thinking that the provisions in sec. 83 that there must be equality of rates when the goods are conveyed "only over the same portion of the line of railway" excludes the respondent from any right of action under that statute.

LORD SHAND—I think that both the Sheriff-Substitute and the Sheriff have by their judgments not only omitted to draw any distinction between the two statutes in question, but seem to have concurred in sending the case to inquiry under both Acts. I am of opinion that under neither Act will any action lie against the company on the questions raised in this record. If under the Act of 1845 a relevant case had been stated, it could undoubtedly have been dealt with in the Sheriff Court, but I am clearly of opinion that by the language of that Act the jurisdiction of the Court is excluded in a case like the present. The words of the Act of 1845 are—[*His Lordship here read sec.* 83 *of Act* 1845 *above quoted*]. Now, the true meaning of these words undoubtedly is, that the goods must be carried on precisely the same journey from the same place and to the same place, and if the distance is at all greater, then the provisions of this section do not apply. The word "only" leaves the company quite free, I think, to reduce the rates per ton, if they feel so disposed, whenever the distance is greater, and under the Act of 1845 it is only when the distance is precisely the same that no advantage is to be given to one trader over another. Now, in the present case the works of the Eglinton Iron Coy. were four miles further from the starting point than those of the respondent, and in that state of the facts I cannot see how the provisions of sec. 83 of the Act of 1845 can have any application.

Then as to the Act of 1854. In it the Legislature give wider enactments as to what is meant by undue preference, but the nature of the remedy is also very precisely defined. It is limited in its character, and consists of staying alleged contravention in a summary method by way of interdict and penalties, which are fully detailed in its different sections.

The 6th section, which is of importance here, provides that "no proceeding shall be taken for any violation or contravention of the above enactments except in the manner herein provided, but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law." Now, while this section authorises proceedings by way of interdict, it does not, as far as I can see, allow of or provide for any action for overpayments, and any doubt upon this point is removed by what follows in the latter part of the section. I think therefore that it comes to this, that by the Act of 1845 certain remedies were provided for cases falling under the conditions therein specified, and these remedies remain still in force, and that certain other remedies were provided by this statute for the contravention of any of the provisions detailed in it, but that no provision was made for a case such as that now presented to us, and therefore that neither under the one statute nor the other has the respondent any remedy.

With regard to the case of *Evershed* referred to by your Lordship, I think it sufficient for its disposal to say that I hold that it was decided under the Act of 1845.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and assoilzied the defenders.

Counsel for Appellants—Lord Advocate (Balfour, Q.C.) — Mackintosh — Guthrie. Agents — John Clerk Brodie & Sons, W.S.

Counsel for Respondent — Trayner — Lang. Agent—Thomas Carmichael, S.S.C.

Friday, November 30.

FIRST DIVISION.

[Exchequer Cause, Lord Fraser, Ordinary.

LORD ADVOCATE *v.* EARL OF FIFE.

Revenue — Succession—Succession Duty—Policies of Insurance——Consideration in Money or Money's Worth—Succession Duty Act 1853 (16 *and* 17 *Vict. c.* 51).

The heir-presumptive to entailed estates who would have been entitled on succeeding to the estates to acquire them in fee-simple, entered into an agreement with the heir in possession, whereby the estates were disentailed, and the debts of the heir in possession, which had been secured by policies of insurance on his life, were charged upon the fee-simple, the policies being conveyed to trustees. By a subsequent agreement the heir-presumptive took over the estates under burden of the debts of the heir in possession, of payment of an annuity to him, and of the upkeep of the mansion-houses. On the other hand, he received, besides the conveyance to the estates, an assignation to the insurance policies over the life of the heir in possession, without any obligation to keep them in force, which, however, he elected to do. The heir in possession having died, the Crown claimed succession duty on the amount recovered under the policies, on the ground that the sum contained in them formed a succession within the meaning of the Succession Duty Act 1854. *Held* that the transaction must be taken as a whole, and that the heir-presumptive had given valuable consideration for the policies in consenting to the disentail and allowing the debt to be charged on the estate, and *therefore* that no succession duty was exigible.

This was an action in which the Crown sought to recover the sum of £4750 from the Earl of Fife in name of succession duty, at one per cent. on £475,000. The claim was made in the following circumstances:—The late Earl (the father of the defender), who died in 1879, was heir of entail in possession of large estates in the counties of Aberdeen and Banff, but he had incurred a very considerable amount of personal debt, and a variety of arrangements were entered into at different times by which that debt might be liquidated, while the interests of all parties were preserved.

