his house, such intimation would have had no effect whatever, because the house was not let except under the condition of inspection. Here, however, the circumstances were different. There was a separate access from the close, and the communication with the rest of the house was nailed up as effectively as if it had been bricked up.

Now, in this state of the circumstances it appears to me that the lodging-house keeper was not bound to give access—indeed it was physically impossible for him to do so.

What was the effect on the licence of the contract with Matthew is another question, and I strongly support the view indicated by your Lordship. The lodging-house keeper was not entitled consistently with keeping his licence to alter the conditions of that licence.

I am therefore of opinion with your Lordship that the conviction was good with respect to the unoccupied room, and as the penalty was merely nominal it seems unnecessary to modify it.

Lord Rutherfurd Clark—On the second point I have no difficulty at all. I have all along been of opinion that the unoccupied room was part of the licensed room with which it was in communication, just as if it had been a lumber room or closet forming part of the room, and was accordingly subject to inspection. So far, therefore, I think the Magistrate was right. On the other point I would rather say nothing at all.

The Court refused the appeal and sustained the conviction.

Counsel for the Appellant—Dickson. Agent—Thomas Carmichael, S.S.C.

Counsel for the Respondent—Comrie Thomson—Harvey. Agent—William R. Weir, S.S.C.

COURT OF SESSION.

Friday, May 25.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

COCKBURN *v.* SCOTT MONCRIEFF AND OTHERS.

SCOTT MONCRIEFF *v.* ROYAL COLLEGE OF SURGEONS.

Incorporated Society—Royal College of Surgeons of Edinburgh (Widows' Fund) Act, 1860, secs. 1 and 10—Income-Tax—Annuity.

Under an Act of Parliament passed in the year 1813 to regulate the administration of the Widows' Fund of the Royal College of Surgeons of Edinburgh, it was provided that the annuities should be paid to the persons entitled thereto, "without deduction for or on account of any tax upon property or income already imposed, or hereafter to be imposed by Parliament; and the treasurer of the Royal College of Surgeons shall, on the 1st day of August, in the present year 1813, and on the 1st day of August in every year thereafter, out of the funds of the said College and corporation, repay to the collector of the said fund the whole amount of the tax upon property or income that may have been paid by him on the said fund for the year preceding." In 1860 an Act was passed in regard to the Widows Fund, by the first section of which it was provided that the previous Acts, including the Act of 1813, "shall be, and the same are hereby repealed, except in so far as hereinafter specially provided." The special provision referred to was contained in the 10th section, which, after reciting the obligations upon the treasurer including that quoted above, provided that the trustees for the fund might enter into an agreement with the College to compound for these obligations by the payment of a fixed sum, "but till then such obligations shall subsist and continue notwithstanding the repeal of the first and second recited Acts hereinbefore contained." No such agreement was entered into.

Held (1) that subsequent to the Act of 1860 the annuitants were only entitled to payment of their annuities under deduction of income-tax; and (2) that the amount of income-tax which the collector of the fund was entitled to recover from the treasurer of the College was the amount paid by him upon the whole income of the fund, less the amount he was recouped by deducting income-tax in paying the annuities.

By Royal Charter, dated 14th March 1778, the members of the College and Corporation of Surgeons of the City of Edinburgh, and the persons who should be afterwards legally admitted members thereof, were incorporated by the name of the Royal College of Surgeons of the City of Edinburgh, and provision was made for raising a fund for the widows and children of the members and their clerk and the acceding members. All future entrants were also to be contributors to, and their widows and children beneficiaries of, the said fund. By the Act 27 George III. cap. 65, further provision was made for the administration of the said fund. By the Act 43 Geo. III. cap. 65, a tax was imposed on property and income, and it was thereby enacted, *inter alia*, that this should be charged on all annuities yearly.

In the year 1813 the Act 53 Geo. III. cap. 76, was passed to amend the Act 27 Geo. III. cap. 65, by which it was, *inter alia*, enacted, section 8—"That the said annuities shall be paid to the persons entitled thereto, without deduction for or on account of any tax upon property or income already imposed or hereafter to be imposed by Parliament; and the treasurer of the said Royal College and Corporation of Surgeons shall, on the 1st day of August, in the present year 1813, and on the 1st day of August in every year thereafter, out of the funds of the said College and Corporation, repay to the collector of the said fund the whole amount of the tax upon property or income that may have been paid by him on the said fund for the year preceding."

In virtue of the provisions of this Act the collector of the Widows Fund from 1813 to 1816, when the income-tax was abolished, paid the annuities in full, and annually received from the treasurer of the College the amount of the tax

which had been deducted from the interests and dividends which composed the greater part of the revenue of the Widows Fund.

By the Act 5 and 6 Vict. cap. 35, passed in the year 1842, the income-tax was reimposed, and by the 102d section thereof it was provided that no assessment under the Act should be made upon the person entitled to an annuity, interest of money, or other annual payments, but that the person liable to such annual payment should be charged with the duty, and the persons so liable were authorised to deduct such tax only from the annuity or other annual payment. It was further provided by the said section that "the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount to, as if the amount thereof had been actually paid unto the person to whom such payment shall have been due and payable."

By sections 103 and 187 all exceptions from income-tax in favour of annuitants, whether resting upon contract or upon statute, were declared null and void, and similar provisions were repeated in the Act 16 and 17 Vict. cap. 34, sec. 35.

The Royal Charter of 14th March 1778 was, with the special sanction of the Act 13 Vict. cap. 23, surrendered to Her Majesty; and the defenders, the Royal College of Surgeons of Edinburgh, were of new incorporated under the said Act and Royal Warrant for a charter dated 11th March 1851.

By the 3d section of the said Act 13 Vict. cap. 23, it was provided that, on the making of a bye-law, as therein provided, *inter alia*, no person admitted after a day to be named in the said bye-law should have any benefit from the Widows' Fund, except persons entitled to admission as being sons or sons-in-law of then existing or deceased Fellows, or as having been or become freedom apprentices to such Fellows before the making of such bye-laws, and their widows.

By the "Royal College of Surgeons of Edinburgh (Widows' Fund) Act 1860," section 4, it was, *inter alia*, provided that the College should cease to have any concern with the management of, or any right or interest whatever in, the said Original Widows' Fund, or the Auxiliary Widows' Fund, or the fund as consolidated and constituted by the said Act of 1860, and the whole capital stock and monies constituting the said Original Widows' Fund and the Auxiliary Widows' Fund were consolidated into one fund, to be thenceforth denominated "The Widows' Fund of the Royal College of Surgeons of Edinburgh," and the same were vested in trustees as thereby provided.

By the 1st section of the Act of 1860 it was provided that "from and after the passing of this Act the first and second recited Acts, and also so much of the said recited Act, and of the Royal Charter granted in pursuance thereof, as relative to the Widows' Fund Scheme, and also to the said Auxiliary Widows' Fund, shall be, and the same are hereby repealed, except in so far as hereinafter specially provided." The first and second recited Acts referred to in the said section were the said Acts 27 Geo. III. cap. 65, and 53 Geo. III. cap. 76.

