whole matter before the funds are completely exhausted in litigation.

One other observation I have to make, which is, that we are not here concerned with *M'Kernan's* case, which may have been, for all that we have here, well or ill decided. Here the question is not one about directly enforcing any agreement, or awarding damages for breach of it, but simply one of interdict. But as the case is before us, I must say I could only concur, as at present advised, with the observations of some of the Judges on the footing that at common law and irrespective of statute an action in the Court was not maintainable. There may or may not have been good grounds for action in that case, but if it was a good action on good grounds at common law, there was no occasion to go to the statute as enabling the Court to entertain the action, and I cannot read these observations without its crossing my mind that the learned Judges had not seen that all statutes are framed with tacit reference to the rules of common law.

Now, I concede that with reference to most, if not all, of the cases to which section 4 applies, the Court would not entertain action—*e.g.*, any agreement to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union—which is only an euphemistic way of paying money to persons on strike in obedience to a trades union. This Court at common law could not enforce such an agreement. Again, any agreement to discharge any fine imposed upon any person by sentence of a court of justice—here again we have a case where common law, quite irrespective of statute, would not entertain action. The cases are not numerous at most, but the statute says, having regard to the nature of the agreement, if your view of the common law does not let you enforce it, there is no authority hereby given to entertain action. Therefore I could only assent to the decision in *M'Kernan's* case on the assumption that at common law, and irrespective — *i.e.*, without the assistance — of statute, action was not competent; and indeed this was the view on which the Lord Ordinary founded, and this and some other considerations have afforded good grounds for the Court refusing to entertain action unless the Act of Parliament required it. These are all the remarks, probably superfluous, which I think it necessary to make in expressing my concurrence with your Lordships.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find that it sufficiently appears from the admissions of the respondents themselves that they propose illegally interfering with and appropriating the funds in question: Therefore sustain the appeal, recal the judgment of the Sheriff complained against, and interdict the respondent from uplifting any part of the said funds till the rights of the parties are ascertained: Find neither party entitled to expenses either in this Court or the Inferior Court, and decern."

Counsel for Appellants — Scott. Agent — Alexander Morison, S.S.C.

Counsel for Respondents—Brand—Solicitor-General (Balfour). Agent—Adam Shiell, S.S.C.

Friday, June 4.

FIRST DIVISION.

[Exchequer Cause—Lord Curriehill.

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

Revenue—Succession-Duty Act 1853 (16 *and* 17 *Vict. c.* 51), *sec.* 2 *and sec.* 12—*Succession—Predecessor—Successor.*

C. became entitled under a settlement made by a lady, who died in 1848, to the fee of a certain sum upon the death of her parents, who were constituted liferenters under the same settlement; during the lifetime of the testatrix the sum was invested in a bond and disposition in security in which C.'s father was debtor. After the death of the testatrix, C. in 1852 discharged her right to the said bond and disposition in security in consideration of another bond granted by her father and mother in her favour; her parents died in 1863 and 1868 respectively. Succession-duty was claimed on the sum due to C. *Held* that this was a succession under the Succession-Duty Act of 1853, that C. was the "successor" and the testatrix the "predecessor" in the meaning of the Act, and claim therefore (*rev.* Lord Curriehill) *sustained.*

Opinion (*per* Lord Shand) that duty was exigible under the 12th section of the Act if it could be held that the 2d section did not apply.

By disposition and settlement dated 22d October 1838, and subsequent codicil, two sisters, Miss Barbara and Miss Christian Constable, conveyed their whole joint estate to the survivor of them in liferent, and after her death to Mr James Nicoll and his spouse (their sister) and the survivor of them in liferent, and to their children *nominatim* in fee. By the codicil it was provided that Mr and Mrs Nicoll should assume the name of "Constable." Mr and Mrs Nicoll had two sons and a daughter Miss Christian Constable Nicoll Constable, in connection with whose succession this case arose.

Miss Barbara Constable died on 3d October 1846, her sister then succeeding to the liferent of their joint estate. In 1846 Mr Nicoll borrowed £10,000 out of that joint estate from Miss Christian Constable on bond and disposition in security, £5000 to be repaid to her in liferent, for her liferent use allenarly, and £5000 to her and her heirs and assignees whomsoever, whom failing or at her death to the said three children of Mr Nicoll, equally amongst them, their heirs and assignees in fee, but under the real and preferable burden always of the liferent of their father and mother, and the survivor of them. By dispositions and assignations dated in 1847 and 1848 Miss Christian Constable acquired right, to the extent of £5000, to a bond and disposition in security, and instrument of sasine following thereon, by which Mr Nicoll had in 1846 became debtor to Euphemia Whitson for £5500. Miss Christian Constable died on 15th September 1848, and her right to the extent of £5000 in the

last-mentioned bond and disposition in security was taken up by notarial instrument following upon the said mutual settlement and codicil, by Mr and Mrs Nicoll, now Nicoll Constable, and their children.

By discharge and renunciation, dated in 1852, in favour of Mr and Mrs Nicoll Constable, their said three children, with joint consent, and with consent of their father and mother, discharged (1) the bond and disposition granted to Miss Christian Constable in 1846 for £10,000, and (2) the bond and disposition granted to Euphemia Whitson for £5500. This discharge was granted in consideration of bonds and dispositions in security by which Mr and Mrs Nicoll Constable granted to their sons respectively certain lands therein set forth, and to their daughter Miss Christian Constable Nicoll Constable the sum of £5166, 13s. 4d., being her one-third share of the fee of the above sums of £10,000 and £5500 so discharged, the same to be payable at the first term of Whitsunday or Martinmas which should occur after the death of the longest liver of the granters (her parents), with the legal interest thereof from the date of the death of such survivor. Mr Nicoll Constable died on 21st March 1863, his wife died on 6th March 1868, and the said sum of £5166, 13s. 4d., with interest from the latter date, therefore became payable to Miss Christian Constable Nicoll Constable as at Whitsunday 1868.