The first of these arrangements was a trust-deed executed by the late Earl in favour of certain trustees named, and the object of the trust was to manage the estates and pay off his debts. The trustees under it continued to manage the estate from 1857 to 1873, in which latter year a new agreement was entered into, the parties to which were the late Earl, his trustees under the trust-deed, and the defender (then Viscount Macduff). The scheme of the new arrangement was to wind up the first trust, to consolidate the debts of the late Earl and the defender, which amounted to £465,000 in the case of the late Earl, and £35,000 in the case of the defender, and to charge the whole upon the fee-simple of the estate. The manner in which this scheme was to be carried out was that the defender, on attaining twenty-five years, was to concur with his father in obtaining a disentail of all the entailed lands, which, having been born after the date of entail (which was subsequent to the Rutherfurd Act), he was entitled to do, and upon this being done to dispone them to the Earl and his trustees in trust, subject to existing incumbrances, and the Earl on his part was to dispone to the trustees certain policies of insurance on his life. The main purposes of the trust were to raise money upon the fee-simple estate, to pay off all the debts incurred both by the Earl and the defender, to pay the premiums upon the policies over the Earl's life out of the rents, and to pay over to the Earl any residue of the rents—upon the Earl's death the money received under the policies was to be applied in paying the debts and winding up the trust; lastly, the trustees were to convey the unsold estates to such persons as the Earl and defender should appoint, and failing such appointment, to entail them on the defender and the heirs-male of his body.

In 1874 a supplementary agreement was made, by which the debt of the Earl to be provided for was to be £475,000, and that of the defender £45,000.

In 1875 a disposition and declaration of trust was executed setting forth that the disentail had been effected, and that the Earl now held the estates in fee-simple, and that a further conveyance to trustees was now necessary. Therefore the Earl and defender assigned the policies of assurance on the lives of each upon trust—1st, for the payment of the expense of the trust; 2d, that the trustees should raise £520,000 for payment of debts owing by the Earl and the defender; 3dly, to pay the interest on debts charged on the fee of the estates and the premiums of insurance; 4thly, to pay the yearly balance to the Earl during his life; . . . 7thly, "upon trust that the trustees shall, after the death of me the said Earl, receive and realise the several sums of money which shall thereupon become payable under and in respect of the policies of assurance on my life hereby assigned, and of any others effected under the trusts hereof, and all other sums of money due to me the said Earl, or to which I may be entitled, and which form part of the trust-estate, and apply the same in payment and satisfaction of all sums of money borrowed, for the purpose of paying my debts under the trusts hereof, and in defraying and discharging all claims, liabilities, and expenses of every description incurred by them, or to which they may be liable in or about the trust hereby created, or in winding up the same, and in obtaining a full and sufficient discharge of all their actings and intromissions, and thereafter to pay over the balance or surplus, if any, to me the said Viscount, whom failing to the heirs, executors, or assigns of me the said Earl of Fife." Lastly, on the Earl's death to convey the estates not sold to such persons as should be appointed by the Earl and his son; and failing such appointment, to execute a deed of entail in favour of the defender and the other parties mentioned. But this direction was qualified by a clause in these terms:—"And such disposition and deed of entail shall contain an express provision and declaration that I the said Viscount Macduff may, by myself alone, and without the consent or concurrence of any other person, revoke and cancel, or alter and innovate, the same at any time at my sole will and pleasure."

In 1876 the arrangement took place upon which the present claim of the Crown was based. In that year an agreement was entered into between the Earl, his trustees, and the defender, which proceeded on the narrative of, *inter alia*, the disentail and the deed of 1875, and that the trustees under the powers conferred upon them had borrowed, on the security of the fee-simple of the estates, a sum of £520,000, and applied it to pay the debts of the defender and the Earl, and had obtained a further advance of £40,534, and that it was for the advantage of the Earl and the defender that the trust be brought to a close. It was agreed that the defender should take over the whole estates burdened with the whole debts both of the trustees and his father, and that he should have disponed to him by the Earl and his trustees the policies of insurance both on the Earl's life and on his own, that he should guarantee the Earl an annuity of £10,000 a-year for life, and that he should be at the expense of maintaining the mansion-house, gardens, and policies in good repair. The defender was not taken bound to keep up the policies upon the Earl's life. The amount of debt with which the lands were at this time burdened was about £577,070. The net rental of the estates at this date was £52,746, and the annual payments which the defender required to make in order to fulfil his obligations to his father under the deed, and pay the interest on the debts, and keep up the policies on his father's life amounted to £59,353, of which sum the premiums on the policies on his father's life, if he should keep them up, came to £15,353. There was thus a deficiency of £6607 from the annual return to meet the annual outgoing. The defender paid the premiums, and kept up the policies until his father's death in 1879, when the £475,000 contained in them fell in.

