On the second point, the circumstances connected with the case on this point are not clearly ascertained. It is tacitly admitted that the pauper may have been drawing an allowance from both parishes. The only conclusion I can come to is, that the pauper for a few months may have neglected to draw her allowance from Cambuslang, but there was nothing to show she was self-supporting.

On the whole case, I think it lies with the parish of Cambuslang to show that the admission made by them is no longer binding, and that it has failed to show any exceptional circumstances sufficient to entitle them to get rid of it.

Lord Gifford—I agree with your Lordships that the admission is binding, and that no cause has been shown why effect should be refused to it. I feel the importance of giving effect to such admission, as, though not *res judicata*, it prevents a *res judicata*, and in one point of view is better than a *res judicata*. I think our decision goes this length, that such an admission will not be displaced except the party seeking to displace it shows clear ground for so doing. I mean an admission got and obtained in *bona fide*. Even a decree got in bad faith may be opened up. The statute says the liability of a parish may be determined by an admission such as we have here.

The second question, the effect of rehabilitation, I think it is unnecessary to determine. This is not a case of real rehabilitation—the mere circumstance of a pauper, owing to insanity or confusion, not drawing an allowance for some time, will not constitute rehabilitation. On the whole case, I think the admission made in 1863 must be given effect to as no exceptional circumstances sufficient to invalidate it have been shown, and that the liability of the parish of Cambuslang has never been interrupted by rehabilitation of the pauper.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the appeal:—Find it proved that on the 6th of March 1863 the inspector of the parish of Cambuslang admitted liability for the support of the pauper by his letter of that date: Find that no facts or circumstances have been proved which are relevant to relieve the respondent from the effect of that admission: Find it admitted from the bar that the parish of Cambuslang continued to support the pauper down to the month of September 1868: Find that from that date until the month of March 1869 the pauper received no relief either from Cambuslang or Barony, and that in that month she became insane, and was sent to Gartnavel Asylum, where she has been ever since, the insanity being certified by the medical officer to have, in March 1869, subsisted for six weeks previously; therefore, Find that the parish of Cambuslang was effectually bound by the said admission, and that the same is still effectual; sustain the appeal, recal the judgment complained of, and decern against the respondent (defender) in terms of the conclusions of the summons: Find the pursuer entitled to expenses in both Courts; modify the expenses of the proof to one half the taxed amount thereof, and remit to the auditor to tax the expenses and to report."

Counsel for Appellant—Fraser and R. V. Campbell. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents—Asher and M'Kechnie. Agent—T. Carmichael, S.S.C.

Friday, January 15.

SECOND DIVISION.

[Lord Gifford, Ordinary.

THE LORD ADVOCATE *v.* THE EARL OF GLASGOW.

Entail—Succession Duty—Statute 16 *and* 17 *Vict. c.* 51, §§ 4, 8.

An heir of entail whose consent was given to the creation of encumbrances on the entailed estate on his succession to the estate, *held* not to be the creator of the encumbrances in the sense of the 34th section of the Succession Duty Act, and in calculating the amount of the succession duty allowance must be made in respect of such encumbrances.

Annuity.

No allowance is to be made under section 38 of the Succession Duty Act in respect of an annuity granted by the heir in possession in favour of the successor, and terminable on the death of the first deceaser.

This action was raised to determine what allowance ought to be made by the Crown to the defender, the Earl of Glasgow, on settling with him for the duties to which he became liable in respect of his succession to the late Earl.

The facts were as follows:—By agreements in 1855 and 1866 between the late Earl of Glasgow, as heir of entail in possession of the estate of Hawkhead and others, and his brother the present Earl, as the heir of entail next in the order of succession, along with the two heirs of entail following in the order of succession, the necessary steps were to be taken to enable the late Earl to charge the entailed estates with the sums of £20,000 and £9440, to be borrowed by him on the security of the entailed estates in virtue of the statutes referred to in the record. By the agreements it was provided that, while the late Earl was to retain as his own funds and property £19,000 of the £20,000 and £6940 of the £9440 so to be borrowed, he was to pay over to the present Earl the remaining £1000 of the former sum and £2500 of the latter, besides £1425 to one and £300 to the other of the consenting heirs, and was also to execute and deliver to the present Earl personal bonds of annuity for £1250 and £500, to be paid during their joint lives, and to terminate at the death of the first deceaser, of them. The sums of £20,000 and £9440 were accordingly borrowed by the late Earl, and charged by him as encumbrances on the entailed estates. He alone executed the bonds and disposition in security which were granted to the lenders of the money, the present Earl not being a party to them at all. And the transaction was completed by the late Earl delivering to the present Earl bonds of annuity, and paying to him and the other consenting heirs the sums stipulated for in the agreements as the price or consideration in respect of which their consents were given.

The pleas in law for the pursuer were—"(1) The sums charged upon the estates of Hawkhead, Crawford Lindsay, and others, in manner aforesaid, were in the sense of the 'Succession Duty Act, 1853,' encumbrances created or incurred by the defender, and in estimating the value of the succession he is not entitled to any allowance in respect thereof. (2) The sums with which the said estates were charged as aforesaid were alienations of the succession, and, to the extent to which the defender benefited thereby, were accelerations of his title to the succession, within the meaning of the 'Succession Duty Act, 1853.' (3) In no view of the case is the defender entitled, in estimating the value of the succession, to an allowance in respect of the sums charged upon the estates as aforesaid, in so far as he has benefited by the creation of these encumbrances."

