of the assessment and on payment of duty in conformity therewith appeal against the assessment to the High Court of the part of the United Kingdom in which the case has arisen, and may for that purpose require the Commissioners to state and sign a Case setting forth the question upon which their opinion was required and the assessment made by them. (2) The Commissioners shall thereupon state and sign a Case and deliver the same to the person by whom it is required, and the case may within seven days thereafter be set down by him for hearing. (3) Upon the hearing of the case the Court shall determine the question submitted, and if the instrument in question is

in the opinion of the Court chargeable with any duty shall assess the duty with which it is chargcable. (4) If it is decided by the Court that the assessment of the Commissioners is erroneous any excess of duty which may have been paid in conformity with the erroneous assessment, together with any fine or penalty which may have been paid in consequence thereof, shall be ordered by the Court to be repaid to the appellant with or without costs as the Court may determine. (5) If the assessment of the Commissioners is confirmed the Court may make an order for payment to the Commissioners of the costs incurred by them in relation to the appeal.'

"Section 60 of the Act is as follows:—'Where upon the sale of any annuity or other right not before in existence, such annuity or other right is not created by actual grant or conveyance but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale.'

"Section 57 of the Act is as follows:—'Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part as the case may be of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty.' . . .

"The Commissioners were of opinion that the instrument was liable (1) as a release or renunciation upon a sale to conveyance on sale duty of £492, calculated upon the amount of the annuity of £4100 which would or might be payable during the period of twelve years next after the day of the date of the instrument, and (2) as the instrument contains a clause of registration to the deed, duty of 10s. in respect of the other matters of the agreement. The Commissioners accordingly assessed the instrument to the duty of £492, 10s. and required payment of that duty. Whereupon the said Messrs Boyd, Jameson, & Young, W.S., paid to the Controller of Inland Revenue, Edinburgh, the said sum of £492, 10s. and the said instrument was thereupon stamped with the stamps denoting the said £492, 10s. assessed as aforesaid and also with the particular stamp provided by the said Commissioners to denote that the full amount of stamp duty with which it was by law chargeable had been paid.

"In view of the terms of section 13 of the Act, and particularly of sub-section (3) thereof, and of the fact which the Commissioners hereby find that the annuity of £4100 referred to in article first of the foregoing agreement was not before in existence and is not created by actual grant or conveyance but is only secured by the said agreement, the Commissioners think it right to submit that in their opinion if the assessment made is erroneous the correct head of charge is contained in section 60 of the Act and that the instrument is liable to *ad valorem* conveyance-on-sale duty on the capital value of Mrs Cormack's *jus relictæ* at the date of execution, *videlicet*, £1360 by virtue of the provisions of section 57.

"The trustees through their agents, while admitting the correctness of the assessment in so far as it applied to the deed duty of 10s., expressed their dissatisfaction with the assessment in so far as it applied to the conveyance-on-sale duty of £492, their contention being that the instrument was not a release or renunciation upon a sale but the only security for an annuity of £4100 for the term of life, and therefore chargeable with the duty of £102, 10s. under the heading of bond, covenant, &c., in the schedule to the said Act, and to the further duty of 10s. as a renunciation of a right not being upon a sale nor by way of security."

The *question* for the opinion of the Court was—"Whether the said instrument is liable to be assessed and charged with the duties of £492 and 10s. in accordance with the assessment of the Commissioners; if not, with what duty is it liable to be assessed and charged?"

Argued for appellants—The *jus relictæ* was not property, it was merely a *jus crediti* the same as legitim—*Cameron's Trustees* v. *Maclean*, 1917 S.C. 416, 54 S.L.R. 355. There was therefore no release or renunciation of property in the sense of the Act—*Warren* v. *Howe*, 1823, 3 Dow & Ry. 494; *Limmer Asphalte Paving Company, Limited* v. *Inland Revenue*, 1872, L.R., 7 Exch. D. 211. This was merely a family settlement—an exchange of a lump sum of money for annual payments—Alpe, Law of Stamp Duties (17th ed.), pp. 90, 91, 205; *MacLeod* v. *Inland Revenue*, 12 R. 1045, 22 S.L.R. 674; *Blandy* v. *Herbert*, 1829, 9 B. & C. 396; *Massy* v. *Nanney*, 1837, 3 Bing. N.C. 478; *National Telephone Company* v. *Inland Revenue*, [1899] 1 Q.B. 250, [1900] A.C. 1; *Dawson* v. *Inland Revenue*, [1905] 2 Ir. R. 69. The deed was therefore only chargeable as a bond for the security of an annuity. In any event it was not now competent for the Court to assess a higher rate of stamp duty than that which the Commissioners had adjudicated—Craies' Statute Law (3rd ed.), 131.