In 1882 this action was brought for, as already stated, the amount of one per cent. succession duty upon that sum of £475,000, on the grounds that "the assignation of the policies to the defender was a disposition of property by which the defender became beneficially entitled to the sum in the policies, and conferred on him a succession within the meaning of section 2 of the Succession Duty Act 1853 (16 and 17 Vict. c. 51)." Section 2 of the Act provides—"That every 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, ... and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person, ... shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession.' " Section 17 provides—"No policy of insurance on the life of any person shall create the relation of predecessor and successor between the assurers and insured, or between the insurers and any assignee of the assured, and no bond or contract made by any person *bona fide* for valuable consideration in money or money's worth, 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; but any disposition or devolution of the moneys payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession."

The defender denied that the conveyance in question was in any sense gratuitous, and alleged that he had given money or money's worth for it, both in consenting to the disentail and in the burdening the estates with his father's very large personal debts. He also alleged that his father was materially benefited by the arrangement, as he was freed of his debts, had the mansion-house upheld, and was secured in an annuity of £10,000 a year for life, whereas his previous income was under £5000.

The Crown pleaded—"The defender having by the assignation of the policies of assurance on his father's life become beneficially entitled to the proceeds thereof on his father's death, and having now realised the same, is bound to pay succession duty thereon at the rate of one per cent., with interest and expenses as concluded for."

The defender pleaded—"(2)The relation of predecessor and successor between the late Earl of Fife and the defender not having been constituted within the meaning of the Succession Duty Act in reference to the said policies, the defender is entitled to absolvitor. (3) The defender having acquired a complete title to the policies during the late Earl's lifetime by a *bona fide* onerous transaction, no succession within the meaning of the said Act has by the assignation been conferred on the defender. (4) The agreements and assignation referred to being onerous *inter vivos* deeds, and having been acted on by the whole parties, the defender is entitled to absolvitor."

On 6th November 1883 the Lord Ordinary (FRASER) pronounced this interlocutor:—"Finds that by assignation, dated 30th September 1876, granted by the late Earl of Fife and the defender, with the consent of certain trustees therein mentioned, the granters assigned to the defender the policies of assurance then subsisting on the Earl's life, with all bonuses declared or accrued thereon: Finds that the said Earl died on 7th August 1879, and that the defender recovered, under the policies of assurance so assigned £475,000: Finds that the said assignation was a contract made *bona fide* for valuable consideration in money or money's worth, given to the said Earl by the defender, and therefore is not a succession within the meaning of the Succession Duty Act 1853: Therefore assoilzies the defender from the conclusions of the action, and decerns," &c.

"*Opinion.*—The Crown sues for payment of the sum of £4750 with interest, as being succession duty payable by the defender in respect of the amount recovered under policies of assurance to the extent of £475,000 on the life of the defender's father the late Earl of Fife, which policies were assigned to the defender on 30th September 1876. This demand is resisted by the defender upon the ground that the assignation of the policies did not confer upon him a succession within the meaning of the Succession Duty Act 1853.

"The 2d section of that Act provides that every '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 . . . . and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person, ... shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession."'

"To this enactment there are exceptions, as stated in the 17th section of the statute, thus:—'No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured, and no bond or contract made by any person *bona fide* for valuable consideration in money or money's worth, for the payment of money or money's worth, after the death of any 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.' Sir George Jessel, Master of the Rolls, in the case of *Fryer* v. *Morland*, 3d August 1876, 3 Ch. Div. 675, stated that in his opinion this 17th section was totally unnecessary, seeing that a contract of assurance as between the insurer and assured was not a 'disposition of property' nor a 'devolution by law.' 'It does not,' said the learned Judge, 'appear to me to be within the words of the first part of the 2d section any more than it is within the second part of the 2d section. Why was it excepted? Well, I do not know. I find it quite impossible to answer the question. It probably was excepted to quiet the fears of persons interested in insurance companies *ex cautela*. But if I am right, it was not required, as not being within either branch of the 2d section.' As to the second part of the 17th section, declaring that no bond or contract made for money or money's worth should create the relation of predecessor and successor, he adds—'The same observation applies to that. A bond or contract for the payment of money is not a disposition of property.'