The pleas for the defender were—"(1) In estimating the value of the succession to the entailed estates above-mentioned, under the provisions of the 'Succession Duty Act, 1853,' the defender is entitled to an allowance for the encumbrances libelled, amounting to £29,440. (2) The defender is entitled to have allowance made for said encumbrances, in respect that the same were not 'created or incurred' by him within the meaning of the statute. (3) In any view, the defender is entitled to an allowance in respect of the encumbrances condescended on, in so far as he has not benefited thereby. (4) Further, under the 38th section of the 'Succession Duty Act, 1853,' the defender is entitled to an allowance in respect of the annuities of £1275 and £500, which came to an end on the death of the late Earl, as being property of which he was deprived on taking up the succession."

Authorities cited—Ersk. 3, 8, 29; *Lord Saltoun* v. *Advocate General*, 3 Macq., 659; *Lord Braybrooke* v. *Attorney-General*, 9 Clark, H.L. 150; *Peyton*, 7 Hurlst and Norman's Exchequer Reports, p. 256; *Attorney-General* v. *Floyer*, 9 Clark, H.L. 477., *Commissioners of Inland Revenue* v. *Harrison*; L.R., Appellate Series, vii. 1.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—

"*Edinburgh*, 23*d June* 1874.—The Lord Ordinary having heard parties' procurators, and having considered the information by the Right Honourable the Lord Advocate, as amended with the closed record, with additional plea for the respondent: Finds that in estimating the value of the succession of the late Earl of Glasgow, upon which succession succession-duty is chargeable against the defender or respondent, the Right Honourable George Frederick Boyle, Earl of Glasgow, allowance must be made in respect of the following encumbrances affecting the said succession, that is to say,—*First*, Bond and disposition in security for £10,000 by the late Earl of Glasgow in favour of Miss Catherine Elizabeth Scott Douglas; *Second*, Bond and disposition in security for £4000 by the late Earl of Glasgow in favour of the marriage-contract trustees of Mr and Mrs Allan Eliott Lockhart; *Third*, Bond and disposition in security for £6000 by the late Earl of Glasgow in favour of the trustees of the late Robert James Hay Cunningham, Esquire, all which bonds are dated 23d April and recorded 31st May 1856; and *Fourth*, Bond and disposition in security for £9440 by the late Earl of Glasgow in favour of Thomas Graham Murray and James Auldjo Jamieson, both writers to the Signet, dated 27th July and recorded 15th November 1866—and with this finding appoints the cause to be enrolled for further procedure: Finds the respondent entitled to the expenses hitherto incurred by him, and remits the account thereof when lodged to the Auditor of Court to tax the same and to report; meantime grants leave to reclaim against this interlocutor.

"*Note.*—The question in this case arises principally under the 34th section of 'The Succession Duty Act, 1853' (16 and 17 Vict. cap. 51). By this statute heritable successions were made chargeable with succession duty according to certain rules fixed and prescribed by the statute. Provision is made for estimating the value of the succession in a certain way, and for the amount and manner of payment of the succession-duty thereon.

"Section 34 of the statute enacts, *inter alia*, 'In estimating the value of a succession no allowance shall be made in respect of any encumbrance thereon created or incurred by the successor not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other encumbrances.' It is under this provision that the present question arises. The respondent, the present Earl of Glasgow, claims that allowance shall be made for the four bonds and dispositions in security mentioned in the preceding interlocutor as encumbrances diminishing or affecting the succession, the Lord Advocate and the Inland Revenue authorities maintaining that the respondent is not entitled to any allowance for these encumbrances, on the ground that, whatever be their form, they were in the sense of the statute 'created or incurred' by the respondent himself.

"There is no dispute that the late Earl of Glasgow is, in the sense of the statute, the 'predecessor,' and that the respondent, the present Earl of Glasgow, is, in the sense of the statute, the successor,' and parties are agreed as to the rate at which succession-duty is to be charged. The respondent is the brother and heir of entail of the late Earl, and succeeded as such under the various deeds of entail.

"It appears that in 1855, and again in 1866, the late Earl of Glasgow wanted to borrow money on the security of the entailed estates. To accomplish this under the provisions of the Entail Amendment Act he required the consent of the defender as the next heir of entail (the heir presumptive) and of the next two heirs of entail then in existence after the defender. To obtain these consents the late Earl entered into the agreement set forth on record with the defender and with the other two succeeding heirs of entail. By these agreements the defender and the succeeding heirs consented to the late Earl borrowing upon the estates, and in consideration of such consents the late Earl agreed, *inter alia*, to grant certain bonds of annuity in favour of the respondent.

"The late Earl then applied to the Court, under the Entail Act, for power to charge the entailed estates. The defender and the other heirs consented. The Court then granted authority, and the late Earl of Glasgow executed the power by granting bonds for £29,440, which sums were validly and effectually charged as incumbrances upon the entailed estates. The late Earl of Glasgow is the sole granter of the said bonds and dispositions in security, and he alone received the sums borrowed. Neither the defender nor the

succeeding heirs of entail were *ex facie* partners to the deeds. About the same time, however, the late Earl implemented the obligations in the agreements, and, *inter alia*, granted personal bonds of annuity to the respondent, the annuities under which have been duly paid.