The Lord Advocate on behalf of the Inland Revenue claimed succession-duty on £3333, 6s. 8d., being the one-third part of the two sums of £5000 to which Miss Constable had right—the one under Mr Nicoll's bond in her favour in 1846, and the other under bond to Euphemia Whitson, as above set forth. On the remaining portion of the said sum of £5166, 13s. 4d. duty was not claimed, the same having been already paid as a part of the succession of Miss Barbara Constable. On 11th August 1853 Miss Christian C. N. Constable granted a trust-deed in favour of her two brothers. A Special Case under 19 and 20 Vict. c. 56, was drawn up, to which the parties were on the one hand the Lord Advocate, and on the other hand these trustees. It was admitted that Miss C. C. N. Constable was a stranger in blood to Miss Christian Constable. The Lord Advocate maintained "that the said sum of £3333, 6s. 8d. was a 'succession' in terms of the 'Succession-Duty Act 1853' (16 and 17 Vict. c. 51), to which the said Christian Constable Nicoll Constable came into the beneficial possession on the death of her mother in 1868; that the said Christian Constable was the predecessor or person from whom her interest was derived; and that being a stranger in blood to the predecessor, duty at the rate of £10 per centum per annum is due upon the sum of £3333, 6s. 8d. That interest was payable upon the duty at 4 per cent. from the 6th March 1868 till paid."

Miss Constable's trustees maintained "that the arrangement under which the original bonds and dispositions in security were discharged having been made prior to the passing of the Succession-Duty Act of 1853, was not and could not possibly have been entered into with a view to evading its provisions, and that the settlements of legacy-duty made on the estates of Miss Barbara Constable and James Constable did not enter into the question now raised. The succession left by Miss Christian Constable was an interest in a heritable security on which at the time of her death there could be no claim for duty on the part of the Crown. At the date of the arrangement for discharge of the heritable debts previously due by Mr and Mrs Constable, and which had come to belong to their children in fee, Miss Christian Constable Nicoll Constable's right to one-third of the contents of these heritable securities had become absolute, and there was nothing to prevent her then making any arrangement which she pleased with the debtors for payment or satisfaction. She discharged the original bonds and dispositions in security in consideration of a new bond and disposition in security, the lands conveyed in security not being the same as those in the bonds which she discharged, and the term of payment not being immediate as in the bonds discharged, but postponed to the death of the longest liver of her father and mother. The new arrangement truly extinguished the old and created a new heritable debt, for if the payment had been in money instead of by a bond with a postponed term of payment, the present money value at the date of the arrangement would have been the same as the value she got under the bond, viz., the amount of her one-third of the securities discharged, subject to the deduction of the value of the expectant liferent of her parents. The original bonds having thus, as far as Miss Constable was interested therein, been discharged, and Miss Constable herself having been the originator and proper creditor in the new bond, she was thenceforth entitled to the money upon a footing which did not make it a succession to the original lenders of the money in the £10,000 and £5500 bonds. If such was the case, Miss Constable did not take the money by succession to her father within the meaning of the Succession-Duty Act. She was not entitled under the bond and disposition in security—which she accepted in lieu of her claim against her father under the two bonds and dispositions in security for £10,000 and £5500 for loans made to him by her aunt—to payment till the first term after the death of the survivor of her father and mother. As it happened, her mother survived her father, and thus, apart from the general view that her right to demand payment of the bond at the first term after her mother's death was not a succession within the meaning of the Act, the trustees founded upon the exception in the 17th section of the Act, which declared that 'no bond or contract made by any person *bona fide* for valuable consideration in money or money's worth, or for the payment of money or money's worth, after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made.'"

The questions submitted for the opinion and judgment of the Court were—"(1) Was the sum of £3333, 6s. 8d. a succession in the sense of 'The Succession-Duty Act 1853'? (2) Assuming the first question to be answered in the affirmative, who was the predecessor in the sense of the said Act? and (3) Who was the successor within the meaning of the said Act?"

The Succession-Duty Act 1853 (16 and 17 Vict. c. 51) enacts (Sec. 2)—"Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any

property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act [viz., 19th May 1853—see section 54], either immediately or after any interval, either certainly or contingently, and either originally or by way of substituted limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession;' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settler, disponer, testator, obliger, ancestor, or other person from whom the interest of the successor is or shall be derived." (Sec. 12) "Where any person shall take a succession under a disposition made by himself, then if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this Act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession at the same rate as he would have been chargeable with if no such disposition had been made; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself, and no person shall be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself, unless at the date of the creation thereof he shall have been entitled to the property subjected thereto expectantly on the death of some person dying after the time appointed for the commencement of this Act."

The Lord Ordinary on Exchequer Causes (CURRIEHILL) found that the sum of £3333, 6s. 8d. was not a succession in the sense of the Succession-Duty Act 1853, and decerned against the Lord Advocate accordingly. His Lordship added this note:—

"*Note.*—This is a case of considerable nicety. It arises out of a claim for succession-duty made by the Crown on the sum of £3333, 6s. 8d. which it is alleged Miss Christian Constable Nicoll Constable acquired as successor of the deceased Miss Christian Constable. The circumstances are fully disclosed in the Special Case, and are shortly as follows:—By a mutual settlement, dated 2d October 1838, the late Barbara Constable and Christian Constable conveyed and bequeathed to the survivor of them in liferent, and in favour of the said Christian Constable Nicoll (now Christian Constable Nicoll Constable), George Constable Nicoll, and James Charles Constable Nicoll, children of the marriage between James Nicoll of Chapelshade, near Dundee, and Agnes Maria Constable or Nicoll, his spouse, equally amongst them, their heirs and assignees in fee, the whole of their estate, heritable and moveable, and in particular a certain heritable subject in Dundee. By a codicil to that settlement, dated 24th December 1839, Barbara and Christian Constable, while ratifying the provisions of the mutual deed, interposed between the survivor of themselves and the fiars a liferent in favour of the parents of the fiars, namely, the said James Nicoll and Agnes Maria Constable or Nicoll, his spouse, and the survivor.

