nished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor.

My Lords, if we attend to the subject for a moment, it will occur to everyone that in the bed of a river there may possibly be a difference in the level of the ground which, as we know, has the effect of directing the tide or current of the river in a particular direction. Suppose the ordinary current flows in a manner which has created for itself by attrition a bay in a particular part of the bank, if that were obstructed by a building, the effect might be to alter the course of the current so as to direct the flow with a greater degree of violence upon the opposite bank, or upon some other portion of the same bank, and then, it will immediately occur to your Lordships that if at that part of the bank to which the accelerated flow of the water in greater force is thus directed there happens to be a building erected, the flow of the water thus produced by the artificial obstruction would have the effect possibly of wearing away the foundation of that building at some remote period, and would thereby be productive of very considerable damage.

It is wise, therefore, in a matter of that description, to lay down the general rule that, even though immediate damage cannot be described, even though the actual loss cannot be predicated, yet if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury in the sense that it is a matter which the Courts will take notice of as an encroachment which adjacent proprietors have a right to have removed. In this sense the maxim has been applied to the law of Scotland that *melior est conditio prohibentis*—namely, that where you have an interest in preserving a certain state of things in common with others, and one of the persons who have that interest in common with you desires to alter it, *melior est conditio prohibentis*—that is to say, you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest.

My Lords, upon these grounds I entirely concur with your Lordships and with the Court below in the conclusions at which you and they have arrived.

Upon the other part of the case, however, there is a matter which has given me very much anxiety, because I foresee that it may, as between these parties, be the source of much future litigation. I agree with your Lordships that it was incumbent on the appellant to prove that what he has done fell within the limits of his agreement; and I also concur with your Lordships that that obligation has not been discharged by him. Now, we have arrived at that conclusion, as the Court below did, from the difficulty of ascertaining whether the buildings actually erected do or do not coincide with the limit laid down on the plan to which the agreement between the parties refers. I observe, however, that the final interlocutor grants and makes perpetual an interdict in conformity with the conclusion of the summons, which conclusion is in effect thus worded:—That the pursuer shall be entitled to have removed, and to have in continuance interdiction of so much of the building as transcends the red line. And, accordingly, the interdict being thus granted, on the application of that interdict, the same question which we have found it impossible to solve will again recur.

It may be said, and perhaps truly said, that if that difficulty hereafter arises, it will be due entirely to either the misconduct of the present appellant or to the inability of the present appellant to justify what he has done, by proving that it distinctly falls within the limits of the agreement, and I am compelled to accept that answer as a sufficient ground for acquiescing in the interlocutor. I trust, however, that the experience of the past will render the parties to this matter disposed to take some course consistent with reason and moderation on either side, and that that may prevent the further litigation which unquestionably is involved in granting an interdict of the description which I have mentioned, which involves an unknown quantity, or at least a quantity of fact that cannot at present be ascertained.

My Lords, with respect to acquiescence, undoubtedly the respondent had a right to assume, when the buildings were at first commenced and during their prosecution, that they were constructed in conformity with the agreement, and we find that when his attention was called to the fact that the agreement had been violated, there was no delay on his part in remonstrating and protesting against what had been done. There has therefore been nothing like acquiescence which would debar him from the ordinary remedy.

My Lords, on these grounds, and at the same time regretting in some degree that we are obliged to deal with this case in a way which, if there be the same spirit of litigiousness as has hitherto prevailed, may possibly create further annoyance, I concur with your Lordships in thinking that this interlocutor must be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Agents for Appellant—Hunter, Blair, & Cowan, W.S., and Preston Karslake, London.

Agents for Respondent—Duncan & Dewar, W.S., and Loch & M'Laurin, London.

# COURT OF SESSION

*Friday, July 20.*

## SECOND DIVISION.

### SIR WILLIAM STIRLING MAXWELL *v.* THE COMMISSIONERS OF INLAND REVENUE.

*Stamp Duty—Personal Bond—Marriage-Contract—Security.* Held that a provision in a marriage-contract of £15,000, £20,000, and £30,000, in favour of children, according to the number that might be born, and in security of the payment of which the husband conveyed his estate to trustees, was a bond for a definite sum of money, and therefore liable in *ad valorem* stamp duty.