"The question is, Are the bonds and dispositions in security of 1855 and 1866 incumbrances which in the sense of the statute have been created or incurred by the respondent himself? The Lord Ordinary is of opinion that they are not, and he has therefore found the respondent entitled to an allowance therefor.

"It is not immaterial, to begin with, that the respondent is no party to the bonds creating the incumbrances. It was not the respondent, but his late brother, who acknowledged receipt of the money, and who bound himself, the heirs of entail, and his 'own heirs, executors, and representatives whomsoever' to repay the same. On the face of the deeds, the debts were incurred by the late Earl alone. It was not seriously disputed, however, that the Lord Advocate was entitled to get behind the deeds and to show what was the real nature of the transaction, in order to see who it was in reality that created the incumbrance.

"Accordingly the whole agreements have been recovered, and the exact nature of the arrangements disclosed; but the Lord Ordinary is of opinion that neither in form nor in substance were the incumbrances created or incurred by the respondent.

"No doubt the respondent's consent was absolutely necessary under the Entail Acts, and there may be cases where he who consents to a deed may be held as the doer of it, but this principle seems to have no application to the present case. If the consent had been given gratuitously, it would have been very difficult to hold that all the bonds are, in a question of succession, to be dealt with as the respondent's own debts, although an ingenious argument going this full length was submitted for the Lord Advocate.

"In like manner, although the subsequent heiresses of entail apparently gratuitously consented to the late Earl's petition, they could hardly be held as the creators or granters of the incumbrance. None of them might ever succeed to the estate. Even the respondent himself was only heir-presumptive; and if the late Earl had left a son the rights of all the consenting parties would have been excluded. In such case the incumbrances beyond all doubt would have been held as created by the late Earl alone, although he had to buy and pay for the necessary statutory consents.

"In truth, the transaction between the late Earl and the present respondent was of the nature of an *inter vivos* purchase. The late Earl wanted to raise money for his own purposes, and he had to buy the respondents' consent. He did so, whether for a large sum or for a small sum is quite immaterial, and having obtained such consent, the late Earl, and no one else, borrowed the money and burdened the estates.

"If, instead of burdening the lands under the Entail Act, the late Earl had disentailed and sold a part of the lands, it would have been difficult to hold that the present Earl would have been liable in succession-duty on the lands disentailed and sold.

"The true meaning of the 34th section of the statute is that a successor is not to be allowed deduction for his own debts, *e.g. post obit* bonds which he has granted anticipating the succession. But the reason of the clause does not reach the present case.

"The Lord Advocate strongly relied, however, on certain important judgments which have been pronounced in England, some of them in the House of Lords, under the statute now in question. The principal cases relied on were the following:—*In re Peyton*, 7 Hurlst and Norman, p. 265; *Attorney-General* v. *Floyer*, 7 Hurlst and Norman, 238,—in H.L. 9 Clark's Appeal Cases, 477; *Attorney-General* v. *Sibthorpe*, 3 H. and N. 424; *Attorney-General* v. *Braybrooke*, 5 H. and N. 488; and *Braybrooke* v. *Attorney-General*, 9 Clark's H.L. Cases, 150; *Attorney-General* v. *Lord Lorton*, 11 Irish Common Law Reps. 429; *Commissioners of Inland Revenue* v. *Harrison*, as decided in the House of Lords 2d May 1874 (see 2d vol. of Law Times, 274).

"Many of these cases bear upon the respondent's alternative plea added during the debate, but they were mainly relied upon as showing that when under the English law of entail a tenant for life combines with the tenant in tail or remainder man to re-settle the estate and create burdens thereon, the burdens or incumbrances are held, under sec. 34 of the Succession Duty Statute as being 'created or incurred,' not by the tenant for life, but by the tenant in tail or remainder man. The attempt was made, with great ingenuity, to assimilate the position or legal character of a tenant for life with that of an heir of entail in possession, and the remainder man was said to hold the same position as the next heir of entail. On carefully considering the cases quoted, the Lord Ordinary is of opinion that the analogy urged by the Lord Advocate does not hold, and that the English cases, when their true nature is examined into and seen, are, instead of being authorities for the Lord Advocate, really authorities for the respondent. For the question always was, Who is the party who has really incurred the debt or incumbrance, according to the substance of the transaction? In the English cases referred to it was held to be the tenant in tail or in remainder, and not the mere liferenter. On the very same principle, and applying as far as he can the tests and reasonings which governed the English decisions, the Lord Ordinary holds that in the present case the incumbrances were really created and incurred not by the contingent presumptive or remote heirs of entail, to whom the succession had not opened, and to whom it might never open at all, but by the heir of entail in possession, who was, in the eye of the law, and in the substance of the transaction in question, the fiar of the whole entailed estates.

"The alternative plea added by the respondent during the debate raises considerations of considerable nicety and interest; and if the respondent's first contention had failed, equity strongly supports the respondent's view. The cases above cited embrace those relating to this plea also. As the Lord Ordinary, however, has sustained the first pleas of the respondent, no decision is required on the alternative plea."