Argued for respondents—The agreement constituted a sale by the widow of her legal rights, the consideration being an annual payment in cash. It was chargeable therefore with conveyance-on-sale duty—*Inland Revenue* v. *Tod*, 1898, 25 R. (H.L.) 29, 35 S.L.R. 671; *In re Lepine, Dowsett* v. *Culver*, [1892] 1 Q.B. 516; *J. & P. Coats, Limited* v. *Inland Revenue*, [1897], 2 Q.B. 423; *Wilson & Sons, Limited* v. *Inland Revenue*, 1895, 23 R. 18, 33 S.L.R. 10; *Measures Brothers* v. *Inland Revenue*, 1900, 82 L.T.R. 689; *Christie* v. *Inland Revenue*, 1866, L.R., 2 Exch. D. 46; *Potter* v. *Inland Revenue*, 1854, 10 Exch. Rep. 147; *Bristol (Marquess of)* v. *Inland Revenue*, [1901] 2 K.B. 336. A family arrangement might be a transaction for full consideration—*Lethbridge* v. *Attorney-*

General, [1907] A.C. 19. It was significant that the Finance (1909-10) Act 1910, sec. 74, imposed conveyance-on-sale duty in the case of gifts—*Baker* v. *Inland Revenue*, 1923, 130 L.T.R. 513. Moreover, it was competent for the Court to assess a higher rate of stamp duty than that which the Commissioners had adjudicated—Stamp Duties Act 1850, sec. 15; *Thames Conservators* v. *Inland Revenue*, 1886, 18 Q.B.D. 279; *Advocate-General* v. *Ross*, 1848, 10 D. 1003; Stamp Act 1891, sec. 13 (3); *Great Northern Railway Company* v. *Inland Revenue*, [1901] 1 Q.B. 416.

LORD PRESIDENT (CLYDE)—[*After the narrative quoted supra*]—The Commissioners were of opinion that this agreement was liable to a *conveyance-on-sale* duty of £492. Several of the classes of instruments enumerated in the First Schedule to the Stamp Act of 1891 are liable to *conveyance-on-sale* duty. But it is vital to the whole contentions of the Commissioners that the transaction embodied in the agreement should be ascertained to be a sale.

In determining whether a particular instrument falls within this or that—or within any—of the categories enumerated in the schedule and defined in the Act, it has been often said that the substance and effect, rather than the precise terms, of the instrument should be regarded—*Christie* v. *Commissioners of Inland Revenue*, 1866, L.R., 2 Exch. 46; *Limmer Asphalte Paving Company* v. *The Commissioners*, 1872, L.R. 7 Exch. 211; *Belch* v. *The Commissioners*, 1877, 4 R. 592; *The Commissioners* v. *Glasgow and South-Western Railway Company*, 1886, 13 R. 480, *revd.* 12 App. Cas. 315. No doubt this is so; but the question is nevertheless one both of form and of substance. Among the infinite variety of transactions there are some which are not necessarily and in themselves sales, but which may conveniently and effectually be carried out under the form of sale; and if the parties select that form as the vehicle of their transaction in preference to some other (which might be equally competent and effectual, but is considered less convenient, for the purpose of carrying out the objects in view), the substance of the transaction may be determined by the form selected. It is not that the legal form into which a transaction is thrown alters its substance. It is that the substance of a particular transaction may be equally consistent with the adoption of either legal form. It would be in vain to seek to avoid liability for the stamp duty appropriate to the form selected merely because the substance of the transaction might have been carried into effect in another legal shape, the form of which would have attracted a stamp duty of inferior denomination.