By the 10th section of the Act of 1860 it was provided—"And whereas by the first recited Act it was provided that there should be paid by the treasurer of the College out of their funds, at the term of Candlemas annually, to the collector of their Widows' Fund Scheme, the sum of £1 sterling for each person who should be at the time a member, and interested in that scheme; and whereas by the second recited Act it was provided that the treasurer of the College should out of their funds annually repay to the collector of the said Widows' Fund the whole amount of the tax upon property or income that might have been paid by such collector on the said fund for the year preceding, be it enacted, that it shall be lawful for the trustees, with the approbation of a majority of the contributors present at any meeting called for the purpose, to enter into an agreement with the College whereby the College shall compound for the said obligations by the payment of a definite or fixed sum; and upon the execution of such agreement, and the receipt by the trustees of whatever sum may be agreed to be paid by the College as aforesaid, the College shall be for ever discharged and relieved from the said obligations to the fund; but till then such obligations shall subsist and continue notwithstanding the repeal of the first and second recited Acts hereinbefore contained."

Archibald William Cockburn, M.D., was admitted as a Fellow of the Royal College of Surgeons of Edinburgh on 22nd June 1838, and at the time of his death, which took place in Edinburgh in the year 1861, he was a Fellow of the said Royal College of Surgeons of Edinburgh.

Mrs Mary Anne Balfour or Cockburn, widow of Dr Cockburn, raised an action on 21st February 1887 against David Scott Moncrieff, W.S., collector, and as representing the trustees for the Widows Fund of the College of Surgeons, concluding for payment of £41, 0s. 1d., the amount of income-tax alleged to have been improperly deducted for the years 1862 to 1885 from the annuity payable to her, with £26, 19s. 1d. of interest.

The pursuer founded upon the provisions of the Act of 1813 above quoted, and pleaded—"(1) The income-tax applicable to the annuity payable to the pursuer for the years mentioned in the summons having been illegally withheld from the pursuer by the defender and his predecessors in office, she is entitled to decree in terms of the conclusions of the summons. (2) The provisions of the Royal College of Surgeons of Edinburgh (Widows' Fund) Act 1860, whereby the Act 53 Geo. III. cap. 76, was in part repealed, not having in any way affected the right of the annuitants to their annuity free from income-tax, except upon the footing that that tax was to be otherwise paid, and the annuitants relieved of the tax, the pleas of the defenders founded on the Act of 1860 should be repelled."

The defender pleaded that all parties were not called.

The Royal College of Surgeons were accordingly sisted as defenders.

In defence David Scott Moncrieff stated that from the time of the re-imposition of income tax in 1842 down to the date of the action no claim had been made on behalf of any of the annuitants to have their annuities paid free of income-tax, and upon this account the collector had made no claim against the College under the

Act 53 Geo. III. cap. 76, for repetition of the amount of income-tax paid by him on the funds under his charge. He averred that from a date prior to the time when the pursuer became chargeable to the fund the annuities were being paid to a considerable extent out of capital on the principle of a diminishing fund, to which no new entrants were admitted, and that the income-tax paid in respect of so much of the annuities as were payable out of capital could not in any view of the provisions of the 8th section of the Act 53 Geo. III. cap. 76, be recovered by the defender from the Royal College of Surgeons. Had the claim now made been made and maintained *tempestive*, the trustees of the fund would have required proportionably to diminish the annuities at the next periodical investigation. The trustees not having done so, in respect that the claim now put forward was not then made, the pursuer in point of fact, *quoad* this portion of her annuity, had received as much as she would have received if the provisions of the 8th section of 53 Geo. III. had been regarded as in force.

Pleaded for David Scott Moncrieff—"(2) The pursuer's right to recover against the defender is dependent upon the subsistence of the defender's right of relief from the Royal College of Surgeons of Edinburgh, and in the event of the defender being found to have no right to recover against the said College, he ought to be assoilzied from the action. (3) The pursuer is not now, and in the circumstances condescended on, entitled to recover the tax upon such part of her income as can be shown to have been paid out of capital. (4) *Separatim*, and in the event of the defender being found to have no right to recover against the Royal College of Surgeons—1. *Mora* and taciturnity. 2. The pursuer being barred by the 103d section of the Income-Tax Act, 1842, from requiring payment of her annuity from the defender, without allowing deduction of income-tax, is not entitled to recover such tax from the defender in a separate action."

In defence the Royal College of Surgeons averred that by sections 1 and 10 of the Act of 1860 the whole of 53 Geo. III. cap. 76, the Act of 1813, was repealed, "except in so far as regards payment by the College to the collector of the Widows Fund of the income-tax paid by him on the fund. The provision in the said Act for the payment of the annuities to the widows, without deduction of income-tax, assuming it to have been in operation at the passing of the Act of 1860, was thereby unconditionally repealed, and the payment of the annuities to the widows was thereafter regulated solely by the Income-Tax Acts, which require all annuities to be paid under deduction of income-tax."

Pleaded for the Royal College of Surgeons, *inter alia*—"(2) The said Act of 53 George III., cap. 76, having been unconditionally repealed by the provisions of the foresaid Act of 1860, except in so far as regards the obligation on the College to repay the income-tax paid by the collector of the Widows Fund, the collector was bound thereafter to pay the annuities under deduction of the income-tax in terms of the Act of 1842. (8) *Mora* and taciturnity."

On 2d December 1887 the Lord Ordinary (KINNEAR) assoilzied the defenders from the conclusions of the summons.

"*Note.*—The argument in this case was taken on the assumption that the obligation imposed on the College of Surgeons by their Act of 1813, to repay to the collector of the Widows Fund in each year the amount of the income-tax paid by him on the fund for the year preceding, is kept in force by the 10th section of the Act of 1860; and, on that assumption, the first question is, Whether the right of the widows to obtain payment of their annuities without deduction of income-tax is saved by the same provision, or whether it has fallen by the repeal of the Act of 1813?

"The last-mentioned statute contained two separate enactments—first, that annuities should 'be paid to the persons entitled thereto, without deduction for or on account of any tax upon property or income;' and secondly, that the College should repay to the collector 'the whole amount of the tax upon property or income' that might have been paid by him.

"I assume that the rights thus conferred upon the widows and upon the collector respectively were still in force when the Act of 1860 came into operation. But the first section of the Act of 1860 repeals the Act of 1813, 'except in so far as is hereinafter specially provided.' It is specially provided by the 10th section that the trustees of the Widows Fund, with the approbation of the contributors, may enter into an agreement whereby the College shall compound by the payment of a fixed sum for an obligation imposed upon them by a former Act to contribute to the fund, and also for the obligation imposed upon them by a former Act to contribute to the fund, and also for the obligation imposed by the Act of 1813, to repay the income-tax paid by the collector; and that upon the execution of such agreement the College shall be relieved of these obligations, but that 'till then such obligations shall subsist and continue notwithstanding the repeal' of the previous Acts. There is no similar provision that the widows' right to their annuities without deduction of income-tax shall subsist and continue notwithstanding the repeal. If the statute is to be construed according to the plain meaning of the words, it follows that the exemption of the widows' annuities from income-tax has been repealed notwithstanding that the income-tax, which may be paid by the collector, is still to be repaid to him by the College.