The Lord Advocate reclaimed.

At advising—

Lord Ormidale—The question for the determination of the Court in this case is, Whether the defender, the present Earl of Glasgow, is entitled, in accounting for the duties owing by him on his

taking up the succession of his brother, the late Earl, to an allowance in respect of certain encumbrances on the estates of which the succession consists.

The circumstances, so far as material, in which this question presents itself are shortly the following:—[*His Lordship here narrated the facts.*]

In this state of matters, the present action has been raised for the purpose of having it determined whether any and what allowance ought to be made by the Crown to the defender, the present Earl of Glasgow, on settling with him for the duties in which he is liable in respect of the succession which has come to him on the death of the late Earl.

This question turns mainly on the 34th section of the Succession Duties Act (16 and 17 Vict., cap. 51,) whereby it is provided that—"In estimating the value of a succession no allowance shall be made in respect of any encumbrance therein created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other encumbrances." It is not matter of dispute, but, on the contrary, both parties are agreed, that in applying this enactment the late Earl of Glasgow is to be held as the predecessor, and the present Earl as the successor; and also that the encumbrances in question were not "made in execution of a prior special power of appointment." The dispute, therefore, is narrowed to the question whether the encumbrances were created or incurred by the defender as successor. If they were, he is not entitled to any allowance, while, on the contrary, if they are held as not having made made by him, he is entitled to such allowance.

According to the form and terms of the encumbrances themselves, they certainly were not made by the defender, the present Earl of Glasgow, but by his predecessor, the late Earl. The bonds and dispositions in security which constitute the encumbrances were granted solely by the late Earl, and the present Earl was not *ex facie* a party to them at all. It cannot therefore be said, if the language or terms of the instruments constituting the encumbrances are alone looked at, that they have been "created or incurred" by the successor, the present Earl. Nor is it obvious why, in a matter of this kind, the form and language of the encumbrances ought not to be given effect to. The statute, being a fiscal one, ought, in conformity with an ordinary well known principle of construction, to be strictly interpreted. Not only so, but it has been ruled by the highest authority—in the cases of *Lord Saltoun* v. *The Advocate-General* (3 Macqueen's Appeal Cases, p. 659), and *Lord Braybrooke* v. *The Attorney-General* (2 Clark's House of Lords Reports, p. 150)—that the Act is not to be construed according to the technicalities of the law of England or Scotland, but according to the popular use of the language employed in it.

I am not, however, to be understood as holding that the substance and reality of the transaction, independently of its form and terms, cannot be examined in order that it may be seen by or for whom the encumbrances were incurred or created. Accordingly, it may be right to keep in view that the defender, the present Earl of Glasgow, along with the next two heirs of entail following him in the order of succession, gave their consents to the encumbrances being incurred or created, and that they could not be effectually incurred or created without such consents. Nor is it to be overlooked that the present Earl did, in point of fact, derive a considerable benefit from the encumbrances, in the shape of the annuities which were constituted in his favour and the sums paid to him out of the money raised. But are either or both of these circumstances sufficient to entitle the Court to hold that the present, and not the late Earl of Glasgow, incurred or created the encumbrances? The mere consent of the present Earl to their creation cannot well be said to be sufficient to do this, for, if so, it might as well be said that the encumbrances were created or incurred by the two heirs of entail following him in the order of succession in respect of their consents. In one sense, not only the present Earl, but also both of these parties, incurred or created the encumbrances, inasmuch as they were all parties to one of the steps necessary to be taken before they could be effectually created or incurred. But, according to the statute, it does not seem to be contemplated, and there is certainly no express warrant for holding, that the present Earl is not to be entitled to an allowance for encumbrances merely because he had agreed to some step preliminary to their being created or incurred.

It might, no doubt, be different if it could be fairly held that, notwithstanding the form of the transaction and the terms of the encumbrances, they were in truth and reality created by and for the present Earl. But is this so? The present Earl no doubt obtained a benefit, which was granted to him as a consideration for his consent, without which the encumbrances could not have been created. It may, indeed, be assumed that one of the objects of the late Earl in creating the encumbrances was to benefit his brother and successor in his title and estates. That was a perfectly natural and legitimate object, and it might have been carried out in various ways. The result of its being carried out in the way in which it was in the present instance is to diminish the succession coming to the present Earl by the amount of the encumbrances.

In these circumstances, the view I am induced to adopt—and it does not appear to me to be an unreasonable one—is to hold that the late Earl of Glasgow, being desirous of obtaining the use of funds which he required, and at the same time assisting his brother and next heir till the succession should open to him, resorted to the method for raising money which he did, and therefore that in substance and reality the encumbrances were incurred and created by him, and not by the present Earl. He was the heir of entail in possession, and fiar of the estates, subject, of course, to the fetters of the entail; and he alone had any real or substantial power of dealing with them (Ersk. 3, 8, 29). The other heirs following him in the order of succession, including even the present Earl, neither had, nor, till the succession opened to them, could have had any right to or beneficial interest in the estates. As remarked by the Lord Ordinary in the note to his interlocutor, "none of them might ever succeed to the estates. Even the present Earl was only heir-presumptive, and if the late Earl had left a son, the rights of all the consenting parties would have been excluded;" and not only so, but the defender's annuity would also, of course, have fallen on the death of the late Earl.