"This 17th section has not hitherto been made the subject of judicial construction in Scotland, except in *Lord Advocate* v. *Sidgwick*, 4 R. 815, as to whether marriage is a valuable consideration in money or money's worth. It was undoubtedly intended to be an exception to the 2d section of the Act, and it renders the duty of the Court in such a case as the present all the easier that it is there. In the case of *Floyer* v. *Bankes*, 33 L.J. Chan. 1, Lord Chancellor Westbury had the subject of the 17th section under consideration. The essential requisites,' said his Lordship, 'of

a contract which is not to create a succession are clearly defined by the 17th section. First, it must be a contract by one person to pay money or money's worth to another; secondly, it must be made *bona fide* for a valuable consideration existing in money or money's worth—the contract creating personal liability between the contracting parties.

"Now then comes the question, whether the defender obtained the assignation of the policies of insurance from his father under a contract 'made *bona fide* for valuable consideration in money or money's worth,' and this question can only be answered after a reference to various deeds which were executed by the late Earl of Fife and the defender.

"(1) The late Earl was heir of entail in possession of large estates, and the defender, his only son, was his presumptive heir. Without the defender's consent these estates could not be disentailed. The Earl had executed a trust-deed in favour of William James Taylor and William Leslie, for the purpose, amongst others, of managing his estates and paying off debts. Under this trust the trustees continued in the management from 1857 down to 1873. In the latter year an agreement was come to between the late Earl and the defender and the late Earl's trustees. This agreement narrated that the Earl was indebted to various parties in £465,000, and the defender in £35,000 at the least; that it was proper that the trust executed by the late Earl should be wound up and a new trust constituted, and the debts owing by the Earl and the defender consolidated and charged upon the fee-simple of the estates. It was therefore agreed to enter into arrangements, which were described as 'equitable and advantageous' to both the Earl and his son. These arrangements were—First, that the Earl and the defender should, on the latter attaining the age of twenty-five years, obtain a disentail of all the entailed lands, and upon this being done, to dispone them to the Earl and Mr Taylor and Mr Leslie in trust, subject to existing incumbrances; secondly, that the Earl should dispone to the trustees the policies of insurance on his life. The purposes of the trust were:—(2) That the trustees should raise, upon the security of the fee simple of the estates, such a sum of money as should be necessary for paying off the debts of the Earl not exceeding £465,000, and the debts owing by the defender not exceeding £35,000; (3) that the trustees should, out of the rents, pay the interest on debts charged on the fee of the estates, and the premiums of insurance upon the Earl's life; (4) raise, if required by the Earl, further sums of money upon the security of his life interest in the estates, as might be required to pay off any debts which he might afterwards incur, and any future policies of insurance that might be effected; (5) pay over to the Earl, if these purposes are satisfied, the residue of the rents of the estate; (6) power is reserved to charge the estate with a jointure in favour of the Earl's widow and provisions for his children; (7) upon the death of the Earl to apply the moneys received under the policies of insurance in payment of debts and winding-up the trust. Lastly, to convey the unsold estates held by the trustees for behoof of such persons as the Earl and the defender should appoint, by deed under their hands, and failing such appointment, to execute an entail of the lands in favour of the defender and the heirs-male of his body.

"(2) A supplementary agreement was entered into between the Earl, the defender, and the Earl's trustees in November 1874, from which it appears that the debt of the Earl had increased to £475,000, and the debts of the defender to £45,000.