"It is said that the sole purpose for which the obligation on the College subsists is to enable the annuities to be paid without deduction; and that the right given to the widows by the Act of 1813 must therefore be kept alive by implication. I cannot assent to either of these propositions. No doubt the original exemption of the annuities from income-tax was intended for the benefit of the widows; and they may still derive benefit in another form from the relief which the collector may obtain from the corporation, since the amount of these annuities may vary according to the state of the fund. But the rights of the widows and the obligations of the corporation are not necessarily commensurate. By the conception of the scheme the entire income of the fund at a given time may be greater or less than the sum of the annuities, and the tax upon the annuities cannot therefore be the measure of the tax upon the fund, or of the collector's right of relief. The Act of 1860 sets forth in the preamble that a change had been effected in the

constitution of the College by their new charter of 1851, the consequence of which would be that a comparatively small number of the Fellows would be contributors to the Widows' Fund; and that ultimately, when the contributors had all died out, the Fellows of the College would cease to have any interest in the fund. In view of these changes, and because the scheme must necessarily come to a close at some uncertain future period, it had become 'expedient to remodel the scheme so as to maintain and secure for the future a due proportion between the amount of the fund and the claims which may be expected to come against it, and as far as possible to secure that the exhaustion of the fund and the termination of the claims might be simultaneous.' In settling the conditions of this remodelled scheme it might well be thought expedient to put an end to the exemption of the annuities from income-tax, and yet to provide that the obligations of the College in favour of the fund should not be determined without compensation. There is no repugnancy, therefore, in the provisions of a statute which repeals the enactment that 'annuities shall be paid to the persons entitled without deduction of income-tax,' and yet goes on to enact that until the College shall compound by the payment of a fixed sum for their obligation to repay the collector the whole amount of the income-tax that might be paid by him, that obligation should subsist notwithstanding the repeal of the statute which originally created it. "The rights which have to be considered in the construction of the tenth section are not interdependent but separable. If the College had compounded for its obligations, as it might have done, the compensation money would have gone to increase the capital of the fund, and the widows would have had the benefit of the increase, because they have the sole beneficial interest in the fund. But no individual widow would have been entitled to claim that the money, or any part of it, should go to meet the income-tax on her annuity. And I think there is no better ground for such a claim with reference to the annual payments which may be made while the obligation subsists than with reference to the fixed sum which would be paid if it were bought up.

"But the material consideration is that the provision for the payment of annuities without deduction is not excepted from the repeal of the Act of 1813. The effect of the repeal, therefore, was to bring the provisions of the Income-Tax Acts into direct operation, as regards these annuities. It follows that since the annuities were not exempt from the tax, the collector was authorised to deduct the amount from the sum paid to the annuitant; and in a question with the pursuer is discharged of the amount so deducted in the same way as if he had paid it to herself."

David Scott Moncrieff, W.S., Collector of the Widows' Fund of the Royal College of Surgeons of Edinburgh, raised an action on 26th November 1886 against the said College, and the president, treasurer, and secretary as representing them, for declarator "that the defenders are bound, on the 1st day of August in each year, out of the funds of the said College, to make payment through their treasurer for the time being, to the pursuer and his successors in office, of the whole amount of property or income-tax which may have been paid by him directly or indirectly, upon the said Widows Fund for the year preceding, by virtue of the Act or Acts of Parliament imposing and regulating the said tax for the time being in force, including the amount of said property or income tax which may have been deducted from interests and annual payments due to the said Widows Fund by the debtors in the said interests, and annual payments, before payment thereof, in terms of said Acts," and for payment out of the funds of the College, *first*, of the sum of "£53, 19s. 5d., being the whole amount of the property or income-tax paid by the pursuer on the said fund for the year preceding the 1st day of August 1886, with interest thereon at the rate of 5 per centum per annum, from the 15th day of October 1886, when payment of said sum was applied for, until payment thereof; *second*, of the sum of £1915, 17s. 1d., being the *cumulo* amount of the property or income-tax paid by the pursuer and his predecessors in office on the said fund, for the period intervening between the 1st day of August 1846 and the 1st day of August 1885, conform to state to be produced in the process to follow hereon, with interest."

The pursuer, after setting forth the Acts above referred to, averred that by the 10th section of the Act of 1860, above quoted, a power was given to the College to compound the "obligation out of their funds annually to repay to the collector of the said Widows' Fund the whole amount of the property or income-tax paid by him upon said fund for the year preceding;" but that no such agreement had been entered into, and that therefore the College were in no way relieved from the said obligation.

The pursuer further averred—"By virtue of the clause of the Act of 1813 (53 Geo. III. cap. 76) above referred to, the collector of the Widows' Fund annually recovered from the treasurer of the College, between 1813 and 1816, the amount of the property or income-tax chargeable on the fund for the year preceding. In 1816 income-tax ceased to be imposed, and was not reimposed until 1842. On its reimposition in 1842 the treasurer of the Widows' Fund did not at first claim from the College repayment of the amount chargeable on the fund. The claim was, however, subsequently intimated, but refused on behalf of the College. It has since been the subject of frequent conferences, but the parties have failed to agree upon a settlement. From the reimposition of income-tax in 1842 down to 1st August 1885 payment of the annuities due to the annuitants on the fund was erroneously made by the pursuer and his predecessors under deduction of income-tax. Repayment of the tax so improperly deducted has been claimed from the pursuer by and on behalf of annuitants and representatives of deceased annuitants. For the year from 1st August 1885 to 1st August 1886 the annuities due by the fund have been paid by the pursuer without deduction of income-tax." The pursuer averred that the College had refused to reimburse him for the sum thus laid out.

In defence the Royal College of Surgeons averred that the collector and his predecessors had not paid to Government the sums now claimed as they had regularly deducted income-tax from the annuities paid by them, and that they were thus recouped for any sums of income-

tax paid to Government, and that as regarded the sum claimed for the year from August 1885 to August 1886, the collector ought to have deducted income-tax for the period, and that the defenders were not liable.

The pursuer pleaded, *inter alia*—"(1) In respect of the provision of the Act 53 Geo. III. cap. 76, referred to, the pursuer is entitled to decree of declarator as concluded for. (2) The sum of £53, 19s. 5d., being the amount of income tax paid on the said fund for the year preceding 1st August 1886, and repayment having been refused to be made by the defenders, the pursuer is, by virtue of the said statutory provision, entitled to decree therefor, with interest and expenses in terms of the conclusions of the summons. (3) The said sum of £1915, 17s. 1d. having been paid as income-tax on the said fund for the years intervening between 1st August 1846 and 1st August 1885, and repayment having been refused to be made by the defenders, the pursuer is entitled, by virtue of the said statutory provision, to decree therefor, with interest and expenses in terms of the conclusions of the summons."