"Barbara Constable died on 3d October 1846, and Christian Constable entered upon the possession and management of her personal estate as disponee, executrix, and legatee in liferent under the mutual settlement. As the whole succession was moveable, legacy-duty has been paid upon the sum settled by the said mutual settlement and codicil, in so far as it flowed from Barbara Constable, amounting to £5000. After Barbara's death Christian Constable invested the sum of £10,000—of which £5000 had belonged to Barbara—on heritable security, granted by the said James Nicoll, or Nicoll Constable, over his lands of Callie and Easter Butters Callie. In other words, Christian Constable lent to James Nicoll the sum of £10,000, for which he granted his bond and a conveyance of the lands of Callie in security. The destination in the bond was as follows:—The money was to be repaid to Christian Constable in liferent, and at her death to the three children of the said James Nicoll above mentioned, equally among them, their heirs and assignees in fee; but so far as regarded the rights of the said children, their heirs and assignees, under the real and preferable burden always of the liferent of their father and mother, and the survivor of them, with the annual-rent of the said principal sum of £10,000 at 3 per cent. Christian Constable and the fiars were infeft *nominatim* upon the said bond and disposition in security, conform to an instrument of sasine recorded in the General Register of Sasines 2d November 1846, but always under burden of the foresaid liferent in favour of their parents and the survivor. Christian Constable afterwards, in 1847 and 1848, acquired right to another bond and disposition in security for £5000, borrowed by the said James Nicoll Constable from Euphemia Whitson over his foresaid lands of Callie and Easter Butters Callie.

"This bond for £5000 was part of an original bond for £5500, which to the extent of the remaining £500 was acquired by Patrick Scott, Dundee, as trustee for Agnes Maria Nicoll Constable in liferent, and her children in fee, and at the death of the said Patrick Scott, then to and in favour of the said Maria Constable herself in liferent and her children in fee. Although Christian Constable Nicoll Constable had right under the foregoing destination to the third of this sum of £500, no succession-duty is claimed by the Crown in respect thereof seeing that legacy-duty has been paid upon it.

"The Crown, however, claims succession-duty upon the sum of £3333, 6s. 8d., being one-third of the two sums of £5000 which belonged to Christian Constable in her own right, and which were secured by the two bonds and dispositions in security already mentioned. These being heritable at the date of her death, which took place on 15th September 1848, no legacy-duty could be claimed upon them; but it is maintained by the Crown that the right of Christian Constable Nicoll Constable to one-third of these bonds was merely a right in expectancy during the life of her parents, and as they survived the passing of the Succession-Duties Act of 1853, succession-duty became payable by her on the death of the last survivor of her parents on 6th March 1868. Christian Constable Nicoll Constable has assigned her interest in the bonds to her brothers George Constable Nicoll Constable and James Charles Constable Nicoll Constable, by

a trust-deed dated 11th August 1853, and the claim is formally made against them as trustees, although really and substantially against Christian Constable Nicoll Constable.

"The defence which is maintained against the claim of the Crown is, in the first place, that the right of Christian Constable Nicoll Constable, after the death of the testator, if she may be so called, was absolute. It is said that from the death of Christian Constable in 1848 she was the absolute fiar in the two securities in question to the extent of one-third under burden merely of the liferent of her parents; that she could have disposed of her right of fee under that burden without the control of anyone; that she was fully vested with the beneficial right of the property; and that she was therefore at the passing of the statute in 1853 not a successor of Christian within the meaning of the Act. I cannot sustain that contention. I think that if matters had remained on the footing on which they were when Christian Constable died in 1848, Christian Constable Nicoll Constable must have been regarded during the life of her father and mother, and the survivor of them, as being not beneficially entitled to the property, and, at all events, as being during the life of her parents only to a partial extent beneficially interested in the succession; and that the death of her parents would have caused an increase of benefit to accrue to her by the extinction and termination of her parents' liferent, which increased benefit would have been a succession within the meaning of the 5th section of the Act.

"But in the view which I take of the case it is unnecessary to make that a ground of judgment. The question really comes to be, Whether, assuming Christian Constable Nicoll Constable to have had merely a right in expectancy during the life of her parents, certain transactions which took place between her and her brothers on the one hand, and her father and mother on the other, in 1852, had not the effect of surrendering and extinguishing her right in expectancy within the meaning of the 18th section of the statute, by which it is provided that no person shall be charged with duty under this Act in respect of any interest surrendered by him or extinguished before the time appointed for the commencement of this Act?

"Now, if the proceedings of 1852 had the effect of surrendering and extinguishing the interest which Christian Constable Nicoll Constable took under the bonds and dispositions in security of 1846, it is impossible to hold that these proceedings were taken with the view of evading the claim of the Crown to succession-duty, seeing that they were all taken and completed a year before the commencement of the Succession-Duties Act in 1853, and there will therefore be little difficulty in holding that the claim of the Crown is excluded by the 18th section. It is maintained, however, on behalf of the Lord Advocate, that the transactions in 1852 did not constitute a renunciation and surrender of Miss Constable's interest under the deeds of 1846, but were merely a change of the investment. It is therefore necessary to examine minutely what was done in 1852.