"(3) In March 1875 a deed called a 'disposition and declaration of trust' was executed by the Earl and the defender, which set forth that the father and the son had executed six several instruments of disentail in terms of the first agreement, and that in consequence of these deeds of disentail the Earl then held the lands and estates in fee-simple, and that it was now necessary, in pursuance of the agreement, to grant a further conveyance to the trustees; therefore the Earl and the defender assigned the policies of assurance on the lives of each, upon trust—1st, that the trustees should raise £520,000 for payment of debts owing by the Earl and the defender; 3dly, to pay the interest on debts charged on the fee of the estates, and the premiums of insurance; 4thly, to pay the yearly balance to the Earl during his life; 7thly, 'upon trust that the trustees shall, after the death of me the said Earl, receive and realise the several sums of money which shall thereupon become payable under and in respect of the policies of assurance on my life hereby assigned, and of any others effected under the trusts hereof, and all other sums of money due to me the said Earl, or to which I may be entitled, and which form part of the trust-estate, and apply the same in payment and satisfaction of all sums of money borrowed, for the purpose of paying my debts under the trusts hereof, and in defraying and discharging all claims, liabilities, and expenses of every description incurred by them, or to which they may be liable in or about the trust hereby created, or in winding up the same, and in obtaining a full and sufficient discharge of all their actings and intromissions, and thereafter to pay over the balance or surplus, if any, to me the said Viscount, whom failing to the heirs, executors, or assigns of me the said Earl of Fife.' Lastly, on the Earl's death to convey the estates not sold to such persons as should be appointed by the Earl and his son, and failing such appointment, to execute a deed of entail in favour of the defender and the other parties mentioned. But this direction was qualified by a clause in these terms:—'And such disposition and deed of entail shall contain an express provision and declaration that I the said Viscount Macduff may, by myself alone, and without the consent or concurrence of any other person, revoke and cancel, or alter and innovate, the same at any time at my sole will and pleasure.' The defender had the right under the old entail, by himself alone, upon succeeding to the estate, to disentail it; and this right was, by the clause in question, preserved to him with reference to the new entail which was to be made. Under the Rutherfurd Act an heir under an entail made after 1st August 1848 could disentail if born after the date of the entail and of full age, and if born before the date of entail (which was the case in hand), with consent of the heir next in succession, providing that the consenting heir be capax, born after the date of entail, and twenty-one years old. It was to get rid of these restrictions upon the power of an heir of entail born before the date of the entail, that the clause

in question was introduced into the agreement, and which assimilates the case of an heir under a new entail born after 1st August 1848 to an heir of entail under an old entail born after that date, and who is twenty-one years of age.

"(4) The trustees proceeded to act under these trusts, and the effect of the arrangement made was (so far as regards the Earl) to pay to him the whole balance of the rents, after providing for the interest of the debts of himself and his son. The latter obtained no further benefit from the deed than the provision made for the payment of his own debts by means of money borrowed on the disentailed estates, and the further important provision made for keeping up the policies of assurance, which was the source to which the parties looked for enabling the defender to obtain an unencumbered succession. It is very clear that this must have operated strongly in the mind of the defender when he consented to disentail the estates and to allow upwards of half a million of debt to form an incumbrance upon them.

"(5) So standing matters, a new agreement was come to in September 1876 between the Earl, the defender, and the trustees, which it is said created a new departure altogether. Under the former deeds the policies were kept up, and the proceeds were to be applied by the trustees after the Earl's death in paying off debt. That was the condition of the bargain by which these debts could be made burdens on the estate. It is maintained, however, on the part of the Crown, that in 1876 the whole position of the parties was altered by an agreement which, while it conveyed over to the defender the policies of assurance, without the intervention of a trust, did so in such a manner as to make that conveyance a 'succession' within the meaning of the Succession Duty Act.

"This deed proceeds upon the narrative of the disentail and of the supplementary disposition and conveyance in favour of the trustees of the estates and of the policies of assurance, and of the fact that the trustees under the powers conferred upon them had borrowed upon the security of the fee-simple of the estates £520,000, and applied that sum to the payment of debts owing by the Earl and his son, and they had obtained further advances from the City of Glasgow Bank to the amount of £40,534, 17s. 10d.; that it was for the benefit and the advantage of the Earl and his son that the trust should be brought to a close; therefore the parties contracted and agreed,—

"1st, That the Earl and the trustees should dispone to the defender (1) the lands and estates held in trust, (2) the policies of assurance on the lives of the Earl and his son.

"2d, That the defender should execute in favour of his father a bond of annuity for £10,000, with security over the estates, but postponed to the existing incumbrances thereon, and to a cash-account bond for £50,000.

"3d, That the Earl should enjoy the right to occupy the residences of Duff House, Innes House, and Mar Lodge, with their contents, and the gardens and policies—the defender undertaking to keep up and maintain in good order and repair the said residences, gardens, and policies.