The defenders pleaded, *inter alia*—"(8) The trustees having obtained repayment of the income-tax paid by them to Government, by deducting the same from the widows' annuities, are not entitled to claim reimbursement thereof a second time from the incorporation. (9) The pursuer being bound under the Acts of Parliament referred to, to deduct the income-tax from the widows' annuities, has no claim for repayment thereof against the defenders."

The Lord Ordinary (KINNEAR) on 4th February 1887 pronounced this interlocutor:—"Finds, declares, and decerns in terms of the declaratory and first petitory conclusions of the summons; *quoad ultra* continues the cause on the motion of the pursuer; and allows him to put in a state showing the amount of income-tax paid by the collector since 1st August 1846, and not recovered or deducted by him from the annuities paid to the person entitled thereto.

"*Opinion.*—There are two questions in this case: first, whether an enactment contained in an Act of Parliament passed in 1813 for amending a prior Act by which the Widows Fund of the Royal College of Surgeons was established is still in force, so as to enable the collector of the Widows-Fund to recover from the funds of the College in each year the income or property-tax which he may have paid on account of the Widows Fund in the year preceding; and secondly, assuming this enactment to be still in force, whether the pursuer is entitled to recover from the treasurer of the College the entire amount of the property and income-tax which has been paid by himself and his predecessors in office during the period between 1846 and 1885.

"There is no dispute as to the meaning or effect of the original enactment. The Act of 1813 provides that 'the annuities shall be paid to the persons entitled thereto without deduction for or on account of any tax upon property or income already imposed or hereafter to be imposed by Parliament, and the treasurer of the Royal College and Corporation of Surgeons shall on the first of August . . . in every year . . . out of the funds of the College and Corporation repay to the collector . . . the whole amount of the tax upon property or income that may have been paid by him on the said fund for the year preceding.'

"The effect is not to exempt the Widows' Fund from income-tax, but to impose upon the College an obligation to reimburse the collector out of its general funds. I do not understand it to be disputed that this obligation would be equally effectual whether the income-tax were paid directly by the collector or indirectly by deductions from the interests and annual payments due to the fund by its debtors; and if the enactment is still in operation and enforceable against the defenders, the pursuer must therefore be entitled to decree in terms of the declaratory conclusions. But it is said that the present College of Surgeons is a different corporation from that which existed in 1813, and is not subject to the obligations of its predecessor; and that if it were otherwise the enactment in question has been repealed by later statutes.

"As to the first point, I can see no reason to doubt that if the Act is still in operation, the obligation it laid upon the then existing College is still enforceable against the present defenders. It is true that in 1850 an Act of Parliament was passed by which certain changes were made in the constitution of the College, and also in the regulations applicable to the Widows' Fund, and that in 1851, under the authority of this Act of Parliament, a royal charter of 1778, by which the College had been incorporated under the name of 'The Royal College of Surgeons of the City of Edinburgh,' was surrendered, and upon that surrender a Royal Warrant was granted by the Queen incorporating the then 'present Fellows of the Royal College of Surgeons of the City of Edinburgh, and such others as should from time to time be elected Fellows in manner therein directed, into one body politic and corporate by the name and style of the Royal College of Surgeons of Edinburgh.' It is said that by virtue of this new incorporation the College of Surgeons of 1813 was extinguished and an entirely new body corporate was brought into existence; and that the rights and obligations of the dissolved corporation cannot be available to or against the new corporation except in so far as they are expressly transmitted by the Act of Parliament or the Royal Charter. No authority was cited by the defenders' counsel for ascribing this effect to the surrender of a charter for re-incorporation; and I should have difficulty in holding that rights of action upon contract could not survive the surrender, so as to subsist against or in favour of the new College. But the obligation in question stands not upon contract but upon Act of Parliament, and I find nothing in the Act of 1850, or in the Royal Warrant that followed upon it, to deprive the Widows' Fund of the benefit of the enactment of 1813. The Act of 1850 does not, as the defenders suppose, dissolve the corporation of the College of Surgeons, but provides that a new charter shall be given to it upon the surrender of its existing charter. The first clause provides that it shall be 'lawful for the said College to surrender their said charter' of 1788, 'and that it shall be lawful for Her Majesty to grant, and for the said College to accept, a charter of new incorporating the said College under the name and title of the Royal College of Surgeons of

Edinburgh, and containing such alterations in the constitution of the said College, and in the privileges of licentiates of the said College, and with such new and additional powers, privileges, and immunities as may by Her Majesty be deemed expedient.' It does not therefore contemplate the extinction of one body corporate, and the creation of another and different body corporate, but the continuance of an existing corporation with a new charter and new privileges; and then it goes on to enact that as soon as the said College, under their common seal shall have accepted such new charter, the acceptance thereof shall operate as a repeal of 'certain recited Acts, and among others of the Act of 1813,' and as a revocation of the charter of 1778, 'in so far as such Acts or charter shall be inconsistent with or repugnant to such new charter.' It follows that in so far as they are not inconsistent with or repugnant to the new charter the recited Acts of Parliament are still to subsist, and if they subsist they must of course be applicable to the new College of Surgeons, which is just the old College under a new name and with additional privileges. The only question therefore appears to me to be, whether there is anything in the new charter inconsistent with the enactment in question so as to operate by implication as a repeal of that enactment, because if there is not it is a still subsisting enactment expressly kept alive by the Act which is said to have dissolved the old College. It is unnecessary to examine its provisions in detail, for there is none which appears to me to be in any sense repugnant to the provision in the Act of 1813 that the funds of the College shall relieve the Widows' Fund of income-tax, and the defenders' counsel in argument did not suggest that there was any repugnancy. One of the leading purposes of the Act of 1850 was to make provision for bringing the Widows' Fund to a close. But until it is wound up in terms of these provisions it is still to be maintained with the same rights and obligations as before, except in so far as the existing regulations may be expressly allowed. And so long as it subsists, I find nothing, either in the Act or in the Royal Warrant, to suggest that the annuities are thenceforth to suffer deduction of income-tax, or that the income-tax paid by the collector shall no longer be recoverable from the treasurer of the College. But if there were any doubt as to the construction of the Act of 1850 it appears to me to be entirely removed by the later Act which was procured by the contributors in 1860 for consolidating the Acts relating to the fund, and for regulating its future management. For the 10th section of that Act, after reciting the provision in question in the Act of 1813, and a provision in an earlier Act, for an annual payment by the treasurer of the College to the collector, provides that an agreement may be made between the trustees with the approval of the contributors and the College, 'whereby the College shall compound for the said obligations by the payment of a fixed sum,' but that until the College shall be discharged by the execution of such agreement, 'such obligations shall subsist and continue, notwithstanding the repeal' of the statutes by which the fund was originally regulated. The Act of 1860 therefore recognises the subsistence of the obligation in question as a good obligation against the present College of Surgeons, and enacts that it shall continue to subsist until it shall be terminated by a special agreement.