This was a special case, prepared by the Commissioners of Inland Revenue at the request of Sir William Stirling-Maxwell, in terms of the provisions of 28 and 29 Vict., cap. 96, sec. 2. The Commissioners state the following circumstances:—By antenuptial contract of marriage Sir William Stirling-Maxwell, *inter alia*, bound and obliged himself, at the first term after his death, to pay to certain trustees for the child or children of the marriage, other than the heir, and the lawful issue of such as should predecease him, the following sums of money:—If one child, £15,000; if two children, £20,000; if three or more, £30,000, and he disponed his heritable estate

in security of these provisions, which were further declared to be in full of *legitim*, and other claims. The question for the opinion of the Court was, Whether this obligation was to be held as a bond for a *definite and certain sum of money*, and whether the marriage-contract was liable to be assessed and charged with the *ad valorem* stamp duty in respect of it as such bond, in terms of the Acts 13 and 14 Vict. cap. 97, and annexed schedule; 55 Geo. III., cap. 184, schedule, part 1; and 17 and 18 Vict., cap. 83, sec. 16?

DUNDAS and SHAND contended (1) that this was not a personal bond within the meaning of the statute; and (2) that at any rate it was not a bond for the payment of a definite and certain sum of money.

The SOLICITOR-GENERAL, YOUNG, FRASER, and RUTHERFURD attended on behalf of the Commissioners of Inland Revenue, and in the course of the discussion they asked the Court, although that point was not raised by the appeal brought by Sir William Stirling-Maxwell, to pronounce a deliverance as to the nature and amount of the stamp required in respect of a provision in the marriage-contract whereby the wife conveyed her whole estate, heritable and moveable, valued at £11,000, to her husband. The commissioners had not given any judgment on this clause.

The Court refused to express any opinion on the new point raised in the argument for the commissioners, holding that it was not competently before them under the appeal, and that it was not their duty to examine into the deed generally, and fix the stamp duty for the first time.

At advising—

The LORD JUSTICE-CLERK—This case comes before the Court upon an appeal against a determination of the Commissioners of Inland Revenue on a matter of stamp duty; and the appeal is presented under the authority of the 15th section of the Act 13 and 14 Vict., cap. 97, as extended by the Act of 28 and 29 Vict., cap. 96, sec. 22. As this is the first appeal of the kind which has been before the Court it is desirable distinctly to understand what questions are or may be competently raised under such an appeal. The question which is stated in the case prepared by the Commissioners of Inland Revenue under the authority of the statute is, Whether a provision contained in Sir W. S.-Maxwell's marriage-contract be a personal bond given as security for the payment of a definite and certain sum of money, and whether the marriage-contract is liable to be assessed and charged with the *ad valorem* stamp duty in respect of it, as such bond. But the counsel for the Commissioners of Inland Revenue further insisted that it was competent for them to raise other questions under this appeal, and in particular they proposed to ask the Court to determine whether a certain provision contained in the same marriage-contract, by which Lady Anna, the wife, assigns to Sir William, the husband, her whole means and estate, estimated to amount to £11,000, is or is not chargeable with a stamp duty as a settlement within the meaning of the 13th and 14th of Victoria. Now, I am of opinion that it is not competent for the Commissioners of Inland Revenue to raise that question here. It is no doubt perfectly competent for the Court, and it is their duty under the provisions of the 15th section of the 13th and 14th Vict., to give a judgment upon the matter of the stamp duty that is brought before them by the appeal, whatever the practical effect of their determination of the matter may be, whether it be in favour of or against the appellant, or in favour of or against the Crown, or whether the effect of it may be to sustain the determination of the Commissioners, or to give relief against that determination to the subject appealing, or even to increase the amount of the stamp duty that is chargeable according to the true reading of the provision. All these things are within the jurisdiction of the Court under that 15th section of the 13th and 14th Vict. But that is only because it is the policy and the purpose of the Act that when an adjudication of the Commissioners on the matter of stamps is brought under the review of this Court, there shall be a determination once for all as to what is the real amount and nature of the stamp duty that is payable in respect of the particular matter or thing on which the Commissioners had charged stamp duty. But to say that that extends the jurisdiction of the Court in such a way as to impose upon them a duty, where one provision of a complicated deed like the present is brought under their consideration with a view to determine what stamp duty is chargeable, to take that deed and read and consider it in the interest of the Crown for the purpose of discovering whether there is not anything else to be found in the deed, on which some stamp duty might possibly be imposed, I say, to represent that to be the duty of the Court under this section of the Act of Parliament, appears to me to be irrational and absurd. And if that be so, it is equally incompetent and out of the question for the Commissioners themselves, coming here as respondents in this appeal, to reverse their position, and put themselves in the position of claimants and appellants for the purpose of obtaining a duty which they have not even themselves said, in adjudicating upon this deed, that the deed is subject to. The only question, therefore, that we are to determine is the question stated in the case, though no doubt, in determining that question, if we should be of opinion that the portion of the deed brought under our consideration is not subject to the stamp duty as a bond, it is quite in our power to say that it is subject to the stamp duty under some other head of the Stamp Act. Now, the question which we have thus to determine is one undoubtedly attended with some difficulty, requiring rather subtle and nice distinctions in order to arrive at a satisfactory conclusion. The objections made by the appellant to this stamp seem to me to resolve into two. He says, in the first place, that this is not a bond within the meaning of the Act, and he says, in the second place, that if it be a bond, it is not a bond for the payment of any definite and certain sum of money, these being the words of the schedule under which it is proposed to be charged. Now, whether this is a bond or not seems to me to depend very much upon the language of that part of the deed of which we are judging, and I find that in that part of the marriage-contract the husband binds and obliges himself and his foresaids—which I take to be (although that part of the deed is not before me) his heirs, executors, and successors, whomsoever—he binds and obliges himself and his heirs, executors, and successors whomsoever to pay to certain parties, as trustees for the child or children to be born of the said intended marriage, other than the child succeeding to the landed estate, and the lawful issue of any of them who shall predecease him, and to the assignees of the said trustees, the provisions following, in the several events after specified—viz., if there shall be only one such child, the sum of £15,000 sterling, if two such children, £20,000, and if three or more such children, £30,000, and that at the first

