therefore think, that the Court have arrived at a sound conclusion upon the difficult question, for difficult it is, and that their judgment should be affirmed.

Mr. Anderson.—Perhaps your Lordships will allow me, before the question is put, to explain that there are some other parcels of land called by other names in the same position as Boquhanran, and for the sake of accuracy I presume your Lordships' declaration will include all the parcels which are in the same position as Boquhanran. We make no distinction between them and Boquhanran, which was taken merely for the purpose of argument, as the primary subject to be dealt with. We understand your Lordships' judgment, I think, thoroughly, and I believe the parties will have no difficulty in adding words which will make it embrace all the lands in the same position as Boquhanran.

LORD CHANCELLOR.—Are all the parties agreed as to that?

Lord Advocate.—I did not receive any notice of this until just now, but Boquhanran was the only estate which was the subject of discussion in the Court below. The other estate,—Kilbowie,—I refer to that estate particularly, in which my client Mr. Black is interested,—that was not mentioned in the Court below at all. It has been introduced, I see, in the reasons of appeal, but no argument was submitted upon it separately, and I have special answers to any such claim if it is made at the instance of the heir at law, for instance under William Dunn's deed.

LORD WESTBURY.—I do not think we can enter into this.

LORD COLONSAY.—No, I think not.

LORD CHANCELLOR.—My Lords, I think your Lordships will agree with me, that nothing can be more inconvenient than that after the argument has proceeded throughout on the title of Boquhanran alone, without touching upon any property whatever, a suggestion should now be entertained, that other properties will be found to be in the same position as Boquhanran, unless all parties are agreed, that that is the case. If they are, there may probably be no objection to including the other properties, but if they are not agreed, it appears to me, that it would be wholly impossible for us to do what has been suggested.

Barstow v. *Black, et al. ex parte* as to certain respondents:—

Interlocutors of the 27th March 1865 *affirmed, with a variation: Cause remitted, and subject to such variation and remit, the appeal dismissed with costs.*

Pattison v. *Henderson, et al.; Barstow* v. *Pattison, et al.*, First Cross Appeal.—*Black* v. *Pattison, et al.*, Second Cross Appeal.—*Boyd, et al.* v. *Pattison, et al.*, Third Cross Appeal—*ex parte* as to certain respondents:—

Interlocutors of the 20th July 1866 *affirmed, and the original appeal and three cross appeals against the said interlocutor dismissed with costs.*

Appellant Barstow's Solicitors, Murray, Beith, and Murray, W.S.; Martin and Leslie, Westminster.—*Appellant Pattison's Solicitors*, Dundas and Wilson, C.S.; Connell and Hope, Westminster. *Respondent Mrs. Boyd's Solicitors*, J. Webster, S.S.C.; Loch and Maclaurin.—*Respondent Black's Solicitors*, J. Ross, S.S.C.; Simson and Wakeford, Westminster.

FEBRUARY 25, 1869.

THE LORD ADVOCATE, *Appellant, v.* WALTER STEVENSON, *Respondent.*

Succession Duty Act, 16 and 17 Vict. c. 51—Apparent Heir—Taking Possession—*On J.'s death W. was heir* ab intestato *to the heritable property, but never made up titles nor drew any rents and died within three months, when S. succeeded and completed his title as heir to J.*

HELD (affirming judgment), *That W. was not liable to succession duty, having never had any interest in possession in the property.*

This was an information for succession duty. Janet Finlay died in June 1862, infeft in a fee simple dwelling house. Williamina Finlay was her heir at law, but never made up any title nor drew any rents, and died in September 1862. Walter Stevenson, being heir at law of both

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[1] See previous report 4 Macph. 322; 38 Sc. Jur. 165. S. C. L. R. 1 Sc. Ap. 411; 7 Macph. H. L. 1: 40 Sc. Jur. 304.

the sisters, thereon made up his title as nearest and lawful heir to Janet. The Crown claimed succession duty twice over, first on the ground that Williamina was the successor of Janet, and second on the ground of Walter Stevenson being the successor of Williamina. The Lord Ordinary (Ormidale) and the Second Division found that no succession duty was payable, in respect of Williamina having succeeded Janet. The Lord Advocate thereupon appealed.

