other uses. But under the law as it now exists this affords no ground of a claim of exemption from stipend, and that whether the teinds are valued or not.

In truth, if the claim for exemption is well founded at all, it must be rested not on the incapacity of the lands to produce teindable fruits, but simply and solely on the fact that, for whatever reason, they do not produce such fruits, and if this be a reason for exemption the consequence would be very extensive in every parish in Scotland. A proprietor would only have to lay down his land in pasture or in pleasure-grounds, or for factories, or to plant them, or dedicate them to game, to escape payment of the whole teinds and stipend, although the teind burdened with the stipend should be a separate estate vested in different parties altogether.

I do not think that the opinions of the minority of the consulted Judges, or of your Lordships, make any limitation as to the extent of garden or pleasure ground which is to be exempted from teind along with the much smaller portion actually occupied by building. Gardens and pleasure-grounds are often in suburbs of great extent, and the same principle would apply to a mansion-house with extensive parks or policies, extending it may be for miles, so long as occupation as such was in *bona fide* and not merely resorted to for defeating the teind. Indeed, the only true principle must be, not the dedication to houses or gardens or parks, but the mere fact that as teindable fruits were for the time, be it long or short, actually grown upon the land.

Indeed, it is even doubtful on principle whether the mere fact that the teinds are valued would make any difference. Valuation was a privilege given to a proprietor who wished to have the leading of his own teind; but may not a privilege be renounced by the party for whose benefit it was given? and if there is no teind at all it is difficult to see why the proprietor should continue to pay a valuation or equivalent for what has ceased to exist; and observe, even valued teind, unless it has been constituted a real burden on the land, does not necessarily become so. The money equivalent, just like the teind itself, is a burden on the fruits, and if there are no fruits at all, what becomes of the tenth thereof? But it is needless to do more than allude to these questions. The true ground and foundation of the opinion which I have formed is, that by the Acts of 1633 the nature of a titular's right and the mode of making teinds effectual was changed, so as to substitute for a mere right to draw teinds a right to demand a money payment. If I am wrong in this, and if we are to decide the present question in the same way as if the legislation of 1633 had never passed, then I should agree with the minority of the consulted Judges, but in that case I should necessarily hold that the whole effect of the legislation of 1633, and the whole decisions and practice that have followed thereon, must be swept away, and I am unable to face such a result.

I attach no importance to the fact that by the sub-division of the lands feued or given off for building purposes the share of teind on each lot or on each part of a lot becomes so small that the expense of division and collection becomes so great as to be disproportioned to the value of the impost. I cannot help this. The same thing often occurs with land-tax, feu-duty, or other fixed burdens attaching to an estate which is afterwards given off in hundreds, or it may be in thousands, of portions. Indeed, the very same inconvenience arises in every case when teinds have been valued, and generally the sub-division of valued teind is even greater than that of unvalued teind, because the sum to be apportioned is usually much smaller. Wherever there is a right of division among the portions, so that each is only liable for its own share, the expense of allocating and collecting the shares is just one of the incidents of this species of property, but this incident can never affect the nature of the right, and can never destroy the legal right itself. It may practically make it worthless, or nearly so, but this is a totally different matter from pleading legal exemption. In the present case, although there are many small holdings, there are many considerable ones, and the gross amount is considerable. No principle is suggested which would exempt smaller lots and subject the larger ones either for their own shares or for those of their smaller neighbours.

Concurring therefore with the majority of the consulted Judges and of the whole Court, I think the interlocutor should be affirmed.

The Court accordingly pronounced the following interlocutor:—

> "The Lords, in respect of the opinions of the majority of the consulted Judges, Adhere to the interlocutor of Lord Curriehill of 8th February 1876 reclaimed against: Find the Common Agent entitled to additional expenses since the date of said interlocutor: Appoint an account thereof to be lodged, and remit to the Auditor to tax the same and to report."

Counsel for Burt and Others—Kinnear. Agents—Whyte-Millar, Robson, & Innes, W.S.

Counsel for Common Agent—Lee—J. M. Gibson. Agent—Party.

Monday, February 4.

OUTER HOUSE.

SPECIAL CASE—LORD ADVOCATE *v.* NISBET'S TRUSTEES.

Succession—Legacy-Duty—Conversion—Amount and Proceeds — Trustees — Succession-Duty Act 1853 (16 *and* 17 *Vic. c.* 51).

Held by Lord Curriehill and acquiesced in, that trustees who had made up titles to heritage under a trust-deed which gave them power to "gift away, convey, and dispone the residue and remainder" of the truster's estate, "heritable and moveable, to any person or persons for any purpose or purposes" they should think proper, but had not themselves taken any benefit under the deed, were not successors in the meaning of the

Succession-Duty Act, nor yet donees of a power of apportionment, but that, as they had sold all the heritable estate for the purpose of distributing it, the duty exigible was legacy-duty upon the amount realised, including proceeds to the date of the account.