term of Whitsunday or Martinmas after the death of the said William Stirling, with a fifth-part more of penalty and interest at the rate of 5 per cent. during the not-payment, and in security he conveys his landed estate. Now, as far as mere words are concerned, and as far as the legal construction of this deed is concerned, the Court are so perfectly familiar with provisions of the kind, that it is in vain to waste words upon it. There is no doubt that this is a personal obligation undertaken by Mr Stirling, now Sir W. Stirling-Maxwell, and that it is conceived in such a form as to be on his part a personal bond. The trustees who are named in the deed are the creditors in that personal bond. Mr Stirling is the debtor in that personal bond. And so completely is the relation of debtor and creditor constituted between these two parties, that when the term of payment arrives, that is to say, the first term of Whitsunday or Martinmas after the death of Mr Stirling, these trustees will be entitled to enforce payment of the sums of money therein contained, if they be then due, in all the ways in which the creditor in any personal bond could enforce payment. It is in vain to say that the money which Mr Stirling's executors or representatives will then require to pay is part of his succession. So far from being part of his succession, it is one of the debts that will require to be deducted from his moveable estate before the amount of his succession can be ascertained, and the creditors in the bond will be entitled to enforce the obligation against every representative of Mr Stirling, against his heir and his executor, against anyone who represents him on the passive titles. Now, in these circumstances, according to ordinary legal construction, and apart altogether from the provisions of the Stamp Act, it seems to me absolutely impossible to say that this is not a personal bond, or to say that it is anything else than a personal bond, in the style of its obligation as well as in its practical effect. The object of it may be to secure a provision for children, but that does not in the slightest degree alter either the form or the effect of the obligation. Now, that being so, the question comes to be whether it is a bond within the meaning of the Stamp Act, and the great argument submitted to us on the part of the appellant latterly was that this was truly not a bond within the meaning of the Stamp Act, because it was a succession within the meaning of the Succession Duty Act. Now, I take leave, in the first place, to say that if the subsequent Act of Parliament imposing the succession duty has made this money, when it comes into the hands of the trustees and passes from them to the children, a succession taxable with succession duty, it does not follow that this ceases to be a bond requiring a stamp. The one does not follow from the other at all. It may be very unjust to impose this double taxation, one at each end, to impose the bond stamp upon this obligation in the marriage-contract, as if it were an ordinary bond for payment of a sum of money between debtor and creditor, and then afterwards when it comes to be paid to tax it as a succession. But if the Succession Duty Acts have done that we cannot interfere to prevent their operation. In the meantime we are only dealing with the Stamp Act of the 13th and 14th Vict., and considering whether this is a bond within the meaning of that Act. It appears to me that looking at what is commonly known as succession, and what I should be inclined *prima facie* to hold to be the meaning of a disposition of property by means of which the property passes from the dead to the living, and an obligation of this kind, the distinction between the two is very manifest and clear, because a disposition of property, which is the phrase contained in the second section of the Succession Duty Act, taken in the widest and most popular sense, means that it is a deed by means of which some valuable estate or *corpus* of money, or the like, is transferred or conveyed from one to another; while the part of the marriage-contract now before us conveys nothing and transfers nothing, but simply creates a personal obligation of a future, and, as it will appear in an after part of the consideration of this case, of a contingent character. Now, whether that distinction be sufficient to exempt this money from the operation of the Succession Duty Act, it is at least a distinction so plain and palpable as to be quite sufficient for the solution of this question under the Stamp Act. This is not a succession in the ordinary sense of the term, but is a personal obligation to pay in the form of what we know as a personal bond. Therefore I think the first objection of the appellant fails altogether. But then he says, in the second place—Be it that this is a bond, in order to bring it within the operation of the schedule of the Stamp Act, it must be a personal bond in Scotland, given as a security "for the payment of any definite and certain sum of money;" and Sir William says that this is not for the payment of a definite or a certain sum of money—that it is neither definite nor certain. The amount to be paid upon the occasion of his death is uncertain. It may be either £15,000, £20,000, or £30,000; and it is also uncertain whether anything will have to be paid at all. If there are no children there will be no payment; if there is one child there will be a smaller payment, two children, a certain larger payment; and if three or more, then the maximum payment of £30,000. Now, the question is whether that is a security for the payment of a definite and certain sum of money. These words, occurring as they do in an Act of Parliament, which imposes a tax upon lieges, are not to be stretched by construction to embrace cases that don't fall within the literal meaning of the words. But, on the other hand, and subject to that principle of interpretation, the statute is to receive a rational and fair construction. Now, in dealing with the stamping of bonds, let us see what the principle and theory of this Act of Parliament are. It appears to me that the adjectives "definite" and "certain" are not only both applied to the substantive "sum" which is the same thing as "amount," but that, so far as I can make out, they mean one and the same quality. I think a definite amount (for sum is nothing more than amount) and a certain amount are just the same thing. I cannot distinguish between them; and therefore in this respect the words of the Act are tautological, and mean only one thing. It is a single idea that is expressed—viz., that the sum for which the bond is granted shall be of ascertained amount; and where the sum is of ascertained amount, then a certain duty is imposed according to the amount of that sum. But it is not the intention nor the effect of this Act of Parliament to allow bonds which are granted for indefinite and uncertain sums to escape from payment. Quite the contrary, because in the very next head of the same section, and still within the general title of bonds, there are various provisions which I think help us a good deal in the construction of the Act. If a bond is granted as a security for the repayment of a sum