"Prior to that date the right of Miss Christian Constable Nicoll Constable was constituted solely by the two bonds and dispositions in security which had been taken by the deceased Christian Constable in 1846. Under these bonds she was fiar to the extent of one-third, under burden of the liferent of her parents. The fee was payable to herself, and could have been demanded by her immediately on the death of her surviving parent. The money was in the shape of a debt by her father James Nicoll Constable, secured over his lands of Callie and Easter Butters Callie. Her brothers had right each to another third of the sums secured by the bonds. On the 4th September 1852 a family arrangement was entered into to the following effect:—Miss Christian Constable Nicoll Constable and her two brothers, with consent of their father and mother, discharged the two bonds and dispositions in security which had been acquired by the deceased Christian Constable in 1846, and under which they were the fiars under burden of the liferent of her parents. So far as regards the brothers George Constable Nicoll Constable and James Charles Constable Nicoll Constable, their consent was given in consideration of absolute conveyances to the lands of Callie belonging to their father—that is to say, their father conveyed to them, out and out, the portions of the lands over which the bonds had been secured in consideration of their discharging the bonds, to the extent of two-thirds, and liberating him from his debt to them. The consideration in respect of which Christian Constable Nicoll Constable discharged and renounced her third share of the lands was the simultaneous execution of another bond and disposition in security by her father and mother, dated 4th September 1852, for the sum of £5166, 13s. 4d. (which included the £3333, 16s. 8d. now in question), secured over the lands of Balmyle, which also belonged to her father, but which were different lands from those over which the bonds and dispositions in security of 1846 had been granted. The term of payment was the first term of Whitsunday or Martinmas which should occur after the death of the longest liver of the granters, with the legal interest of the said principal sums from the date of the death of the longest liver.

"The question is by no means free from difficulty; but, on the whole, I have come to be of opinion that the transaction must be regarded as both in form and in substance a proper surrender and renunciation by Christian Constable Nicoll Constable of the right in expectancy which she then had in the bonds of 1826. I think it was the intention of all the parties—that is to say, of Mr and Mrs Constable on the one hand, and their sons and daughter on the other—to put an end altogether to the connection which had subsisted between the late Miss Christian Constable and themselves under the original bonds. In the case of the sons this is perfectly clear, because they out and out discharged the debt owing to them by their father and surrendered their interest to him in consideration of obtaining an absolute conveyance of certain heritable property, and accordingly it was conceded that no claim either for legacy or succession-duty was competent at the instance of the Crown against either of the sons.

"Now, does it make any substantial difference that Miss Christian Constable Nicoll Constable, instead of obtaining from her father an absolute conveyance to the lands of Balmyle, obtained

from him an absolute security over these lands for her third share of the debt constituted by the original bonds over the lands of Callie and Easter Butters Callie? In point of fact she did absolutely discharge the debt owing to her by her father, no doubt in anticipation of the term of payment—but still she did discharge it. She surrendered her security for her debt over the lands which had been originally burdened with it, and she accepted from her father a new obligation directly in her own favour, without mention of the liferent of her father and mother, and payable at the first term of Whitsunday or Martinmas after their death, the security, moreover, being granted over an entirely different estate.

"I think, therefore, that it must be held that this was not a mere change of investment, but a surrender and extinction of the interest which she had derived from the deceased Christian Constable; and as that took place before the Succession-Duties Act came into operation, no duty is chargeable, at all events as on succession from the deceased Christian Constable. And if I am right in this view, it follows that no claim for duty can be made under section 12 of the statute as on a succession under a disposition made by Christian Constable Nicoll Constable herself, the cases of *Lord Braybrooke* and of *Sibthorp* being, in my opinion, not applicable to the present case.

"But it is contended that if the right of Christian Constable Nicoll Constable under the transaction of 1852 can no longer be regarded as a succession from the deceased Christian Constable, it is a succession from James Nicoll Constable, her father. I did not, however, hear much argument in support of that view on behalf of the Crown, and I do not think that it can be successfully maintained. The new bond of 1852 was, in my opinion, a bond granted to Christian Constable Nicoll Constable by her father for a valuable consideration in money's worth. He obtained what was apparently an important object to him—not only the discharge of the debt originally owing by him, but a release of the lands of Callie and Easter Butters Callie, over which the original debt had been secured. That release enabled him to deal with these lands as his own, unfettered and unencumbered, and his granting to his daughter the new bond with security over the lands of Balmyle was therefore a highly onerous transaction.

"On the whole matter I am of opinion that the claim of the Crown for succession-duty cannot be maintained."

The Lord Advocate reclaimed.

Authorities—*Wilcox* v. *Smith*, 1857, 26 L.J., (Chan. App.) 596; *Attorney-General* v. *Lord Middleton*, 1858, 27 L.J. (Exch.) 229; *Attorney-General* v. *Sibthorp*, 1858, 28 L.J. (Exch.) 9; *Lord Braybrooke* v. *Attorney-General*, 1860, 9 Clark H.L. 150, 29 L.J. (Exch.) 283; *Earl of Zetland* v. *Lord Advocate*, Feb. 12, 1878, 3 L.R., App. Ca. (new series) 505, 5 R. (H.L.) 51.

At advising—

Lord President—In this case the Crown claims succession-duty on a certain sum of £3333, 6s. 8d. to which Miss Christian Constable, represented by her trustees in this Special Case, is said to have succeeded upon the death of an old lady of the same name, Miss Christian Constable; and the questions which are put to the Court are, whether this sum is a succession in the sense of the Succession-Duty Act of 1853? and assuming that question to be answered in the affirmative, we are then asked, who was in the sense of that Act the predecessor, and who was the successor, in respect of that succession?