Having regard to these considerations, I am unable, so far as the 34th section of the statute is

concerned, to hold that the encumbrances in question were created or incurred by the successor, the present Earl of Glasgow. The point does not, however, appear to have hitherto been matter of judicial determination in this Court; and not being conversant with the law or technicalities of real property in England, I am reluctant, for fear of misapprehension, to rest my opinion on the English cases referred to in the note to the Lord Ordinary's interlocutor, and commented on by both parties in the argument addressed to this Court. I may remark, however, with the Lord Ordinary, that, according to my reading of these cases, they are authorities in support of, rather than against, the views I have expressed. Thus, *in re Peyton* (7 Hurlst and Norman's Exchequer Reports, p. 265), Baron Martin, in delivering the judgment of the Court in reference to a question whether a party to whom a succession had come was entitled to an allowance in respect of a certain annuity and of certain mortgages, remarked—"They are encumbrances created, it is true, by both Sir Henry Peyton and his father, but so far as they affect the succession they are in reality and substance created solely by Sir Henry Peyton. His father could not by any act of his affect the succession. We therefore think the annuity to Mr Algernon Peyton and the mortgage were encumbrances created by the successor, and his father's consent was necessary to the effectual creation of them." Now, when it is kept in view that in that case the party who was held to have created the encumbrances occupied, as I understand the case, a position, as regarded his right in and power over the estate, similar to that which the late Earl of Glasgow occupied in the present instance, while the consenter occupied, as regarded his rights in and power over the estate, the position of the present Earl of Glasgow—the analogy between the two cases, and the effect of the decision in the one upon the other, become apparent. So, in the case of *Lord Braybrooke* v. *The Attorney-General* (9 Clark's House of Lords Reports, p. 150), it was held that the protector of a settlement—the analagous position of the present Earl of Glasgow when the encumbrances in question were created—giving his consent to a disposition of property cannot be treated as the creator of such disposition.

In regard to the second and third pleas of the Crown, to the effect that to the extent at least to which the defender derived benefit from the transaction in question the succession must be held to have been accelerated by him, and that, therefore, in terms of the latter part of section 15 of the statute, the duty payable on the succession must "be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place;" and to the effect that in no view of the case is the defender entitled, in estimating the value of the succession, to an allowance in respect of the sums charged upon the estates, in so far as he has benefitted by these sums, little or no argument was addressed to the Court in support of them. For myself, I think it sufficient to say that neither of these pleas are tenable in the circumstances which here occur; for there has been no acceleration of the succession, no re-settlement of the estates, no change made in the order, or time, of the succession, and no surrender or extinction by the defender of any prior right held or vested in him; and just as little can it be said that the defender has in any correct sense been so benefitted by the encumbrances as that he must be deprived of the allowances to which he might otherwise be entitled in respect of them, for although a consideration was given to him for his consent to the encumbrances being charged on the estates, his succession has, to the extent of these encumbrances, been diminished.

On the other hand, it was contended by the defender that in terms of the 38th section of the Act he was entitled to an allowance in respect of his annuities having come to an end on the death of his predecessor, the late Earl of Glasgow: and in support of this contention the cases of *Lord Braybrooke* v. *The Attorney-General* (9 Clark's House of Lords Reports, p. 150), *The Attorney-General* v. *Floyer and Others* (*ib.* p. 477), and *The Commissioners of Inland Revenue* v. *Harrison* (Law Reports, Appellate Series, vol. vii., p. 1,) were cited and relied upon. But these cases are distinguishable from the present, inasmuch as, while in them the annuity in dispute was charged on the estates constituting the succession, and was made to depend, not merely on the death of the predecessor, but also on the annuitant coming into possession of the estates as successor, here the annuities have not been charged on the estates at all, and were made to depend upon the death of the first deceaser of the late and the present Earl of Glasgow, and although it happened that its termination occurred at the same time as the death of the late and the present Earl coming into possession, it might have terminated on the death of the late Earl—and, if he had left a son, without the present Earl ever coming into possession at all. This, I apprehend, is a clear and material distinction, sufficient to displace the cases referred to as precedents to govern the present.

For the reasons I have now stated I am of opinion that the interlocutor of the Lord Ordinary under review is well founded and ought to be adhered to.

Lord Neaves—I am of the same opinion. The interpretation of the statute has been quite fixed in the former decisions, particularly in the case of *Saltoun*, and it must be interpreted according to reasonable language and popular use, in the general sense, and not upon technicalities. We must look to the position of the parties in possession of this entailed estate. The clause of the Act is "in estimating the value of a succession no allowance shall be made in respect of any encumbrance thereon created or incurred by the successor, but an allowance shall be made in respect of all other incumbrances." How this matter may stand under the English entail system I do not profess to know. It would be very difficult for us to transfer any apparent judgment, or leaning one way, to this Court. Our own system is intelligible to ourselves, and I think admits of no reasonable doubt in this case. This is a succession which the present Earl of Glasgow approaches upon the death of the party to whom he was heir presumptive; he gets that succession, and the question then arises whether or not an allowance is to be made in respect of an encumbrance created, and if in estimating the value of a succession there is found to be an encumbrance created by the successor, or incurred by the successor, whatever that may mean, that is not to be given allowance for, because it is the party's own doing. But all other encumbrances are to be allowed for as truly diminishing