Lord Advocate (Moncreiff), and *Agnew*, for the appellant.—Williamina took a beneficial interest in the property, and if so, she was competent to dispose *mortis causâ* of such interest. Williamina was apparent heir of Janet, and could make up her title at any time—1 Bell's Com. 99 (5th ed.). The apparent heir has the privilege of entering at once into the natural possession of the estate, and of levying the rents, and if he has been three years in possession, the uncollected rents are part of his assets—*Hamilton* v. *Hamilton*, 2 Paton, Ap. 137 ; Ersk. Pr. iii. 8, 5, 8. Creditors of the heir may also attach the heir's estate held upon apparency—*Earl of Lauderdale*, M. 5262. The apparent heir's rights are as great within the *annus deliberandi* as after it. Therefore the apparent heir's interest must be a beneficial interest.

[LORD WESTBURY.—Is it an interest in possession? Is it not all a contingent thing which not being exercised dies with the party entitled to it ?]

It is enough to say, that the apparent heir might have disposed by will or by deed *mortis causâ* of a continuing interest in the property within the meaning of the Statute—*Attorney General* v. *Hallet*, 2 H. & N. 368.

Anderson Q.C., and *J. S. Will*, for the respondent, were not called upon.

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

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

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

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

The Act distinctly provides in the 2d section "that every devolution of law of any beneficial interest in property, or the income thereof upon the death of any person dying after the time appointed from the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such devolution or succession," etc.

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

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

It appears, that there are certain acts which an heir who has not made up his title may perform ; and which, in a certain sense, may be considered (as the Lord Advocate has strongly argued) as entitling us to consider Williamina in the case as having a beneficial interest. But

such acts as have been referred to do not seem to me to render it such a beneficial interest in possession as we have to look to under the Succession Duty Act. In what way can we say, that Williamina had any such interest under the circumstances that have occurred? She had a year in which to deliberate whether she should or should not make up her title, in other words, to deliberate whether or not she would desire to become the owner of the property, and so become entitled to its possession. During that year she died, and nothing having been done by her, the property of Janet was an *hæreditas jacens*.

That being so, and she having died without any intimation of intention one way or another, the respondent, Mr. Stevenson, became, upon making up his title, the successor of Janet, and therefore the succcessor to the *hæreditas jacens*, and was entitled to it as claiming under Janet.

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

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

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

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

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

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

The apparent heir has, as we have heard, what is called an *annus deliberandi;* he has a year and a day to determine whether he will take up the succession or not; and if he finds that there are debts of the ancestors which are likely to be an onerous charge exceeding the value of the beneficial interest, he may renounce the estate. If the apparent heir has behaved himself in such a manner as to shew, that he has taken up the succession, although he has not made up his title, then he may be charged with the debts of the ancestor by the creditors, who chose to take diligence against him. In this case Williamina did nothing whatever. There were no rents payable during her lifetime. Half a year's rent became due after her death, which happened

four months after the death of her predecessor, Janet Finlay. The question, then, is, Whether she did any act whatever to shew, that she intended to take up the succession. The only act that is attributed to her in that direction is, that there was found a will after her death, by which she professed an intention to dispose of this house to a person of the name of Clunie. But I think it is perfectly clear that that is not such an act as would make Williamina Finlay the heir in actual possession and enjoyment of the property.

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

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

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

Mr. Anderson.—Will your Lordships allow me to mention, that the *annus deliberandi* is now abolished, and that it is now only six months instead of a year, that is allowed. I think it is only right that that fact should be noticed before your Lordships proceed further.

Lord Advocate.—It does not make any difference.

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

Lord Advocate.—Exactly, my Lord.