The facts of the case are somewhat complicated, and require careful attention. There were two old ladies, Miss Barbara and Miss Christian Constable, who appear to have been sisters-in-law of Miss Christian Constable's father, or, in other words, sister of her mother, and they made a mutual settlement which is contained partly in a deed and partly in a codicil appended to that deed, the effect of which taken together was that they conveyed their whole joint estate to the survivor in liferent, and after the survivor to Mr James Nicoll and his spouse, their sister, in liferent, and in liferent to the survivor of these two spouses, and to their children *nominatim* in fee. There were three children of that marriage—two sons and one daughter—and the daughter is the lady with whose interest we are now dealing. Miss Barbara Constable died in 1846, and then Miss Christian Constable was interested in the joint estate in this way—she of course remained vested in the absolute property of her own share of that estate, and she was liferentrix of one-half of that estate which belonged to her deceased sister. Now, in these circumstances, and during her survivance, she made a certain investment of the funds belonging to her own and her sister's estate. In the first place, in 1846, very soon after her sister's death, she lent a sum of £10,000 to her brother-in-law Mr James Nicoll, for which he granted an heritable bond, but of that £10,000, £5000 was her own money and £5000 was the money of her deceased sister Barbara. Then in the same year, and very shortly afterwards, she purchased and obtained an assignation of a bond and disposition in security which had been granted by Mr James Nicoll to a person of the name of Euphemia Whitson, and so she became vested in that bond, the assignation being purchased with her own money. The two bonds in this way came to stand upon a somewhat different footing. Of course the bond which was assigned by the original creditor Euphemia Whitson was assigned directly to Miss Christian Constable herself, and she was the sole creditor in that bond by virtue of the assignation. But in the case of the other bond she took the bond payable to herself in liferent, and failing her to James Nicoll and his spouse in liferent, and in liferent to the survivor of them and to the children of their marriage in fee. In short, that bond was taken with the same destination as the joint estate of the two old ladies had been destined in the mutual settlement. In this state of matters Miss Christian Constable died in 1848, and then the bond which Miss Christian had obtained by assignation was taken up by the liferenters and fiars in the deed of settlement by means of a notarial instrument under the new forms of conveyancing. In short, that bond fell directly under the mutual disposition and settlement of the two old ladies, and came to the liferenters and fiars under that testamentary arrangement. The other bond did not require to be taken up in the same way, because it was conceived in favour of the liferenters and fiars as creditors in the bond after the death of Miss

Christian Constable herself; and so they were creditors in the bond *ex figura verborum*. Now, as regards the estate of Miss Barbara Constable, and as regards also a certain sum of £500 which was contained in Euphemia Whitson's bond, and which came from another relative of the parties, we have nothing to do here. The Inland Revenue have been satisfied in respect of the succession of Miss Barbara Constable, and also in respect of the succession to that £500, and the only question before us regards the succession to Miss Christian Constable, which consisted as we have seen, of £5000, being part of the £10,000 above mentioned, and of £5000, being the amount of the second sum above mentioned. Now, one-third of that £10,000 is the sum upon which succession-duty is claimed, viz., £3333, 6s. 8d., and that is the share of that money which belonged to Miss Christian Constable the younger in fee upon the death of Miss Christian Constable the elder in 1848. The succession therefore opened a considerable time before the Succession-Duty Act of 1853 was passed, but Miss Christian Constable was not entitled to the beneficial enjoyment of that succession until the death of both her father and mother; and the first question comes to be, whether in these circumstances this is a succession falling within the provisions of the second section of the Succession-Duty Act; and this question, I think, requires to be considered, in the first place, apart from a certain transaction which took place in 1852, still before the Succession-Duty Act was passed, and which is said to have had the effect of converting this from a succession into some other kind of interest in Miss Christian Constable. Now, putting out of view in the meantime this transaction of 1852, I confess I cannot entertain any doubt that as matters stood in 1848, if they had continued to stand in the same position down to the passing of the Succession-Duty Act, this interest of Miss Christian Constable in the sum of £3333, 6s. 8d. would have been a succession within the meaning of the second section of the statute. There are a number of different cases or alternatives presented in that second section. It contains dispositions of property among other things, and it contains also devolution by law of certain property, and under these two general heads there are a number of different cases or alternatives presented, in all of which the duty attaches. But taking the words which appear to me to apply to the particular case we are dealing with, and throwing aside all the other alternative words in the section, it reads, I think, thus—"Every past disposition of property by reason whereof any person shall become beneficially entitled to any property upon the death of any person dying after the time appointed for the commencement of this Act shall be deemed to have conferred on the person entitled by reason of such disposition a succession; and the term successor shall denote the person so entitled, and the term predecessor shall denote the person from whom the interest of the succession is or shall be derived." Now, I think we have everything in the facts of this case as I have stated them to fulfil the conditions of that section. There is a disposition in this case, being the mutual settlement of the two old ladies, and if necessary there is also a disposition or destination in the bond for £10,000, which is just as much a testamentary disposition as anything else, and by reason of that disposition—following the words of the statute—Miss Christian Constable became beneficially entitled to property upon the death of both her father and mother, both of whom died after the Succession-Duty Act was passed. Now, that being so, the effect is, in the language of the statute, to confer on the person entitled by reason of such disposition a succession. And therefore, apart from what took place in 1852, I should be of opinion that the case was altogether free from difficulty.