the estate which reaches the successor, and which is his true succession. Now, in the case of an entail in general there can be no voluntary encumbrance created except by the heir of entail in possession, and that cannot be done without consent. This was done in the lifetime of the late Earl of Glasgow, who was the heir of entail in possession. The fiar of the estate, who made the encumbrance, is the principal party undoubtedly; he is the only granter of the documents that passed, but for that purpose he was compelled to have the consent of his next heirs in order to make it effectual, and so as really to be a good security to the party. But still I think the plain ground is that the party who creates the encumbrance is the heir of entail in possession. What incurring an encumbrance means is not very clear, but in this case the encumbrance was created in the usual way that encumbrances are created, by such a bond as a fiar would have granted for a sum of money, and all that was needed to give it validity as in a question with subsequent heirs of entail was the consent that was here given by the presumptive heir and the heirs who were more remote than the presumptive heir. Now, I cannot say that every consenter is to be held as either the creator or the incurrer of an encumbrance which is given by his consent. But then it is said you get some benefit by that; and this brings us to considerations of very great delicacy. The late Lord Glasgow having no family of his own, and looking forward to his presumptive heir as likely to succeed him, had in his own mind, in all probability, as every man will have, that it was his duty to maintain the respectability of their position, if that was not already adequately provided for; and for that purpose he went into the market in order to enable him to act —I don't say generously, though it was generous in one sense,—whatever he did was always generous— he was a generous man,—but it was just also, and it was a claim upon him *ex jure sanguinis* to see that for the sake of his father's memory and the respectability of the family, and the good of the estate, the principal sum which he raised should be devoted in part to sustaining the respectability of the family and the comfort of his more immediate successors, and to that purpose the encumbrance was to a certain extent applied. But that was the mere application of the fund raised by the late Earl to the purposes of the late Earl. It was his desire and purpose not to make a profit of this transaction, but to enable him thereby to discharge the natural functions and the natural claims and charities that existed in this case. He got it for that purpose, and he applied it to that purpose. Now I cannot conceive that that is an incumbrance either created or incurred by the heir, particularly when he might never have succeeded.

With regard to the proposition which the present Earl has been by degrees moving towards, viz., maintaining that he should get an allowance for the annuity that has fallen, I concur with Lord Ormidale in thinking that that cannot be allowed. I don't think the English cases on that subject are applicable. I think that the terms of this bond are peculiar. It was not a bond that was to terminate upon the present Lord Glasgow succeeding to the estate. That is not the nature of it. It was to exist during the joint lives of the parties. Now, it might have happened that the bond might have terminated in various ways before the succession opened, or the succession might have opened before it had terminated. Supposing the late Earl of Glasgow had committed an irritancy, he would have forfeited the estate, and the next presumptive heir would have been entitled to take up the estate. It was a bond that was to continue during the joint lives, and therefore it was not an interest that was inseparably entwined in its own nature and constitution with the succession to the estate, and could not therefore be held as a loss to be set off against the benefit that was got from it. I look on that as an independent transaction in that way.

Lord Gifford—I remain of the opinion which I formed as Lord Ordinary, and adhere to the views which I have explained in the note to the interlocutor which we are now reviewing. Upon the first question in the case, which relates to the encumbrances, I think that upon any sound construction of the statute that cannot be held as having been created by the successor. They were created by the late Earl of Glasgow, for whatever purpose, and not by the present Lord Glasgow. I reach that conclusion, not only from the words of the statute, but from a consideration of its purpose and object. That is the only additional remark on this first point of the case that I wish to make. The object of the statute is to impose duties for the benefit of the Crown or the country upon a succession, that is, upon the amount or value of property which has passed by succession from the dead to the living, and directions are given in the statute as to what is to be understood by the term "predecessor," and what by the term "successor." The object then being a tax upon succession, it is essential to ascertain what the true amount or value of the succession is; that is, in other words, how much is the heir or successor *lucratus* or richer in consequence of the succession, for that is the quantum upon which the law has thought proper to lay the tax or duty. It is plain that a man is not richer by a nominal succession if there are encumbrances or burdens by which it is either diminished or exhausted. A succession is not a succession at all for purposes of taxation if it is exhausted altogether by burdens or encumbrances affecting it. The heir may still succeed to an inheritance of some kind, but it is a very barren one, for it is exhausted by the encumbrances or burdens affecting it. Therefore, in the general case, under the section with which we are dealing, section 34, all encumbrances must be deducted. But, then, it sometimes happens that a party is in such a position that, having the hope of a succession, he may anticipate it, and get some of it before the succession opens. By *post obit* bonds and other devices which are known to impecunious or needy heirs, they can anticipate the benefit which is to come to them, and the purview of the statute was that a man should not escape the payment of the public tax or duty which is imposed upon the succession by anticipating the benefit of it, and creating encumbrances upon it before the succession opened; and it is therefore that the statute provides, by section 34, that in estimating the value of the succession no allowance shall be made in respect of any encumbrance thereon created or incurred by the successor; that is to say, the party on whom the duty is imposed—the successor—shall pay for both what he has got before the succession opens and for what he beneficially receives after the succession opens, because in reality that is the true value of the succession. Now, I think, according