or sums of money to be thereafter lent, advanced, or paid, it is still liable to the duty. If it is granted for repayment of a sum which may become due upon an account-current, but which is not due when the bond is granted, it is still to be the subject of duty. And if the money secured, or to be ultimately recoverable, is limited by a maximum amount, then the duty is to be imposed upon the maximum which is stated in the bond; and if no maximum is stated in the bond, but a penalty is stated in the bond, then the duty is to be levied on the penalty; but if there is no maximum amount, and no penalty, the statute exhausting the ingenuity of its framer to reach every case, goes on most skilfully to provide that where there shall be no penalty of the bond in such last-mentioned case—that is, where there is neither a sum stated to be paid, nor a penalty stated, and the sum is thus left perfectly uncertain and definite, then such bond shall be available for such an amount only as the *ad valorem* duty denoted by any stamp or stamps thereon will extend to cover, that is to say, the provision is just this—If you choose to frame your bond in such a way that I, the taxing officer, cannot find any sum to take as the *valor* on which my duty is to be imposed, then take notice that, according to the amount of duty that you impress in the form of a stamp upon that obligation, will be your right to recover when the time comes. You cannot recover one penny more under the bond than you have *ad valorem* duty to cover, so you take the risk. Now, putting all these things together, is it not perfectly clear that it was intended—whether it is accomplished is another affair—but that it was intended by these different provisions of this part of the schedule to reach every personal bond whatsoever which might afterwards come to be an obligation for the payment of a sum of money. Now, let us consider how this affects the present case. In the first place, there is no sum payable at all under this bond, except upon a certain condition or contingency—that is to say, that there shall be children. There is not anything in the provisions of this schedule which excludes from its operation the case of a bond for a sum of money payable upon a contingency. I can find nothing so to limit the operation of the words. I think the words are perfectly broad enough in their natural meaning to reach the case of a bond payable only upon a contingency. But then it is said further, this is not merely a contingency, because when the time arrives we don't know what sum is to be payable; it may be either £15,000, or £20,000, or £30,000. Now, that at first sight is very plausible and very taking, but when you come to analyse it, it is nothing more but contingency after all. It is three contingencies instead of one—that is to say, the husband here has undertaken, in the contingency of his having one child, to pay £15,000, and in the contingency of his having two to pay £20,000, and in the contingency of his having three to pay £30,000. Well, the Commissioners of Inland Revenue might perhaps have said, "There are three contingent bonds, one for £15,000, one for £20,000, and one for £30,000." I don't think that would have been a very fair construction of the Act of Parliament, I must say, because in no event will the whole three sums come to be payable, but only in the worst event for the obligant the maximum sum of £30,000. It may be that something less may be payable, but it may be also that the largest sum will be payable. Now, I must say, it would be in my mind an unfair and an irrational construction of this schedule of the Stamp Act to say that this obligation for payment of £30,000, in the event of Sir William having three or more children is not within the operation of these provisions; and therefore I am for dismissing this appeal, and confirming the determination of the Commissioners of Inland Revenue. I may say, further, that I am quite clear, as indeed was conceded in argument latterly by the counsel for the commissioners, that this part of the marriage-settlement does not fall within the title "settlement" in the schedule, but falls under the title "bond," under which they have classed it.