In the present case it cannot be said, and it was not maintained, that the agreement between the trustees and the widow took the form of a sale. It took the form of a contractual substitution—a "swapping," to use a colloquial expression—of the widow's legal rights to aliment, mournings, terce, and *jus relictæ* for certain specially created contractual provisions, consisting of a bond of annuity and the liferent of a house and furniture to be selected by the widow and bought for her use. The stamp duty attracted by an instrument effecting an exchange or excambion is only 10s., unless the subjects of the exchange consist of real property (section 73). But while the form of the agreement was that of an exchange of legal rights for specially created contractual provisions, it is always possible that in substance it was truly a sale.

It was a peculiar feature of the debate that two alternative and opposite conceptions of the alleged sale-character of the transaction were presented on behalf of the Commissioners. According to the first of these the hypothesis is that the widow was the seller, the trustees were the buyers, the subject sold was the widow's *jus crediti* in respect of the legal rights she had elected, and the price paid by the trustees was the annuity and the obligation to buy a house and furniture for the widow's use. According to the second the position was exactly reversed; the trustees became the sellers, the widow the buyer, the annuity and the liferent provision of house and furniture became the subject of the sale, and the discharge by the widow of her *jus crediti* became the price. This ambiguous presentation of the sale-character of the instrument is significant of the difficulty of extracting the substance of a sale out of what was, in form if not in substance, an exchange of one group of rights for another.

The actual decision of the Commissioners proceeds upon the soundness of the first of these alternative conceptions. The Commissioners held that the agreement fell within the class of instruments scheduled under the description of "Release or renunciation of property or a right or interest in property upon a sale." According to the First Schedule, such an instrument is dutiable as a "Conveyance on Sale," and the amount of the duty is calculable *ad valorem* upon the amount of the price. Professing to follow the directions of sub-section (3) of section 56 with regard to the mode of charging the consideration for a sale, when the money forming such consideration is payable periodically during a life or lives, the Commissioners calculated the duty upon the amount of the annuity which would or might be payable during the period of twelve years next after the date of the agreement. They took no account of the obligation to buy a house and furniture for the widow's liferent use, although that obligation was just as much a part of the consideration for the widow's discharge of her *jus crediti* as the annuity was.

If a contract is to be strictly accounted a sale it must have either the immediate effect or the ulterior object of transferring some piece of property, or some interest in property, in consideration of a money price or a price measured in money, though not necessarily payable in cash. The appellants maintained that the widow's *jus crediti* in her legal rights was neither property nor an interest in property. I am against them in this. The debts due to the widow in