But then it is said that the proceeding in 1852 changed the state of matters altogether, and prevented the application of this clause of the statute when it came to be enacted. Now what was it that took place in 1852? The object of the transaction was this—Mr James Nicoll, the father of the lady with whose interest we are dealing, was anxious to pay off his two sons. It must be kept in mind that Mr Nicoll was in the peculiar position of being the debtor in the bonds which formed the succession in question, and he was not only debtor, but he was also liferenter of those same bonds in which he was debtor. Now, he was anxious to get rid of this anomalous state of things, at least to a certain extent, and he arranged with his two sons that they should surrender their interest in these bonds and receive in exchange for that a conveyance of certain lands in property. And this accordingly was carried into execution; and I do not suppose there can be the least doubt that, as far as the interest of these two sons was concerned, the succession was entirely put an end to, and the right which they had after that arrangement was carried through was no longer an interest in the testamentary estate of Miss Christian Constable—no longer a succession—but it was a right of absolute and immediate property, not in expectancy, not depending upon the death of any party, but a present right of property in land; and so the interest of the nature of succession which had formerly stood in them became absolutely extinct, and their case would fall within the 18th section of this statute, which provides for the case of the extinction or surrender of a right of this description before the Act comes into operation. But the position of the daughter—the lady whose interest we are now dealing with—was quite different under that arrangement of 1852. She was not paid off; she did not surrender a right and obtain something else in place of it. As far as she was concerned, there was nothing in practical effect beyond a mere change in the security which she held for her money. It is quite necessary in dealing with this matter to keep in view that the money—the £3333, 6s. 8d.—which Miss Christian Constable derived from her aunts was personal succession for all the purposes of this statute. That is expressly declared by the leading enactment of the statute, which provides that real property is not to include heritable bonds, and that money lent upon heritable securities in Scotland is for the purposes of the statute to be personal estate. Therefore what Miss Christian Constable succeeded to under the settlement of her aunts was a certain sum of money, and the circumstance of its being invested upon heritable security is a mere accident which has nothing to do with this question. What she succeeded to was a certain sum of money amounting to £3333, 6s. 8d. Now, the effect of the transaction of 1852, in so far as she was con-

cerned, was to leave her exactly in the same position. She still continued to have a right to £3333 by reason of the disposition of her aunt, although that money had by the arrangement of 1852 come to be invested upon a different security—a totally immaterial circumstance. Her interest was exactly of the same amount after the proceedings of 1852. It had come to her in the way already specified, by the testamentary arrangements of her aunt, and her beneficial enjoyment of it was postponed until the death of the party, who did not die until after the time appointed for the commencement of the Act of 1853. And therefore it appears to me that this transaction of 1852 does not alter the case in any important respect. I think the case still remains one under the 2d section of the statute, and that the succession which Miss Christian Constable derived from her aunts is a succession just as much after the proceeding of 1852 as it was before. It must be observed always in dealing with this statute that its language is not technical but popular. It is intended, as has been often observed, to apply to two different systems of jurisprudence—the Scotch and the English,—and therefore it deals in what may be called neutral language,—not technical language belonging to either system. Now, looking at the clause in that view, just observe what it is that is required in order to keep this £3333, 6s. 8d. in the condition of a succession. It is simply this, that it shall have come to the lady who receives it by reason of a disposition. It does not matter what the title to the money is, in what way it is invested, or by virtue of what deed it now stands vested in the person of the successor. It comes there by virtue of an infeftment; but the statute has nothing to do with that, because the statute inquires only whether it is not by reason of a disposition,—perfectly popular language; and it is impossible, I think, to hold that it does not come to her on the death of her father and mother by reason of the disposition which was made by her aunts.

I am therefore of opinion that this sum is a succession in the sense of the statute, that Miss Christian Constable is in respect of that successor, and that Miss Christian Constable the elder is the predecessor within the meaning of the clause of the statute.

Lord Deas—I think it is impossible to doubt that this statute has the unusual feature in our statutes of being substantially an *ex post facto* law, and certainly in that respect it is entitled to no favour. We must give effect to it, however, if its terms are sufficiently clear. I have very fully and carefully considered this question and the statutory enactments, and I have come quite separately to the conclusion which your Lordship has arrived at; and that being so, I think it quite unnecessary for me to repeat the same reasons for my judgment. But I entirely agree with that conclusion.

Lord Mure—I have come to the same conclusion. We are called upon to deal with a succession which, as I understand the case, came to this lady Miss Christian Constable under a disposition executed in 1838 by her two aunts, and by which the fee of the estates of these two ladies was conveyed to the children of James Nicoll, of whom Miss Christian Constable is one—the liferent of that estate being reserved to the survivor of the disponers—the survivor of these two ladies. By a codicil of 1839 an alteration was made, by which, for the reasons there stated, on the death of the longest liver of these two ladies the liferent of the fee of the whole estate was given to James Nicoll and his spouse, the father and the mother of the fiars. On the death of Miss Barbara in 1846 certain investments were made by the survivor Miss Christian Constable, and among others a sum of money, part of which is here in question, was invested on heritable security over an estate which belonged to James Nicoll; and the destination was taken to Christian Constable herself in liferent and to the children of James Nicoll in fee, the liferent of James Nicoll and his spouse being still retained under that bond in so far as related to that particular portion of money that was settled by the settlement of 1838. Now, in that state of matters, and putting aside the transactions of 1852, I entirely concur with your Lordship in holding—and I think the Lord Ordinary is of the same opinion—that the second section of the Succession-Duty Act of 1853 applied to the circumstances of the case. I think that if matters had remained in that state after the passing of the Act the position of this lady would have been beyond all question that of a person succeeding in terms of the 2d section of that Act of Parliament, the words of which your Lordship read, and which I think are distinctly applicable to that case, leaving out the intermediate words, which relate to devolutions and things we have nothing to do with here. The only difficulty that I have had in the case was as to whether the proceedings of 1852 were not such as to take the case out of that 2d section of the statute, in respect of the provisions of the 18th section of the statute, where certain exemptions are specified. The Lord Ordinary has held that the effect of the transaction in 1852, before the passing of the Act, was to extinguish the interest of Miss Christian Constable in the succession, and he states the reasons why, looking to the nature of the bond that at that time was held over the estate of James Nicoll, and the fact that that bond was transferred over to a different estate, so far as the interest of Miss Christian Constable was concerned, and another bond executed over that different estate, he thought there had been an extinction of her interest in terms of the 18th section of the statute—as I understand his Lordship in the words of the 18th section—"And no person shall be charged with duty under this Act in respect of any interest surrendered by him or extinguished before the time appointed for the commencement of this Act." Now, I agree with the Lord Ordinary in thinking that this question is attended with some nicety, and at first I was under the impression that his Lordship's reasoning on that part of the case was correct, but further consideration has led me to the conclusion that the proceedings in 1852 did not take the case out of the 2d section of the statute, and are not covered by the words that I have read in the 18th section; and what has led me to that conclusion is this—that I do not understand that by what took place in 1852 the interest of Miss Christian Constable was extinguished or surrendered. What she took by the settlement of 1838 was not any share in that heritable bond, which was not in existence at the date of that settlement. It was a mere investment of her aunt's. What she took,