The other Judges concurred, and the appeal was accordingly dismissed.

Agents for Appellant—Dundas & Wilson, C.S.

Agent for Respondent—The Solicitor of Inland Revenue.

## PATTISON *v.* HENDERSON AND OTHERS

(*ante*, vol. i. p. 210).

*Trust—Substitution—Superiority—Dominium utile—Consolidation—Death-bed—Title to Reduce.* By a deed conveying the truster's whole estate, heritable and moveable, to another, a number of substitutes were called, upon whom it was to devolve in certain fixed proportions if certan events occurred. The residue was conveyed to certain legatees. One of the substitutes acquired a right by the deed to the superiority of some lands, in which the truster was then vested. After the date of the deed, and without making any special destination of it, the truster also acquired the *dominium utile* of these lands. The institute under the deed made up separate titles to these estates, and afterwards consolidated them in his own person. Held that the effect of this consolidation was not to give the substitute the right both to the property and the superiority, and that he had only a personal right under the deed which gave him a title to sue a reduction of a deed executed on death-bed by the institute, to the effect of making good his right to the superiority but no further.

The late William Dunn, Esq. of Duntocher, merchant in Glasgow, by disposition and deed of settlement, dated the 17th day of April 1830, disponed and conveyed his whole estate, heritable and moveable, from him after his death to and in favour of the now deceased Alexander Dunn, residing in Duntocher, his brother, but with and under certain burdens and conditions therein set forth. It was thereby specially provided and declared, but without prejudice in any respect to or limitation of the rights and powers of the said Alexander Dunn, under and by virtue of the conveyance in his favour thereinbefore written, to exercise the most full and absolute control in the disposal of the said estates and effects, either during his lifetime, or by settlements or other writings, to take effect at his death, that in the event of the said Alexander Dunn's dying intestate, and without leaving heirs of his body, and of his not otherwise disposing of the subjects and estate thereby conveyed to him, the same should fall and devolve, and accordingly the said William Dunn thereby, in these events, but under the burdens and provisions thereinbefore written, disponed and conveyed his said estates, heritable and moveable, in the terms therein mentioned.

Last year the Court held that this was a good conveyance in favour of the substitutes called by the declaratory clause of the deed, which was to