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

The question here is, whether Williamina had a continuing interest capable of being transmitted by her as her absolute property? The facts are, that she held upon an apparency, that the beneficial interest would not arise until the expiration of six months after the death of her sister Janet ; that she died before those six months expired, and that she did nothing either to incur representation or to make up the title to the estate. I think it is clear, therefore, that she had no continuing interest, either in the sense of those words in the Scotch law or in the meaning to be attached to those words under the Succession Duty Act. Well, now, had she a beneficial interest in possession? I think it abundantly clear, if you look at the 21st section and take the words about the time when the duty shall arise, and become payable for the purpose of applying them by way of test or criterion, as to what is the meaning of the words beneficial interest in the section, you must come to the conclusion, that what is meant is a beneficial interest in actual enjoyment and possession. If that be so, it is clear that the apparency of Williamina never came within that category, and never was an interest of a nature to which the words "beneficial interest in possession" can be properly applied.

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

of this being a precedent for other cases, which must be dissimilar on account of the peculiar circumstances of the present case.

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

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

Interlocutors complained of affirmed, and appeal dismissed with costs.

Appellant's Agents, W. H. Melville, Solicitor of Inland Revenue.—*Respondent's Agents*, Grant and Wallace, W.S.; Holmes and Company, Westminster.

FEBRUARY 26, 1869.

CLEPHANE, *et al.* (Paupers), *Appellants*, *v.* LORD PROVOST, ETC., OF EDINBURGH, *Respondents.*

Charitable Foundation—Sale of Hospital—Rebuilding a House for Inmates—*An hospital and church, belonging to an ancient charity, having been compulsorily sold to a railway company, and the proceeds of the purchase being paid, a scheme was considered for rebuilding the hospital.* HELD (affirming judgment), *That it was discretionary in the Court to apply the proceeds towards the benefit of the pensioners without rebuilding the hospital; and that the original charters and deeds under which the charity was established did not necessarily imply, that a building for the pensioners to live in was essential.*[1]

The appellants were members, beneficiaries, or pensioners entitled to and enjoying the benefits of the Trinity Hospital of Edinburgh, suing *in formâ pauperis*. In a former appeal the House of Lords, *ante*, p. 1217: 4 Macq. Ap. 603; 36 Sc. Jur. 325, made a decree, by which it was declared, that it was fit and proper, that so much of the money received by the respondents from the North British Railway Company as would be "sufficient for the purpose, but not exceeding £7000, should be applied in the purchase of a site, and in building a church, which, after reserving full accommodation for all the inmates of the hospital in the said proceedings mentioned, and the persons connected therewith, will afford to the inhabitants of the district in the said proceedings mentioned, as much accommodation as was afforded by the collegiate church in the said proceedings mentioned, which has been removed." And it was declared, that the duty of building the church belonged to the respondents, as trustees of the charity, and that "such new church will be the property of the said charity, subject to its being used, and, if so used, to its being kept in repair and maintained in like manner as the said old church was before its removal by the said railway company." And it was ordered "that all the residue of the money received from the said railway company, and all interest thereon, and all the rest of the property of the said hospital, is applicable to the enlargement and maintenance of the said charity, as declared and established by the charters, dated respectively the 12th of November 1567 and the 26th of May 1587, in the said proceedings mentioned, according to a scheme to be settled for that purpose, including therein the rebuilding of the hospital, if the same shall be deemed necessary."

On the cause being remitted to the Court of Session, minutes of and objections to a scheme were lodged and considered, and the First Division made an interlocutor, dated 11th December 1866, containing, *inter alia*, the following findings:—"Further, find that the funds so to be employed by the said defenders shall consist of £7000 of the sum of £17,671, 9*s.* 6*d.*, which they received from the said railway company, as the price of the said former church, with

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[1] See previous report, 22 D. 1222; 5 Macph. 115: 36 Sc. Jur. 325; 39 Sc. Jur. 65. S. C. L.R. 1 Sc. Ap. 417; 7 Macph. H. L. 7: 40 Sc. Jur. 306.