to a fair construction of that principle, it leads necessarily to this, that it must be the successor that anticipated the succession and got a part of it before it opened. Now, I don't think that that has been said to be the case here. It was exactly the same, as stated in the illustration in the Note—and I don't see any answer to it, and have heard none from the bar—as if the parties had concurred in selling a part of the entailed estate. Suppose a power of sale had been asked and consent given, the succession can never be after that anything more than what is left of the estate, for there can be no succession to what has been sold or alienated by the possessor long before his death. And it is nothing to the purpose that, as the price of the consent which entitled and enabled the predecessor to sell, he has paid something to the successor. That is not the successor anticipating his succession. It is an *inter vivos* bargain between the predecessor and successor; that is, between the late Earl of Glasgow and the heir presumptive, who never might have any right at all to the estate. On that ground, and upon the purview of the statute, as well as its words, I think that this encumbrance cannot be held in the sense of the statute to be incurred by the successor.

On the second branch of the case, which was argued before me in the Outer House only as an alternative view, and therefore was not disposed of by me in the interlocutor or note which I pronounced then, but which, as Lord Neaves expresses it, the successor has been gradually bringing up in the course of the litigation,—that besides not being bound to allow for the bonds and encumbrances, he is also entitled to deduction for the value of the annuity which happened to cease at the time of the succession opening—I concur with the opinions of both your Lordships who have hitherto expressed them. I think that the fallacy here is that the annuity which the successor was enjoying was an annuity which he was bound to relinquish, or which he was deprived of on succeeding. It is necessary to look at the very words of the statute, and the words of the 38th section under which this part of the case arises are these,—"When any successor, upon taking a succession, shall be bound to relinquish or be deprived of any other property," then the Commissioners shall make deduction therefrom. The two expressions, under one or other of which the present Earl of Glasgow must show that he comes in order to succeed in his contention, are, "bound to relinquish," or "be deprived of." Now I think neither of these expressions apply to the position in which he is. He was not bound to relinquish his annuity, which came to a natural end. He stipulated for it for a limited period—no doubt a period depending on conditions, but depending on conditions which did not impose any obligations on him. He was not bound to relinquish; neither was he deprived of it, for a man cannot be said to be deprived of that which comes to its natural termination. It ends; there is no deprivation of it. The case intended by the clause to be provided for is, I think, a very obvious case, and is very familiar in our own law. It sometimes happens that entailed estates are so settled that they must always be kept apart, so that an heir of entail in one set of lands will not be entitled to succeed under another entail to other lands without giving up the first. They shall be separate families, and never be merged. Now, it is that kind of case which is intended to be provided for by the section in question; and it is quite in conformity with the purview of the statute, because the question is,—What shall be his succession—how much shall he be richer? Now, a man who is bound as a condition of taking up the succession to one entailed estate to give up another entailed estate, is only richer by the difference between the two, and it would be very unfair to make him pay on the whole value of the new one as the succession, when the condition to his succession was to give up, it may be, one-half the value in the previous estate. That is quite an intelligible case, and quite satisfies the purpose of this statute. And, therefore, I think the contention to which he has gradually come is rather an unreasonable contention, especially looking to the fact that this bond of annuity is just part of the transaction which was entered into between himself and the Earl of Glasgow under the deeds in question. I am therefore of opinion that, in addition to the point disposed of by the interlocutor, this claim must be repelled.

Lord Justice-Clerk—I concur entirely in the opinion of the Lord Ordinary, and in the Note he has appended to his interlocutor, and I only summarise my views in a few sentences because of the general nature of the points involved and their importance. In regard to the first of these points, the question is whether in this case the burden in question was created or incurred by the present Earl. In the ordinary legal phraseology with which we are conversant, it is impossible to say that a substitute heir of entail, not being the heir in possession, can either incur or create a burden on the entailed estate. He has no power to do so. He may indeed grant rights to take effect after his succession, and he may grant such rights, perhaps, during the period when the former heir is in possession; but he cannot grant a right which shall burden an estate; he cannot incur or create an encumbrance on this estate to take effect during the possession of a predecessor. No such act is alleged here. The alleged encumbrance was granted and made effectual by his predecessor, and was one which, neither with nor without consent, the substitute heir, the present Lord Glasgow, had himself power to impose. A substitute heir of entail is not a proprietor in any sense; he is an heir expectant under a protected destination, and the creditor for the preservation of that protection. He has a right to make his *jus crediti* good by action, and can thus prevent its being defeated while the heir in possession is sole fiar, although limited in his enjoyment of his estate by *jus crediti* of the substitute heirs. Thus the consents provided for in the recent entail statutes incur a renouncing by certain substitute heirs of their right of action in the event of a specific contravention; and if that requisite number abandoned their right, the rest of the substitute heirs are excluded. But those provisions cannot and do not confer on a substitute heir, not in possession, any active right whatever as regards the estate. Now, as I read the English authorities, they tend strongly in the same direction. The apparent analogy in favour of the Crown arises solely from the difference in their mode of conveyance. There the tenant for life is in possession; the tenant in entail has the radical right remaining in him, burdened by the right of the tenant for life, and on the expiration of that right the then radical right of the tenant in tail emerges. Now, in the English cases it has been held under this clause