"But it is said that if it has not been extinguished by changes in the constitution of the College, the obligation is invalidated by the 103rd and 187th clauses of the Income-Tax Act of 1842. The provision which has just been cited from the Act of 1860 would be conclusive against this argument if there were any question as to the construction of the Act of 1842. But I am unable to see that the clauses which are relied upon by the defenders have any bearing upon the question. The 103rd invalidates contracts for the payment of rents or interests without deduction of income-tax. But that cannot strike at an obligation created, not by contract, but by Act of Parliament. The 187th provides that general exemptions contained in letters-patent granted by the Crown, or in any statute 'granting any salary, annuity, or pension,' shall not be construed as exemptions, from 'the duties granted by this Act.' But that can have no application to a special enactment which requires no construction for the purpose of identifying the tax to which it relates, and which does not give any exemption from taxation, but provides that the income-tax, which must admittedly be paid by the collector, is to be recovered from the treasurer of the College.

"The second question is, whether the pursuer is entitled to recover the whole amount of the income-tax which has been paid on the fund since 1846. The statute contemplates that the payments shall be made year by year, and no satisfactory reason is given for the course which has been followed since the income-tax was reimposed in 1842. But the one fund cannot be impoverished and the other enriched, contrary to the provisions of the Act of Parliament, by the mistake of their officers or trustees, and it would appear to me that the collector must still be entitled to recover the income-tax which he can show that he has paid without reimbursement, except in so far as his claim may be cut off by prescription. But the treasurer cannot be required to pay the amounts which have been deducted from the annuities, and which are thus already in the collector's hands. It is said that the widows against whom the tax has been charged will be entitled to repayment. But this cannot be assumed until their claims have been made good against the collector; and the questions which appear to have been raised as to their right to recover cannot be determined in this action, to which they are not parties. In the meantime, the collector may put in a state showing the amount which he has paid, and which has not been recovered from annuitants or otherwise."

The state put in by the collector in obedience to this interlocutor was in these terms—

"STATE showing the amount of Income-Tax paid by the Collector of the Widows Fund of the Royal College of Surgeons of Edinburgh since 1st August 1846, and not recovered or deducted by him from the annuities paid to the persons entitled thereto.

Amount of tax paid for year ending 1st August 1847 . . .	£44	7	5			
Amount recovered from Annuitants	42	0	0			
				£2	7	5
Amount of tax paid for year ending 1st August 1848 .	£48	10	2			
Amount recovered from Annuitants	49	0	0			
Amount of tax paid for year ending 1st August 1849 .	£53	7	5			
Amount recovered from Annuitants	42	15	6			
				10	11	11
Amount of tax paid for year ending 1st August 1850 .	£45	12	10			
Amount recovered from Annuitants	46	5	0			
Amount of tax paid for year ending 1st August 1851 .	£53	8	1			
Amount recovered from Annuitants	40	5	0			
				13	3	1
				£26	2	5

Note.—From the year 1851 downwards the Widows Fund has been diminishing, and the income-tax paid has been less than the amount deducted from the annuitants."

On 5th March 1887 the Lord Ordinary, in respect of the said state and of its not being objected to, decerned *ad interim* for £26, 2s. 5d., and granted leave to reclaim.

Mrs Cockburn and the College of Surgeons reclaimed.

As the question between the collector and the College of Surgeons depended for its determination on the decision of the Court on the question between Mrs Cockburn and the collector, the latter, though later in date, was made the leading case.

Argued for Mrs Cockburn—Mrs Cockburn's rights and her present claim were founded upon the Act of 1813, which expressly secured to the widows their annuities free of income-tax. The privilege thus conferred was preserved from the general repeal of the statute by the Act of 1860, if not expressly, at any rate by implication. If the view which the Lord Ordinary took was correct, then either the Widows' Fund would be enriched at the expense of the College, or the provisions of section 10 of the Act of 1860 were meaningless. The right of the widows to receive their annuities in full, and the right of the collector to be recouped by the College were correlative. The object of imposing this burden on the College was undoubtedly to favour the widows, and to secure to them as large a provision as possible, and the only difference that existed between the state of matters in 1813 and 1860 was, that in 1813 all surgeons were members of the fund while in 1860 only a select number were. [Lord President.—The only question you are interested in is whether section 10 of the Act of 1860 repeals the Act of 1813.] The privilege of the widows was preserved by implication. The obligation of the College to recoup the collector was preserved, and this implied that the right (of the widows), in respect of which this obligation existed, was preserved also. Upon the question of *mora* the error, if there was one, was mutual, and therefore the present claim was not barred. Authorities on the question of *mora*—*Seath* v. *Taylor*, January 21, 1848, 10 D. 377; *Moncrieff* v. *Waugh*, January 11, 1859, 21 D. 276; *Baird's Trustees* v. *Baird*, July 10, 1877, 4 R. 1005; *Kintore* v. *Kintore*, June 28, 1884, 11 R. 1013.

Argued for the College of Surgeons—The pursuer's claim, though laid on the Act of 1813, really depended upon the construction to be put on the Act of 1860. After the re-imposition of the Income-Tax Act in 1842 the rule was to pay the widows' annuities under deduction of income-tax, and the Act of 1860 did not in any way alter this rule as to the payment of annuities — *Robson* v. *M'Nish*, February 2, 1861, 22 D. 429. By the Act of 1860 it was contemplated that some kind of an agreement might be come to between the collector and the College as to their mutual obligations, but no such arrangement was ever made, so the obligation upon the College to repay the collector the sums paid by him in name of income-tax remained. The measure of the collector's claim was just the difference between what was deducted as income-tax from the annual payments made to him and the *cumulo* sum he was entitled to deduct from the widows' annuities. Mrs Cockburn's annuity began in 1862, so she was directly under the Act of 1860. Her case was quite a simple one, and it was clear from the provisions of the 1860 Act that there was no ground for her present claim. The contention of the collector that he was entitled to be recouped by the College the whole amount of income-tax paid by him without deducting from it the sums he was entitled to deduct from the widows' annuities was unreasonable, and against the spirit of the statutes. There was more than *mora* in this case, there was discharge; besides, the parties now claiming were not the true creditors, who were dead.