The late Mr David Nisbet, who died in 1853, left a trust-disposition and settlement appointing certain trustees, who were to hold his estate for the ends that should be specified in a separate writing under his hand, "and failing any such writing being found, then and in that case my said trustees and their foresaids have full power hereby committed to them, after payment of all my just and lawful debts, and the expense of carrying these presents into effect, to gift away, convey, and dispone the residue and remainder of my said estate, heritable and moveable, to any person or persons, and for any purpose or purposes, as they or the survivor of them may in their or his discretion think proper." The truster left no writing under his hand bearing reference to the said trust-disposition. There were found in his repositories, besides that deed—(1) a document titled on the back "Memorandum of Paternity," &c., holograph of the truster, and signed by him on 30th June 1843; and (2) a jotting holograph of the truster, but unsigned and undated, which he had apparently framed with the view of preparing instructions to his trustees as to the disposal of his estate. The accepting trustees made up titles to the estate, paid the truster's debts, let the heritable, and invested the personal estate. They made suitable payments for the maintenance and education of two illegitimate children (a boy and a girl) of the truster, and their mother, named in the memorandum of paternity referred to. In 1869, the son being anxious to set up in business as a stock farmer, and the daughter, who was imbecile, being under treatment in the Asylum for Idiots at Earlswood, Surrey, the trustees executed a deed of declaration of trust declaring that the whole estate was vested in them for these purposes, viz., to pay certain small legacies, and to make provision for the maintenance of the truster's daughter and her mother, and also to set up the truster's son in a farm; by the sixth purpose it was declared that the whole free residue of the trust-estate should be held in trust for the alimentary behoof of the truster's son; and, in the event of his leaving a widow, for payment to her of an alimentary annuity equal to one-half of the free income of the residue on the average of the three years preceding his death; and in the event of his leaving lawful children, for division of the residue among them, share and share alike. Failing children, it was declared that the residue should be divided, subject to such conditions as the trustees should think fit, as follows, viz.:—one-half to the Royal Infirmary of Edinburgh, and the other half equally, or in such other proportions as the trustees should consider more expedient, among the nineteen charitable institutions therein specified. The son died without issue on 29th April 1874, in the thirty-fourth year of his age, leaving a widow, whom he appointed his sole legatee and executrix, and whose alimentary annuity, in terms of the deed of declaration, has been fixed at £270 a year. Thereafter the trustees sold the heritable estate, and divided half of it as they had provided, retaining the other half for the payment of the liferent and alimentary provisions. The trustees in 1851 paid legacy-duty on the personal estate of the truster, and succession-duty on the heritable estate as if they were themselves the beneficiaries.

The Lord Advocate maintained now that legacy-duty was payable on the whole value of the estate, including all the proceeds arising from the heritable estate since the truster's death till the lodging of the account.

The trustees maintained that the succession-duty paid by them, amounting to £707, 11s. 10d., was all that could be required of them, in respect that, although not successors, they were donees of a power of appointment in the sense of the fourth section of the Succession-Duty Act 1853.

Lord Curriehill pronounced this interlocutor:—

"*Edinburgh*, *4th February* 1878.—The Lord Ordinary having heard the counsel for the parties and considered the special case—(1) Finds that the residue account passed in 1857 must be held as settling the duty on the personal estate of the deceased David Nisbet, architect in Edinburgh, and that the duty of £436, 16s. 5d. then paid by his trustees is all that can be demanded in name of legacy-duty or otherwise in respect of the said personal estate in respect of the death of the said David Nisbet, and the facts and circumstances as disclosed in the case: (2) Finds that the heritable property of the deceased was not liable in succession-duty, and that the sum of £707, 11s. 10d. paid by the said trustees in 1857 as succession-duty was erroneously paid: (3) Finds that in respect of the discretionary powers conferred upon the trustees to sell and distribute the estate of the deceased David Nisbet, and of their exercise of the said power of sale, the heritable property of the deceased was converted into moveable property, and is therefore liable in legacy-duty: (4) Finds that the said duty is chargeable at the rate of £10 per cent., and is to be paid by the said trustees upon the value of said property and the proceeds thereof as realised by them from and since the death of the testator, including the capital sums, if any, paid by the said trustees out of the said property and proceeds so realised to the beneficiaries under the deed of declaration mentioned in the Special Case, and interest thereon at the rate of four per cent. from the respective dates of payment of said capital sums, but always under deduction of all debts of the testator, and all necessary charges and expenses affecting the said property and proceeds thereof, and under deduction of the sum of £707, 11s. 10d. erroneously paid in name of succession-duty in 1857, with interest thereon at the rate of £4 per cent. from the date of said payment; reserving to the said trustees any claims competent to them to recover from the said beneficiaries or their representatives the proportions of said duty effeiring to the capital sums paid to them, and interest thereon as aforesaid; and before further answer, appoints the case to be enrolled, in order that the precise sum now payable in name of legacy-duty may be ascertained.