that the joint act of a tenant for life and of a tenant in tail in creating a burden over the estate is to be held the incurring or the creation of an encumbrance by the tenant in tail, notwithstanding that he could not create an encumbrance without the consent of the tenant for life. And then that illustrates very strongly the view that I have now been taking; for the radical right remaining and being vested in tenant in tail, he was of course in the position of heir in possession. He had the fee—the other was only an encumbrance. Here the fiar is the heir in possession. The right of the substitute heir is a *jus crediti*, not a real right in the estate; but I think consequently—apart altogether from the views which Lord Gifford has stated clearly and strongly—he cannot be said to incur or create an encumbrance of this kind. As regards the allowance claimed in regard to the annuity which fell on the late Lord Glasgow's death, I can see no ground for that. The present Earl was not deprived of anything by the late Earl's death in regard to the annuity, for he received all for which he stipulated; the annuity only ceased at its stipulated term. His succession to the estate was coincident with the cessation of the annuity; but they were not cause and effect. The annuity would have ceased although the present Earl would never have succeeded; as, for instance, if the late Earl had had children. In like manner, the annuity might have continued though he had succeeded, as in the case of the late Earl having committed irritancy and forfeited the estate during his life. The decision in *Harrison's* case is unquestionably a very weighty one, and I should have found it difficult, whatever I might have thought of its merits—and undoubtedly the question is one which admits of doubt—I should have had great hesitation in going against a decision of the House of Lords in regard to the construction of an imperial statute if the interests in question had been similar; but looking to the ground on which that case was determined, and especially to Lord Selborne's judgment, I cannot help seeing that the tenant in tail had the radical right and interest in him at a time when this annuity transaction was entered into; for Lord Selborne rather seems to think that it was a payment out of his own estate which was stipulated for by mere anticipation; I say, looking at that, I cannot apply the grounds of judgment in *Harrison's* case to the relations in which the parties here stand. Your Lordships adhere to the Lord Ordinary's interlocutor.

Mr Hamilton asked for expenses. Mr Rutherfurd opposed this motion, and submitted that since the date of the Lord Ordinary's interlocutor the balance of success between the parties had been equal.

The Court found the respondent entitled to expenses, but modified them to two-thirds, *i.e.*, they take off from the Inner House expenses one-third the amount.

Counsel for Inland Revenue—Lord Advocate and Rutherfurd. Agent—Angus Fletcher.

Counsel for Earl of Glasgow—Dean of Faculty (Clark), Q.C., and Hamilton. Agents—Hope, Mackay, & Mann, W.S.

Friday, January 15.

SECOND DIVISION.

SPECIAL CASE—THOMAS GLADSTONE AND OTHERS (MACKIE'S TRUSTEES) AND OTHERS.

Annuity—Income-Tax—Deduction.

A testator left to his widow an annuity "free from all burthens, taxes, and deductions whatsoever,"—*Held* the trustees under his trust-disposition and settlement were not entitled to deduct income-tax from the amount of the annuity.

Trustee—Partnership—Auctor in rem suam.

One of the trustees under a testamentary deed was a partner in a commercial business with the testator. The testator directed his trustees to conduct the concern until his youngest son attained the age of twenty-five. It having been found by the trustees that it would be for the advantage of the trust-estate to increase the interest in the business enjoyed by the partner, who was also one of their number, they applied to the Court for its opinion and judgment upon their powers in the matter. *Held* that the trustees could not increase the share of their co-trustee *qua* partner; no one could be *auctor in rem suam*, but that the wording of the trust-deed entitled them to appoint him factor with a reasonable allowance for his trouble.

This was a Special Case raising important and interesting questions under the succession to the estate of the late Ivie Mackie of Auchencairn, Kirkcudbrightshire, who died on 23d February 1873, survived by his wife Mrs Agnes Gladstone or Mackie and three sons, James Todd Mackie, John Gladstone Mackie, and Stuart Mackie. His eldest son James died on 5th August 1873, leaving a will, the executors under which were the fifth parties to the case. The other parties were the widow Mrs Mackie, of the fourth part, David Fulton, of the third part, and the two younger and surviving sons, of the second part. The trustees under Mr Ivie Mackie's trust-disposition and settlement were the parties of the first part.

Mr Mackie disponed his heritable and real estates to trustees for certain trust purposes, and out of this disposition and settlement there arose certain questions which formed the subject of the case presented to the Court. The first question submitted arose under the truster's provision for his widow, to whom he directed his trustees to pay "an annuity, free from all burthens, taxes, and deductions whatsoever, of £2500, during all the days of her life." Mrs Mackie, founding upon this clause of the deed, maintained that she was entitled to receive payment of her annuity of £2500 free of income-tax; while the trustees contended that they were bound to deduct income-tax before payment.

The second question arose on a direction to the trustees contained in the sixth purpose of the trust-deed, which was as follows:—"I direct my trustees, as soon as can conveniently be done, to invest in any of the securities abovementioned (that is to say heritable security, Government stock, or railway or other debentures) the sum of £35,000, the interests or dividends on which shall be paid to the said James Tod Mackie, my son,