Argued for the collector of the Widows Fund—The object of the Act of 1860 was not merely to secure the contemporaneous exhaustion of the fund and the termination of the claims, but also to sever the connection of the College with the fund, and to admit of its transfer to an insurance company. The fallacy of the argument for the College lay in assuming that after 1842 no widow could legally accept her annuity without suffering deduction of income-tax. It was admitted that the Act of 1860 preserved the obligation on the College to meet the case that the fund might be liable to pay the widows their annuities free of tax, but then it was claimed they were not liable. The collector, however, maintained that the College was so liable. In 1860 there was a liability on the fund to pay free of tax, and an obligation on the College to repay the collector. The Act of 1860, sec. 1, did not repeal the obligation of the College, and therefore the widows' right was preserved by implication. The collector was entitled to be recouped for all payments of income-tax made by him, and he was not bound to deduct the sums of income-tax which he retained from the widows—*Rodger's Trustees* v. *Rodger*, Jan. 9, 1875, 2 R. 294; *Mackie's Trustees* v. *Mackie*, Jan. 15, 1875, 2 R. 312; *Kinloch's Trustees* v. *Kinloch*, Feb. 24, 1880, 7 R. 596.

Amount of tax paid for year ending 1st August 1847 . . .	£44	7	5			
Amount recovered from Annuitants	42	0	0			
				£2	7	5
Amount of tax paid for year ending 1st August 1848 .	£48	10	2			
Amount recovered from Annuitants	49	0	0			
Amount of tax paid for year ending 1st August 1849 .	£53	7	5			
Amount recovered from Annuitants	42	15	6			
				10	11	11
Amount of tax paid for year ending 1st August 1850 .	£45	12	10			
Amount recovered from Annuitants	46	5	0			
Amount of tax paid for year ending 1st August 1851 .	£53	8	1			
Amount recovered from Annuitants	40	5	0			
				13	3	1
				£26	2	5

Note.—From the year 1851 downwards the Widows Fund has been diminishing, and the income-tax paid has been less than the amount deducted from the annuitants."

On 5th March 1887 the Lord Ordinary, in respect of the said state and of its not being objected to, decerned *ad interim* for £26, 2s. 5d., and granted leave to reclaim.

Mrs Cockburn and the College of Surgeons reclaimed.

As the question between the collector and the College of Surgeons depended for its determination on the decision of the Court on the question between Mrs Cockburn and the collector, the latter, though later in date, was made the leading case.

Argued for Mrs Cockburn—Mrs Cockburn's rights and her present claim were founded upon the Act of 1813, which expressly secured to the widows their annuities free of income-tax. The privilege thus conferred was preserved from the general repeal of the statute by the Act of 1860, if not expressly, at any rate by implication. If the view which the Lord Ordinary took was correct, then either the Widows' Fund would be enriched at the expense of the College, or the provisions of section 10 of the Act of 1860 were meaningless. The right of the widows to receive their annuities in full, and the right of the collector to be recouped by the College were correlative. The object of imposing this burden on the College was undoubtedly to favour the widows, and to secure to them as large a provision as possible, and the only difference that existed between the state of matters in 1813 and 1860 was, that in 1813 all surgeons were members of the fund while in 1860 only a select number were. [Lord President.—The only question you are interested in is whether section 10 of the Act of 1860 repeals the Act of 1813.] The privilege of the widows was preserved by implication. The obligation of the College to recoup the collector was preserved, and this implied that the right (of the widows), in respect of which this obligation existed, was preserved also. Upon the question of *mora* the error, if there was one, was mutual, and therefore the present claim was not barred. Authorities on the question of *mora*—*Seath* v. *Taylor*, January 21, 1848, 10 D. 377; *Moncrieff* v. *Waugh*, January 11, 1859, 21 D. 276; *Baird's Trustees* v. *Baird*, July 10, 1877, 4 R. 1005; *Kintore* v. *Kintore*, June 28, 1884, 11 R. 1013.

Argued for the College of Surgeons—The pursuer's claim, though laid on the Act of 1813, really depended upon the construction to be put on the Act of 1860. After the re-imposition of the Income-Tax Act in 1842 the rule was to pay the widows' annuities under deduction of income-tax, and the Act of 1860 did not in any way alter this rule as to the payment of annuities — *Robson* v. *M'Nish*, February 2, 1861, 22 D. 429. By the Act of 1860 it was contemplated that some kind of an agreement might be come to between the collector and the College as to their mutual obligations, but no such arrangement was ever made, so the obligation upon the College to repay the collector the sums paid by him in name of income-tax remained. The measure of the collector's claim was just the difference between what was deducted as income-tax from the annual payments made to him and the *cumulo* sum he was entitled to deduct from the widows' annuities. Mrs Cockburn's annuity began in 1862, so she was directly under the Act of 1860. Her case was quite a simple one, and it was clear from the provisions of the 1860 Act that there was no ground for her present claim. The contention of the collector that he was entitled to be recouped by the College the whole amount of income-tax paid by him without deducting from it the sums he was entitled to deduct from the widows' annuities was unreasonable, and against the spirit of the statutes. There was more than *mora* in this case, there was discharge; besides, the parties now claiming were not the true creditors, who were dead.

Argued for the collector of the Widows Fund—The object of the Act of 1860 was not merely to secure the contemporaneous exhaustion of the fund and the termination of the claims, but also to sever the connection of the College with the fund, and to admit of its transfer to an insurance company. The fallacy of the argument for the College lay in assuming that after 1842 no widow could legally accept her annuity without suffering deduction of income-tax. It was admitted that the Act of 1860 preserved the obligation on the College to meet the case that the fund might be liable to pay the widows their annuities free of tax, but then it was claimed they were not liable. The collector, however, maintained that the College was so liable. In 1860 there was a liability on the fund to pay free of tax, and an obligation on the College to repay the collector. The Act of 1860, sec. 1, did not repeal the obligation of the College, and therefore the widows' right was preserved by implication. The collector was entitled to be recouped for all payments of income-tax made by him, and he was not bound to deduct the sums of income-tax which he retained from the widows—*Rodger's Trustees* v. *Rodger*, Jan. 9, 1875, 2 R. 294; *Mackie's Trustees* v. *Mackie*, Jan. 15, 1875, 2 R. 312; *Kinloch's Trustees* v. *Kinloch*, Feb. 24, 1880, 7 R. 596.

At advising—

Lord President—There is an appearance of complication about these two cases which by some decree of fate invariably attends all income-tax cases, but to my mind they present no real difficulty.

The matters in dispute require to be looked at somewhat carefully, and the effect of certain statutes has to be fully ascertained. The first of these is the Act of 1813. In the 8th section of the Act there are two provisions which are undoubtedly connected with one another. But I do not think they are in any closer relation. They are naturally and by juxtaposition associated with one another, and that is all. The first provision is, "that the said annuities shall be paid to the persons entitled thereto without deduction for or on account of any tax upon property or income already imposed or hereafter to be imposed by Parliament," that is to say, these annuities are to be paid free of income-tax. The section then goes on to provide that "the treasurer of the said Royal College and Corporation of Surgeons shall on the 1st day of August in the present year 1813, and on the 1st day of August in every year thereafter, out of the funds of the said College and Corporation, repay to the collector of the said fund the whole amount of the tax that may have been paid by him on the said fund for the year preceding."