name of mournings, aliment, and *jus relictæ* are property, for like any other debts they are capable of being disposed of by assignation, and as assets of the widow's estate they are capable of being sold. Again, the widow's terce—a legal liferent of one-third of her husband's heritage—is, I think, an interest in property. Her rights under all these heads might clearly, in my opinion, have been sold to a third party, who would have become creditor of the trustees in her stead. But the question still remains—did she (the creditor) sell her rights to the trustees (the debtors) when she discharged them? Was it *upon a sale* that she released or renounced her *jus crediti* in favour of the trustees? It may perhaps be possible to imagine the widow as assigning her *jus crediti* to the trustees, in whose hands it would then suffer extinction *confusione*. But was this what she did either in fact or in substance? If the discharge of the terce had stood alone or been separable (as by having a part of the money consideration attached or appropriated to it), it might perhaps have been possible to say that the widow discharged her right to it—substantially—upon a sale thereof. At any rate the renunciation of an ordinary liferent in favour of a fiar who pays a money price in order to buy up (as the phrase goes) the liferenter's rights would, I imagine, be a good instance of "release or renunciation upon a sale." But this carries me no distance towards acceptance of the view that a discharge of debt for consideration, by a creditor in favour of the debtor, should be regarded as occurring substantialy *upon a sale* of the debt. There was, in my opinion, no sense in which the widow discharged the debts due to her in name of aliment, mournings, and *jus relictæ upon a sale* thereof, or upon a sale of anything. She did not transfer the debts due to her, she extinguished them; she did not sell them, she discharged them. I have no materials upon which I can sever the discharge of the terce from the other parts of the transaction. If the opposite view to that which I have expressed is the true one, there would appear to be a wide and hitherto undreamt-of field for the application of conveyance-on-sale duty. Moreover, the consideration for the supposed sale consisted in part of an obligation to buy a house and furniture for the widow's liferent use. This part of the consideration is not itself a money consideration, nor is it measured in money. If it had been the sole consideration it would plainly have been impossible to speak of sale in connection with the transaction. In the present case it played a minor but a substantial part in the bargain. How far, if at all, is it permissible to pick and choose among the constituents of a mixed consideration, and to affirm a "substantial" sale because some of the constituents are in money or measured in money? The transaction must be taken as one finds it. It is true that in this transaction the preponderating constituent of the consideration, viz., the annuity, was money; and I recognise the possibility that a transaction might still be a sale notwithstanding that something other than money was thrown in along with the money price. But the trustees' obligation relative to the house and furniture, small as it was compared to the value of the annuity, cannot be disposed of in this way. The "swap," as I have ventured to call it, was between the widow's legal rights as a whole and the specially created contractual provisions as a whole, and in such a case it seems to me relevant to regard the fact that a material, if minor, part of what would have to be regarded as the price for the "substantial" sale (supposed to be concealed in the "swap") is by its own nature incapable of playing the part of consideration for a sale. There are also broader considerations which I think it is legitimate to take into account, and which seen to me to confirm the views above expressed. It is no doubt true that *given a sale* mere inadequacy of consideration is immaterial. But, especially in the circumstances of a transaction such as that under examination, the inadequacy of the supposed price may, I think, throw light on the question whether in substance though not in form the transaction was one of sale. Is it consistent with the idea of a sale, that an immediate right to £136,000 in cash—I ignore for a moment the smaller elements in the transaction—was given up for an annuity (on the life of a lady of 80 years of age) of, say, £6000? I take that figure to cover the freedom of the annuity from income tax and super tax. The £6000 is less than the interest alone of the £136,000 at five per cent. I cannot think it illegitimate to consider the circumstances of the parties to the agreement in deciding what was the substance of their contract. The widow got what might reasonably be regarded as a reasonable provision in the shape of income, house, and furniture, consistently with allowing the £136,000 to remain secured, along with the rest of the settled funds, for the benefit of her own and her husband's children. This was the true practical gist of the transaction, and it is only by the exercise of a considerable amount of fancy that it is possible to imagine the parties engaged in buying and selling from and to each other. I am frankly unable to discover in anything they did the substance of a sale.

In submitting for consideration the second alternative view of the sale character of the transaction embodied in the agreement, the Commissioners founded on the latter half of sub-section (3) of section 130 of the Act. If one gives effect to that view the stamp duty assessable on the agreement should, according to the contention of the Commissioners, be not £492 but £1360. The appellants contended that the enactment referred to neither requires nor authorises the Court to assess a larger duty than that already and (*ex hypothesi*) erroneously assessed by the Commissioners, and their argument on the second alternative view was submitted under reservation of this contention, to which I shall refer later.

The case made for the Commissioners

upon this second alternative view seemed to depend on the assumption that the substance of the transaction could be determined on the footing of eliminating from it all elements but two, namely (1) the bond of annuity, and (2) the discharge of the mournings, aliment, and *jus relictæ*. On that footing the argument was as follows:—First, inasmuch as the annuity (regarded as the subject of sale by the trustees to the widow) was an annuity "not before in existence" within the meaning of section 60 of the Act, the agreement by which the trustees secured it to the widow must be deemed, in accordance with the section referred to, to be a "Conveyance on Sale," and liable to stamp duty as such. Second, the annuity being property conveyed to the widow "in consideration, wholly or in part, of a debt due to her," the debt must be deemed, in accordance with section 57, to be the consideration in respect of which the conveyance (in the present case, the agreement) is chargeable with *ad valorem* duty. Third, the effect of this is to make the agreement liable to assessment to stamp duty in a sum of no less than £1360.