and what she held, and what she got on the death of her father and mother, was the very same interest that was given to her by the disposition of 1838. What she held all along was an interest in that succession. Well, her interest in that succession was not extinguished by the change of the security made in 1852. She discharged the original bond for the convenience of her parents, but her interest was never extinguished in the succession. On the contrary, in order to keep up and maintain that interest in the succession they granted a bond over a different estate, in which her interest is there secured. That is the view that I take of the proceedings in 1852. It is not a surrender of the interest; it is a surrender of a share of a bond under which the money was secured to her, but the interest remains still, and the interest was provided and re-secured by the second security over the second estate. On that broad ground I have come to the conclusion that the Lord Ordinary's reasoning, though very strongly put with reference to this surrender of the interest, is not strictly speaking sound, and that the views which your Lordship has explained on that point are those by which the case ought to be regulated.

Lord Shand—The Lord Ordinary indicates an opinion that if Miss Constable's right in the succession in question had remained down to the passing of the Act of 1853 on the original securities which had been granted for her share of her aunt's succession, the fund in question would have been a succession within the meaning of section 2 of the statute; and I understand that your Lordships are clearly of that opinion. I have no difficulty in holding that to be a sound view, for I think with your Lordship, and very much on the ground your Lordship has explained, that section 2 of this statute, by its language as well as in its spirit, covers a case of that kind. The words which directly include the case in that view of it are these, that every past disposition of property by reason of which any person has become beneficially entitled to any property upon the death of a person dying after the time appointed for the commencement of this Act shall constitute a succession. I say no more on that subject, except that in coming to this conclusion we are following two authoritative decisions which have already been pronounced in England on the same subject—I mean the decisions in the case of *Wilcox* v. *Smith* and the *Attorney-General* v. *Middleton*, which were cited in the course of the discussion. I find, particularly, that in the case of the *Attorney-General* v. *Middleton* there is a very exhaustive and able opinion by Lord-Justice Bramwell, in which the whole subject is very carefully discussed, with an analysis of the terms of the 2d section of the statute; and I think his Lordship puts in a single sentence the true meaning of the section in that part of it which applies to this case, when after quoting certain of the words of the statute he says, at p. 234 of the Law Journal report—"Therefore the whole meaning of the thing is, every past disposition of property by reason whereof any person has become beneficially entitled before the passing of this Act to some property of which he will get the benefit upon the death of somebody," constitutes a succession under the statute.

But then the question, and perhaps the only question, of difficulty in the case is that on which we now differ from the Lord Ordinary. It is said that although there was a succession in Miss Constable to her aunt under the original deeds, the statute no longer applies, because that succession was surrendered, and also a succession is no longer taken by reason of a past disposition of property by a third party, and the case is therefore within the 18th section of the statute. Now, on that question I agree with what has fallen from your Lordships, that this is not properly a case of surrender on the part of the legatee. There is a striking contrast between what took place in the case of the two brothers of this lady and of the lady herself in 1852. The two brothers did surrender their rights, or, I should rather say, received payment of the amount that was due to them upon a transaction which wiped out the succession as at that date. But this lady received nothing. She did not come into possession of the succession to which she had acquired right. All that occurred as between her and her father and mother at that time was, that without getting into possession of her succession, she agreed that for the convenience of her parents the money which was still to remain a fund to be paid after their death should be placed upon another security and held under other deeds. I agree with your Lordships in thinking that this was not a surrender on the part of this lady of her right, and I think the succession still continued to be held by reason of the aunt's disposition or deed of settlement. The expression in the statute "by reason whereof" is comprehensive. It is not "by virtue whereof." If the words had been "by virtue whereof," it might have been maintained fairly enough that the property was now held by virtue of the new deeds, and not by virtue of the old deed, the operation of which no longer affected the succession. It is still a fund which she takes, under the security on which it is held, by reason of the original settlement of the aunt.