Now, these last words, "that may have been paid by him on the said fund for the year preceding," require construction, because the income-tax was not really paid directly by the collector of the fund, but was deducted from the payments made to him by his debtors.

The first question therefore would seem to be, under this branch of the case, whether the meaning of this provision is that the collector is to be repaid by the treasurer of the College every penny which has been deducted from the payments made to him by his debtors? or whether, having suffered so much by way of deduction in settling with his debtors, but having been recouped so much by deductions from the widows, who are his creditors, he is only to be repaid by the treasurer of the College the difference, being the sum which he is actually out of pocket?

That question, however, does not arise on the statute of 1813, because by it the widows were entitled to have their annuities paid to them free of income-tax, but it does, however, arise under the Act of 1860. Accordingly I shall reserve what I have to say as to the meaning of the words at the close of section 8 of the Act of 1813 until I come to deal with the provisions of the Act of 1860.

After the passing of the Act of 1813 a considerable change took place both in the management of this fund and the views of the College of Surgeons in regard to its administration and its benefits. The members of the College came to think that the fund should be wound up, and accordingly in 1850 an Act was passed giving effect to this resolution, and providing a method by which this was to be accomplished. This was followed, after the winding-up had proceeded a certain length, by another Act passed in 1860. This brings us to the consideration of the Act of 1860, the terms of which are very distinct. By the first section it was provided that the various Acts relating to the Widows' Fund Scheme, including the Act of 1813, "shall be, and the same are hereby repealed, except in so far as hereinafter specially provided," and the parties are agreed that the special provision there referred to is contained in section 10 of the same Act.

The 10th section of this Act declared as follows—"And whereas by the first recited Act it was provided that there should be paid by the treasurer of the College out of their funds, at the term of Candlemas annually, to the collector of their Widows' Fund scheme, the sum of £1 sterling for each person who should be at the time a member, and interested in that scheme; and whereas, by the second recited Act, it was provided that the treasurer of the College should, out of their funds, annually repay to the collector of the said Widows' Fund the whole amount of the tax upon property or income that might have been paid by such collector on the said fund for the year preceding, be it enacted, that it shall be lawful for the trustees, with the approbation of a majority of the contributors present at any meeting called for the purpose, to enter into an agreement with the College whereby the College shall compound for the said obligations by the payment of a definite or fixed sum; and upon the execution of such agreement, and the receipt by the trustees of whatever sum may be agreed to be paid by the College as aforesaid, the College shall be forever discharged and relieved from the said obligations to the fund; but till then such obligations shall subsist and continue notwithstanding the repeal of the first and second recited Acts hereinbefore contained." It must be observed that this is the exception, and the sole exception, from the repeal of the Act of 1813, and the concluding words, "notwithstanding the repeal of the first and second recited Acts hereinbefore contained," plainly show the extent of the repeal, and of the exceptions from the repeal. It appears to me clear that the right of the widows under the Act of 1813 to receive their annuities free of income-tax was not excepted, and that this right of the widows is therefore by the Act of 1860 abolished. What then remains? The position of the collector of the Widows' Fund is very much altered in consequence of his not being obliged to pay the widows their annuities free of income-tax. He is therefore much less a loser than he previously was, because if he has to pay the annuitants under deduction of income-tax, then he is thereby *pro tanto* reimbursed in respect of the loss he has already suffered through the deductions made by his debtors.

The statute in these circumstances very naturally recommends that the trustees and the College shall compound for the annual repayment of income-tax by payment down, once for all, of a slump sum. It was seen that the payment would be a trifling affair comparatively, because the income of the fund and the annual sum payable by way of annuities was not likely to differ very greatly in amount, and the income-tax on the balance was likely to be a very small matter if the collector was to be reimbursed by the College, not to the extent to which he had suffered deduction in settling with the debtors to the fund, but to the extent merely to which the income-tax on the fund's investments exceeded the income-tax upon the annuities—that is, to the extent to which the whole funds have been actually diminished in respect of income-tax payments. I cannot doubt

that that is the true construction of the section. The burden of income-tax which falls upon each individual is necessarily the nett amount of abatement which his income suffers by reason of the tax when his income is received and the burdens upon his income are paid.

Take, for example, the ordinary case of a man with a landed estate, and a rental of, say, £1000 a-year. The landlord receives his £1000 minus income-tax. But let us suppose he has a bond upon the estate on which he has to pay interest. In paying the interest on the bond he deducts a corresponding sum for income-tax from his creditor, and the difference between the sum deducted from his rental and the sum retained by him from his creditor is the measure of the burden imposed by the Legislature upon him. It is impossible to deal with the trustees or the manager of a fund differently from an ordinary proprietor. A balance must be taken between the deductions he has to submit to and the deductions he has to make, and the balance represents the measure of the burden.

In this view I consider it a monstrous construction of the statutes to say that the collector here is entitled to go against the College for the full amount deducted from the invested funds in name of income-tax, and not to take into account the benefit he gets from the deductions which he in his turn is entitled to make from the widows' annuities.

The principle which I have just referred to is the one upon which the Lord Ordinary has gone in his judgments in both cases. The result of this, so far as Mrs Cockburn is concerned, is that she has no right to have her annuity paid over to her except under deduction of income-tax. She has therefore no grounds for her claim, and the Lord Ordinary has come to a right decision as regards the action at her instance.

We now come to apply the same facts and enactments to the questions raised by the other case. The Lord Ordinary by his interlocutor of 4th February 1887, "Finds, declares, and decerns in terms of the declaratory . . . conclusions of the summons." I do not think by this interlocutor the Lord Ordinary intended to go further than I have indicated that we are prepared to go; besides, I am not sure if his Lordship noticed how indefinite the terms of the declaratory conclusions were, and how in consequence a certain ambiguity arises. Be that as it may, while I am not prepared to say that the views expressed by the Lord Ordinary in his opinion are different from what I have now stated, I would rather express the rights of the parties thus—That the collector of the Widows' Fund shall be entitled to be reimbursed to the extent to which the payment of income-tax may have actually diminished his funds, setting on the one side all the deductions to which he has been bound to submit, and on the other hand all the deductions which he has felt himself entitled to make.

But then the Lord Ordinary in this same interlocutor goes on to decern in terms of the first petitory conclusion of the summons. Now, I do not agree with the Lord Ordinary upon this matter. What has taken place is this—The collector has for the year from 1st August 1885 to 1st August 1886 paid the annuities due by the fund free of income-tax. That was plainly on the face of the provisions of the statute of 1860 an illegal and improper proceeding.