I do not think the case thus made is a sound one, and my reasons for holding this opinion are similar to those I have endeavoured to explain in discussing the Commissioners' first alternative view. The discharge of the mournings, aliment, and *jus relictæ*, which might, I assume, be taken as constituting a money price, cannot be isolated from the discharge of the terce, which is not a money consideration, but still was an integral part of the total consideration, and was not so trifling in value that it can be disregarded. In *John Foster & Sons* v. *Commissioners of Inland Revenue*, [1894] 1 Q.B. 516, the fact that the consideration for the alleged sale was not a money price but consisted of stock or marketable securities was not held fatal to the contention that the transaction was substantially one of sale, only because by virtue of the terms of section 71 of the Stamp Act 1870 (now section 55 of the Act of 1891), it is made clear that within the meaning of the Act the consideration for a "sale" may consist of such stock or marketable securities. This judgment was followed in *Coats* v. *Inland Revenue Commissioners*, [1897] 2 Q.B. 423. It is clear, I think, that the discharge of a legal liferent of heritage is not capable of playing the part of consideration for a sale; and if that be so, and if, as seems to me to be the case here, such a discharge is, albeit a minor, still a material, part of the consideration for the trustees' bond of annuity and their obligation relative to the house and furniture, it becomes necessary to scrutinise somewhat closely a view of the transaction which represents it as one substantially of sale. The broader considerations to which I allude in discussing the Commissioners' first alternative view apply with equal force to their second alternative view.

My opinion therefore is that the substance of the transaction embodied in the agreement was identical with the form in which the agreement was made. It was an exchange of the widow's legal rights for certain special contractual ones. It was not in substance a transfer or release of her legal rights upon a sale thereof, nor was it a sale of special contractual provisions created by the agreement in consideration of a money price.

The appellants, however, admitted that the agreement contained a "bond, covenant, or instrument, being the only or principal or primary security for any annuity," not created by way of sale, within the meaning of the First Schedule. I think we should assess the stamp duty accordingly—in addition to the deed duty of 10s.

In view of the conclusion at which I have arrived it is unnecessary to decide the question of the powers and duty of the Court with regard to assessment of stamp duty raised on the terms of section (3) of section 13 of the Act.

LORD SKERRINGTON—The nature and amount of the stamp duty to which the agreement quoted *ad longum* in the Stated Case is liable depends upon whether the transaction to which the instrument gave legal effect was one of sale. It was certainly not a sale in the ordinary meaning of that term, as appears from the dubiety which still prevails in the mind of the Inland Revenue as to which of the parties was the seller and which was the purchaser, and in like manner as to which group of stipulations ought to be regarded as the subject-matter of the supposed sale and which group as the price payable by the supposed purchaser. Indeed except for one specialty, viz., the renunciation by the widow of her terce, which is a *jus in re* in contrast to a *jus crediti*, the transaction would have conformed precisely to Bell's definition of novation, viz., "The substitution of a new engagement or obligation by the same debtor to the same creditor, to the effect of extinguishing the original debt"—Prin., p. 576. To sum up the stipulations on each side, Mr Cormack's widow accepted from her husband's testamentary trustees (*a*) their personal obligation as such trustees to pay to her a sum of £4100 annually during her life with the added advantage (value not specified) that it should be free of income tax, super tax, and death duties, and (*b*) the benefit (value not specified) of their personal obligation not only to purchase (when called upon to do so) a suitable house which she was to select, but also to furnish it with furniture which she was to select from that which had belonged to her husband, and with such additional furniture as she might reasonably require the trustees to buy—of which house and furniture Mrs Cormack should be entitled to the liferent use—and that in substitution for and extinction of (*a*) her *jus crediti* for mournings and aliment (value not specified) and her *jus relictæ* (value £136,000), and (*b*) her *jus in re* as a tercer which gave her a real right to one-third of the free rents (amount not specified) of a house and office worth £3100. Though the fact is by no means conclusive, it is not irrelevant to point out that the value of the benefits for which