"*Note.*—The trustees of Mr Nisbet were not his "successors" within the sense and meaning of the Succession-Duty Act. They had no beneficial interest in the succession; they were

merely Mr Nisbet's disponees in trust for behoof of other parties, and although they had a discretionary power to select the beneficiaries, they were not donees of a power of apportionment within the meaning of section 4 of the Act. It was therefore, in my opinion, a mistake to demand and levy from them succession-duties on the value of Mr Nisbet's heritable property as on a beneficial succession to which they were individually entitled, as seems to have been done in 1857. If the case had been one for succession-duty at all, the duty should have been demanded and paid either in 1857 or subsequently, in respect of the succession of the parties taking the estate beneficially.

"But I am satisfied that the case is not one falling under the Succession-Duties Act at all. The trustees had the most ample discretionary power to convert the estate into money, and to distribute it among such objects as they might select. They accordingly selected the objects in 1869, and declared that the property should ultimately be distributed among these objects in different proportions, the trustees, however, continuing to hold the property for behoof of some of the beneficiaries in liferent and others in fee. And in pursuance of their deed of declaration the trustees have from time to time converted the whole heritable property into cash, and have, in consequence of the failure of one of the liferenters, paid the portion of the fee thereby liberated to the charitable institutions named asfiars in the deed of declaration.

"The case therefore appears to me to be one for legacy-duty as on a moveable succession, and to fall under the rule established by the case of the *Advocate-General* v. *Hamilton*, 22d February 1856, 18 D. 636. It was there held that where trustees with discretionary powers of sale exercised the power, they thereby converted the heritage of the deceased into moveable succession, and rendered the proceeds liable to legacy-duty. This being so, the duty must be computed according to the rule now well settled by many cases—viz., upon value of the property as at the date of the account being given in, with all the proceeds from the death of the testator, or, where payments have been made to legatees, then upon the amounts so paid, with interest from the date of payment. (See *Attorney-General* v. *Cavendish*, 23d July 1870, Wightwick Rep. p. 82; *Thomas* v. *Montgomery*, 3 Russ. 502; *Advocate-General* v. *Oswald*, 20th May 1848, 10 D. 969, and 31 and 32 Vic. c. 124, sec. 9.) In the present case there can be no difficulty in adjusting the amount—(first), because the rate of duty is here the highest rate, viz., £10 per cent., as all the beneficiaries are strangers in blood to the deceased; and (second) because most of the payments of capital to the beneficiaries prior to 1874 appear to have been made out of the personal estate of the deceased.

"It is conceded by the Crown, and even without such concession I should without difficulty have decided, (1) that the residue account passed in 1857 must be held to be a final settlement of all duties demandable in respect of the personal estate of the deceased; and (2) that in settling the duties now payable for the converted heritage credit must be given for the amount of £707, 11s. 10d. erroneously paid by the trustees in name of succession-duty in 1857. The case is ordered to the roll in order that the amount of duty now payable may be ascertained before a final answer is given to the questions which the Court is asked to decide."

Parties acquiesced in this judgment.

Counsel for the Lord Advocate—Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Nisbet's Trustees—Pearson. Agents—Mitchell & Baxter, W.S.

Saturday, March 2.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

COMMON AGENT IN LOCALITY OF SPRINGBURN *v.* BOARD OF POLICE OF GLASGOW.

Teinds — Public Roads — Police Commissioners — Stipend — Heritors — Glasgow Police Act 1866 (29 *and* 30 *Vict. c.* 273).

In an augmentation of stipend in a burgh parish a certain portion was allocated on the Police Commissioners as proprietors of the streets which were by Act of Parliament "vested in them for the purposes of" the Act. The Commissioners were by the Act further empowered to make sewers and drains under the streets, to lay down gas and water pipes, to purchase land for widening or straightening streets, and to convey any portion of a street to the adjoining proprietors.—*Held* that the Commissioners were not proprietors of the streets, and were not properly localled on for stipend in respect thereof.

Question, Whether streets are teindable subjects?

In an augmentation obtained by the minister of Springburn the common agent allocated a portion of the stipend upon the Board of Police of Glasgow as being proprietors of certain roads and streets in the parish.

The Board lodged objections to the locality, in respect (1) that the roads and streets under their charge did not produce, and were not capable of producing, fruit yielding teind, and that no rent was payable therefor; and (2) that the said roads and streets being vested in them as Police Commissioners, and only for the purposes of the statute so vesting the same, they were not liable for stipend in respect thereof.

The Lord Ordinary, on 14th July 1876, reported the case to the Inner House, adding the following note to his interlocutor:—

"*Note.*—. . . As the first and leading objection raises a question of general importance, which is at present under the consideration of the Second Division upon a reclaiming note against a recent interlocutor pronounced by me in the *Locality of Calton*, and as I am informed that the question is to be heard before seven Judges, I have thought it right to report the present case without a judgment in order that it might be discussed along with the *Calton* case should such a course be deemed expedient by the Judges of the Second Division.

"The second objection raises a question of a different kind, which does not arise in the *Calton*