The collector was clearly wrong in making these payments without deduction, and he cannot possibly be allowed to profit by it. He must recover back from the annuitants what he has erroneously paid. The College dispute their liability upon these obvious grounds. Accordingly that part of the Lord Ordinary's interlocutor decerning for £53, 19s. 5d., the sum specified in the first petitory conclusion must be recalled. Thereafter the Lord Ordinary continued the cause on the motion of the pursuer, and allowed him "to put in a state showing the amount of income-tax paid by the collector since 1st August 1846, and not recovered or deducted by him from the annuities paid to the person entitled thereto." To that part of the interlocutor I give my entire assent. I think that is entirely the principle upon which the case should be settled. The result is that a state has been put in bringing out a sum of £26, 2s. 5d. due to the pursuer, for which sum the Lord Ordinary has granted interim decree.

The only points of difference between me and the Lord Ordinary are, that instead of adhering to that part of the interlocutor which deals with the declaratory conclusions, I propose to your Lordships that we should, for the reason I have already stated, insert a more definite finding, and that we should recal the finding relative to the first petitory conclusion. Otherwise I am for adhering.

Lord Shand—I am of the same opinion. The first action that falls to be dealt with is Mrs Cockburn's, for if she is found entitled to have her annuity paid free of income-tax, then undoubtedly the College is bound to reimburse the collector the sum which he has thus advanced on its behalf. What, then, is Mrs Cockburn's position in this matter, and what are her rights? Against the claim which she now submits two answers are made. First, that although no doubt under the Act of 1813 the privilege was conferred upon the widows of having their annuities paid to them free of income-tax, yet this privilege was repealed, first by the Income-Tax Act of 1842, and second by the statute of the 1860. It does not appear to me to be necessary in this question to consider the effect of the Income-Tax Act of 1842 in consequence of the language in the Act of 1860, which to my mind is clear and unambiguous. The 1st section of that statute expressly repeals the Act of 1813, "except in so far as hereinafter provided." It is clear that the privilege of receiving their annuities free of income-tax was not preserved to the widows, nor was it re-enacted by the Act of 1860.

It was urged that this privilege was re-enacted by implication, and in support of this the provisions of section 10 were cited. I do not say that such a privilege might not be preserved by implication, but to be effectually preserved it would require the language to be clear and unambiguous. If the Legislature intended this privilege to be continued, why was it not so enacted in express terms? In the absence of any expressions favouring this construction I cannot adopt the argument for the continuance of this privilege.

In the case which we have now before us the claim of the widow dates from 1862 only. If the

claim had been carried back to 1813 or to 1842, or had applied to the period between 1813 and 1860, it must have been met by two most formidable pleas. First, the effect of the Income-Tax Statutes, and secondly, *mora*. In my opinion the claim which the collector of the Widows Fund has against the treasurer of the College is just the difference between what he retains from the widows' annuities as income-tax and what is kept back by his debtors in making their payments to him. Upon the whole matter I agree with the judgment proposed by your Lordship.

Lord Adam—The first question, which arises in Mrs Cockburn's case is, whether the provision in section 8 of the Act of 1813 as to the widows being paid their annuities free of income tax is or is not repealed?

It is repealed unless it be specially saved or re-enacted. Is then this privilege re-enacted? It certainly is not, nor is it in any way saved from the repealing words.

But it has been suggested that we are to re-enact it by implication. It certainly would require a very much stronger argument than anything I have heard to satisfy me that it was the intention of the Legislature to preserve this privilege, and therefore without any hesitation I come to the conclusion that it was intended by the Act of 1860 to repeal the privilege conferred by the Act of 1813.

The next question arises in the other action, and is this, What is the amount of income tax which the College is bound to repay to the collector of the Widows' Fund? Now, the words of the 8th section of the Act of 1813 are, "to repay to the collector of the said fund the whole amount of the tax upon property or income that may have been paid by him on the said fund for the year preceding."

It has been urged that the meaning of this is that the collector is to be repaid all that has been deducted from him, and that in estimating this amount he is not bound to take into account the sums he is entitled to deduct from the annuitants. I cannot adopt such a reading of the statute. It is only the difference between these two amounts which the collector can claim against the College. With regard to the sum of £53, 19s. 5d. claimed by the collector in the first petitory conclusion of his summons, I do not see that he is entitled to recover this sum from the College, because he will be entitled to recover it from the annuitants, and so he will not in any way be out of pocket. Upon the whole matter I concur with your Lordships.

Lord Mure was absent from illness.

In the action at the instance of Mrs Cockburn against the collector of the Widows Fund the Court adhered.

In the action at the instance of the collector against the Royal College of Surgeons the Court pronounced this interlocutor:—

> "Recal the interlocutor of 4th February 1887, in so far as it decerns and declares in terms of the declaratory conclusions of the summons, and in so far as it decerns in terms of the first petitory conclusion of the summons: *Quoad ultra* adhere to the said interlocutor: Dismiss the action so far as regards the said declaratory conclusions, assoilzie from the first petitory conclusion, and decern: Find that the defenders are bound to pay annually to the pursuer a sum sufficient to reimburse him and the fund under his charge of the difference between the amount of income-tax paid by the pursuer, directly or indirectly, and the amount of income-tax deducted by the pursuer in paying the widows' annuities; and as regards the said interlocutor of 5th March 1887, refuse the reclaiming-note and adhere to the said interlocutor."

Counsel for the Pursuer Mrs Cockburn—Darling—W. E. Fraser. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Defender the Collector of Widows' Fund — H. Johnston — A. Pearson. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Defenders the Royal College of Surgeons — Gloag — Strachan. Agent — James Robertson, Solicitor.

Friday, May 25.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

WALKER, HUNTER, & COMPANY *v.* THE HECLA FOUNDRY COMPANY.

Copyright—Design—Infringement—Patents, Designs, and Trade-Marks Act, 1883 (46 *and* 47 *Vict. cap.* 57)—*Interdict.*

The holders of a certificate under the Patents, Designs, and Trade-Marks Act, 1883, for the copyright of a registered design for kitchen-range fire-doors, the design being for "a range fire-door with moulding on top, the moulding forming part of range, shape to be registered," applied for interdict against an alleged infringement. *Held*, after a proof, that as the respondents' fire-door differed merely in the outline of the moulding from that of the complainers', it was an infringement, and interdict *granted*.

Ante, July 20, 1887, 24 S.L.R. 750; 14 R. 1072.

This note of suspension and interdict was presented by Walker, Hunter, & Company, of the Port-Downie Ironworks, Falkirk, against the Hecla Foundry Company, ironfounders and range manufacturers, Dobbie's Loan, Glasgow, and the individual partners, to have the respondents interdicted from "infringing the copyright of a registered design for kitchen-range fire-doors, No. 16,596, the property of the complainers, conform to certificate of registration, dated 10th November 1884, granted in pursuance of the Patents, Designs, and Trade-Marks Act (46 and 47 Vict. c. 57), and in particular, from making, vending, or using any fire-doors for kitchen-ranges having a moulding, cast or fixed, thereon, in manner shown in the design."

In defence the respondents maintained various pleas, which, as stated in the opinion of the Lord Ordinary *infra*, were held to have been previously decided, as reported *ante* 24 S.L.R. 750, and 14 R. 1072. The respondents also main-