Mrs Cormack stipulated had, so far as appears, no relation of any kind to the value of the benefits which she surrendered. It was stated at the bar, and was not contradicted by the counsel for the Inland Revenue, that Mrs Cormack was eighty years of age at the date of the agreement. Accordingly after making a fair allowance for the various stipulations the value of which does not appear on the face of the instrument, and which the Commissioners did not think it necessary to determine—stipulations which counsel on both sides appeared to regard as negligible—the result of the whole matter is that Mrs Cormack may be said to have discharged her right to the immediate payment of a capital sum exceeding £136,000, and also her liferent interest in one-third of the rents of her husband's heritable property in return for benefits which will cease upon her death, and the annual value of which during her life will probably not exceed the annual income which she would have enjoyed if she had claimed her *jus relictæ* and had purchased trust investments, which at the then current rate of (say) 4½ per cent. would have provided an annual income of £6120, to which say (£50) would have fallen to be added annually during her life in respect of her terce, without encroaching on her invested capital. The Commissioners have implicitly decided that this transaction was in its nature one of purchase and sale, or that it must be deemed to fall within that category in respect of some statutory enactment. If this view is well founded I should hesitate to say that the Commissioners were not entitled to proceed as they actually did, viz., to hold (as I understand them to have held) that Mrs Cormack sold her legal rights to her husband's trustees, that those legal rights were "property" or an "interest in property" within the meaning of the Stamp Act 1891, and that the agreement which carried this sale into effect must be stamped in terms of the First Schedule to the Act as a "release or renunciation . . . upon a sale" with *ad valorm* conveyance-on-sale duty upon the value of the consideration, viz., an annuity of £4100 capitalised as directed in section 56 (3) of the statute. In justification of the course adopted by the Commissioners it may be admitted that a testator who in his will makes conventional provision for his widow, which he declares to be in satisfaction of her terce and *jus relictæ*, is occasionally said to have offered her these conventional provisions as the price of a discharge of her legal rights as his widow. I have always regarded such language as rhetorical and inaccurate, and I do not know of any section of the Stamp Acts which makes it necessary to take a different view of the matter. Wills containing provisions of this kind are very common, and I confess that I was ignorant that discharges granted in pursuance thereof attracted an *ad valorem* stamp duty as conveyances on sale. As an alternative view it was suggested in the Stated Case on behalf of the Commissioners that the transaction with which we are concerned might be regarded as a purchase by Mrs Cormack of a life annuity of £4100, in which case *ad valorem* stamp duty would in the view of the Commissioners be calculated upon the sum of £136,000 as the consideration for the sale, thus increasing the stamp duty from £492, 10s. as assessed by the Commissioners to £1360, 10s. This alternative contention seems to me to be quite inadmissible. Nothing is more common than for a person who is a creditor for a debt which is immediately exigible to agree with his debtor to accept payment of the debt in the form of annual instalments during a certain period of years, or again, during the life of the debtor. Further, if the creditor is generous, or possibly ordinarily prudent, he may agree to accept in satisfaction for his debt an annual sum during his debtor's life which does not exceed the interest on the debt. I never before heard it suggested that such transactions must necessarily be regarded as purchases by the creditor of an annuity for a term of years or for life, and I reject the suggestion that any such contract of purchase and sale was made between Mrs Cormack and her husband's trustees. The Commissioners refer to section 60 of the statute, but this section does not apply unless there has been a "sale" of an annuity or other right, in which case by a legal fiction an instrument containing a mere personal obligation is "deemed" to be an instrument of conveyance on sale.

In my judgment the transaction was not one of purchase and sale, but was one by which a body of family trustees who had presumably no legal power either to invest the trust funds except on trust investments or to traffic in the sale of life annuities compounded a claim against the trust estate upon exceedingly favourable terms, and thereby, as was said by Lord President Inglis in *City of Glasgow Bank* v. *Geddes's Trustees* (1880, 7 R. 731, p. 734), exercised a "discretionary power which must be vested in all trustees." If I am right in this opinion, it was not argued on behalf of the Inland Revenue that the stamp duty ought not to be assessed at the sum of £102, 10s., as contended for by the appellants.

LORD CULLEN—I concur.

LORD SANDS—By the testament of the late Mr James Cormack, shipowner, Leith, certain provisions were made in favour of his widow. These provisions were of much less value than her legal rights, and she made a claim for the latter, which were of very large value. After certain negotiations an agreement, embodied in a deed which is printed in the Stated Case, was concluded between Mrs Cormack and the testamentary trustees. Under this agreement Mrs Cormack discharged her "whole rights of aliment, mournings, terce, and *jus relictæ*." In consideration of this discharge she agreed to accept (1) an annuity of £4100 per annum for her life free of income tax and super tax; (2) the liferent of a dwelling-house to be provided by the trustees; and (3) the liferent of certain furniture.