But I think it right to say, that even supposing the words a "past disposition of property by reason whereof" this lady became entitled to the property would not properly apply to the original settlement of 1838 and 1839, I should still hold that succession-duty was payable, and that under section 12 of the statute, which in my opinion would cover the case in that alternative view. It may be in your Lordships' remembrance that in the argument on this case, which took place last session, the Lord Advocate (now Lord Watson), for the Crown, put his argument entirely upon section 12 of the statute. I do not think that was necessary for the case, because, for the reason I have now explained, I think the case covered by section 2. But if section 2 did not cover the case, I am clearly of opinion that section 12 would; for section 12 provides—[*reads it*]. If it be said that this property is no longer held by reason of the original disposition, then I say it is a succession taken under a disposition made by this lady herself. It is true she did not grant the bond under which the succession was taken, for she is the grantee or creditor in that deed; but she was truly the maker of that deed in this way, that having a security over one property, she consents to take, and does take, a security over another. It is her act the taking of the new security, which could only be done with her authority and con-

sent, and she takes under that deed just in the same way as a person lending his money may take the destination as he pleases, it may be, to himself, and to others failing himself. He is thereby practically granting a disposition of that estate to those who are to succeed; it is his disposition in a question with those who come after him, and it is practically his disposition even with reference to himself. As the succession in this case is therefore, in my opinion, in any view, a succession to property within the meaning of section 12, I should certainly hold that if the case did not fall under section 2 the succession-duty claimed is nevertheless due. On these grounds I agree with your Lordships in thinking that we should alter the judgment of the Lord Ordinary and give effect to the claim of the Crown.

The Court recalled the Lord Ordinary's interlocutor, and in answer to the questions put to them, found (1) that the sum of £3333, 6s. 8d. was a succession in the sense of the Succession-Duty Act 1853; (2) that Miss Christian Constable was the predecessor, and (3) Miss Christian Constable Nicoll Constable the successor, within the meaning of the said Act; and decerned against the second parties accordingly.

Counsel for Inland Revenue—Lord Advocate (Watson) — Solicitor-General (Macdonald) — Rutherfurd. Agent—D. Crole, Solicitor of Inland Revenue.

Counsel for Miss Constable's Trustees—Balfour —Macfarlane. Agents—W. & J. Cook, W.S.

Friday, June 4.

FIRST DIVISION.

[Lord Adam, Ordinary.

MACKENZIE *v.* BRITISH LINEN COMPANY.

(*Ante*, p. 241, 20th Dec. 1879.)

Bill—Forgery—Adoption.

Facts and circumstances which *held* (*rev.* Lord Adam, Ordinary, and *diss.* Lord Shand) to amount to adoption of a bill of exchange by a person whose signature had been forged as drawer and endorser thereon.

Opinion (*per* Lord Deas) that a person in knowledge that his signature to a bill had been forged was both morally and legally bound to inform the bank of the fact.

Opinion (*per* Lord Shand) that the duty of disclosure was in each case a question of circumstances; and that something active was necessary to constitute adoption over and above mere silence, however obstinate.

In February 1879 John Fraser, grocer, Greig Street, Inverness, discounted with the British Linen Company's Bank at Inverness a bill for £76, at two months' date, which bore to be signed by himself as acceptor, and by Duncan Mackenzie, contractor, Abriachan Wood, and John Macdonald, crofter, Ballintore, as drawers and endorsers. The bill fell due on 10th April, and on the 12th the bank's agent wrote to each of the drawers and endorsers that such a bill was lying in his hands under protest for non-payment, and desiring them to order it to be retired immediately. No answer was received from either of them. On the 14th Fraser called at the bank with a blank bill bearing to be signed by the same parties as before, and requested the agent to renew the former bill, and on his refusal to do so for the full amount Fraser paid £6 to account in cash, and the bill was filled up for £70, at three months' date; the former bill was given over to Fraser. On 14th July, three days before this bill fell due, the agent wrote to the drawers and endorsers—"Your bill on John Fraser p. £70 is due on 17th July, and lies at the office for payment." On 18th July, the bill not having been honoured on the 17th, he wrote to each of them —"Your bill on John Fraser, 14th April, 3 m./d., for £70, is lying in my hands under protest for non-payment. Be so good as to order it to be retired immediately." No answer having been received, and the bank agent having put the matter in his law-agent's hands, Mackenzie by his law-agent intimated that he would not pay the bill because the signatures bearing to be his were forgeries. Mackenzie was accordingly charged by the bank for payment of the £70, with interest. He brought a suspension, and averred that he "never subscribed or adhibited his name to the said bill either as a drawer or endorser thereof, and never authorised any person or persons to do so on his behalf." He pleaded—"(1) The signatures upon the bill charged on, bearing to be the complainer's, never having been written by him, or with his authority or knowledge, and the respondents' averments of adoption being unfounded in fact and insufficient in law, the complainer is entitled to have the charge suspended."

The bank averred that at 14th April, the date of the renewal of the bill, "the complainer knew that the said bill had been renewed in whole or in part by means of the said blank acceptance." They also stated—"The said bill was drawn and endorsed by the complainer, or with his knowledge and authority, and the respondents believe and aver that the complainer was aware that the said bill, having his name as drawer and endorser thereon, was presented to the bank, and that the bank discounted it in reliance thereon. He never intimated to the bank that the signature of his name to the first bill was a forgery, nor did he so intimate to the bank in regard to the second bill until a fortnight after he had received notice from the bank of the bill being due. If he did not draw and endorse the bills himself, he misled the bank into the belief that the signature thereon was his genuine signature, and he adopted them as his, and assumed the responsibility attaching to drawing and endorsing them." They pleaded—"(1) The said bill having been drawn and endorsed by the complainer, or with his knowledge and authority, there are no sufficient grounds for suspending the charge thereon. (2) The complainer having adopted said bills, is barred from pleading the forgery thereof."

Proof was led, the material portions of which are set forth in the Lord President's opinion; and on February 3, 1880, the Lord Ordinary (ADAM) suspended the charge complained of, and whole grounds and warrants thereof, and decerned. His Lordship added this note :—