A question has now arisen as to the amount of stamp duty exigible upon this

deed. The testamentary trustees maintain that the amount of the duty is determined by its character as being a "bond, covenant, or instrument . . . being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security . . .)"—Act of 1891, Schedule I. The Commissioners of Inland Revenue, on the other hand, have determined that the deed here in question falls under the exception "except on the original creation thereof by way of sale," and that the stamp duty chargeable is the duty chargeable upon the release or renunciation of any property upon a sale.

The question accordingly arises whether the transaction embodied in the deed involved a "sale" within the meaning of the statute. Sale is a form of exchange in which the consideration on one side is money, or something that by law or practice is treated as equivalent thereto. In this view it is important to observe what was the consideration here *hinc inde*. In the narrative of the deed an indication is given, very naturally as I think, of the approximate estimated amount of the value of the money rights which the lady surrendered. But there had been no realisation, and, in the view I take, the consideration, even on the lady's side, was not a sum of money, but, as the operative part of the deed bears, the surrender of her "whole rights of aliment, mournings, terce, and *jus relictæ*." On the other side, apart from sentiment which in view of the inadequacy must have bulked largely in the matter, the consideration given by the trustees was an annuity, the liferent of a house, and a liferent of furniture. Now, but for the terms of the statute, it might have appeared that an annuity is not money. But under section 56 (3) it is provided, "Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically during any life or lives, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the amount which will or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of the instrument." This seems to make it clear that when property is conveyed solely in consideration of an annuity, the transaction is to be treated as a sale, the annuity supplying the place of the money element in a sale It has to be observed that the Act does not consistently treat an annuity as money. For it seems clear under the terms of the schedule already quoted that where money is given as the consideration for the grant of an annuity, this may be treated as the sale of the annuity.

In considering whether this transaction whereby on the one hand the widow surrendered her legal rights, and, on the other hand, obtained an annuity, a liferent in a house, and the liferent of certain furniture was a sale, the whole transaction must, I think, be considered in relation to the surrounding circumstances. The arrangement was not a sale in form, nor was it, in my view, a sale according to popular understanding and terminology. These considerations, however, are not conclusive if a transaction, though not in the form of a sale and, owing to some incidental peculiarity, not a sale according to popular terminology, is truly in substance a sale, that is, an exchange in which the consideration upon one side is money. Did Mrs Cormack sell her rights as widow in her husband's estate for a sum of money, or, on the other hand, did she buy an annuity for a sum of mouey or what was so immediately or definitely commensurable with a sum of money as to be equivalent thereto? In my opinion this was not the real nature of the transaction. In reaching this conclusion I have special regard to two considerations. In the first place, apart from sentiment to which I have already alluded, there were elements other than money on either side. These elements may not bulk very large, but they are not elusory, and there is of course no suggestion that they were introduced to disguise the real nature of the transaction. In the second place, there was such a disparity in value between what was given and what was received as to exclude the idea of sale as a commercial transaction with so much property on the one side set against so much money on the other. It is clear, I think, that if the widow had discharged her legal rights without consideration, no other duty than a discharge stamp would have been exigible. I am unable to accept the suggestion that if the lady had stipulated that as part of the arrangement a family portrait, worth say £3000, should be handed over to her, this could have been treated as a sale to her of a portrait for £136,000 or thereby, and liable to stamp duty as such. I do not indeed go so far as to suggest that a transaction is not to be treated as a sale wherever it appears that, though all other conditions are satisfied, the consideration on the one side is somewhat inadequate. But such gross inadequacy as appears in the present case is, in my view, a legitimate element to be taken into consideration in determining whether, in the light of the whole circumstances, the transaction was truly of the nature of a sale, or was, on the other hand, a family arrangement into which the considerations peculiar to sale of something for money did not largely enter.

I come accordingly to the conclusion that the amount of duty exigible is the duty chargeable upon a deed embodying a covenant for the creation of an annuity otherwise than on the original creation of it by way of sale.

The Court found that the instrument was not liable to be assessed and charged with the duty of £492 and 10s., and that the duty liable to be assessed was £102, 10s. and 10s., and ordered repayment to the appellants of £389, 10s.

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