"4th, The defender 'undertakes and hereby binds and obliges himself and his heirs and executors to pay, and so free and relieve the first and third parties, or either of them, of the whole annuities, debts, claims, demands, and obligations of every kind exigible from or due by the first party or the third parties as trustees foresaid, as well those secured upon the estates as those standing upon personal obligation, and on payment to procure the said parties formally discharged thereof.'

"There was here a contract by which very onerous obligations were undertaken by the defender. These are shown by a joint minute of admissions lodged by the parties. The fourth head of the agreement stipulates that the defender shall pay the whole annuities, debts, payments, cliams, and demands of every kind. This personal liability was here for the first time undertaken by him. The joint minute, taken along with the statements in the deeds, enables one to ascertain the amount of the debt for which the defender became responsible; and also it enables one to ascertain the amount of the annual payments he had to make. Take first the amount of the debts without reference to the annual payments.

"1st, Debts, as set forth in the supplementary agreement of November 1874, due by the Earl, . . . £475,000

Note.—This is included in the bonds to the Scottish Widows' Fund for £520,000, mentioned in the minute.

"2d, Personal debts of the Earl and his trustees, as stated in the joint-minute as at 1876, when the agreement of that year was entered into, . . . 51,000

"3d, Bonds of annuity to several annuitants, payable during the Earl's lifetime, amounting annually to £5107, which at ten years' purchase is . 51,070

£577,070

Such was the amount of debt that required to be cleared off, and on account of which the defender obtained the conveyance to the estates and to the policies of assurance.

"Now, to take the annual payments which the defender was bound to make in order to fulfil his obligation. They are as follows, as set forth in the joint minute:—

"(1) Annual interest on Scottish Widows' Fund bonds for £484,000 . £20,570

"(2) Annual interest on bonds for improvement expenditure, . . 1,700

"(3) Annuities payable during the Earl's life, . . . £ 5,107

"(4) Annuity to the Earl, . 10,000

15,107

"(5) Interest on £51,000 of personal debts of the Earl and his trustees as at 1876, ... 2,550

"(6) Maintenance of the three mansions and policies of the Earl, . . 3,250

£43,177

"(7) Annual premiums of insurance on the Earl's life, ... 15,128

"(8) Premiums of insurance on the defender's life, ... 1,048

£59,353

"The amount of the nett rental of the estates acquired by the defender in consequence of the conveyance to him, is, per minute, ... 52,746

Deficiency, . £6,607

There was thus a deficiency in the annual return from the property conveyed to meet the annual outgoings, and if it had not been the circumstance that the defender's father died about three years after the agreement of 1876 was entered into, the transaction would have been unfortunate, in a pecuniary sense, for him. In these circumstances it requires some little ingenuity on the part of the Crown to make out that this was a gratuitous conveyance on the part of the late Earl of Fife to his son the defender. It is contended that the agreements of 1873, 1874, and 1875 must be thrown out of view altogether, and that of 1876 alone looked at. As therefore in the year 1876 the Earl of Fife, in consequence of the defender consenting to the disentail of the estates, became fee-simple proprietor, the conveyance of the policies to his son was, it is contended, a gratuitous deed. No consideration for consenting to the disentail on the part of the son can, it is said, be considered. That was a former bargain, all of which was accomplished and at an end. The case must be dealt with as standing alone on the agreement of 1876, and as if the Earl of Fife had never been hampered by entails. All this is very unreasonable and very unsound. The whole deeds must be taken together. It was one entire scheme from the beginning, whereby the father and the son agreed to certain operations for the purpose mainly of clearing off the father's debts. There was first one trust, then a second trust with larger powers, and then the trust was dispensed with, and a more economical administration adopted by handing over the whole property to the defender with the burden of all the father's debts and the securing of an annuity to the latter.

"But it is further said that the conveyance was gratuitous, because there must be deducted from the annual payments which the defender made the sum of £15,108, being the annual premiums of insurance on the Earl's life, in which case the nett rental received by the defender would be greater than the payments he had to make under the agreement. And the ground upon which this proposition is rested is, that the defender is not taken bound to pay the premiums on the policies of assurance although he gets an assignation to them. The reason for not taking him expressly bound to keep up the policies, but leaving it optional to himself, is obvious enough. The father left him to exercise his own judgment as to continuing the heavy payment of £15,000. The father was at the time of the agreement only sixty-two years of age, and the nett rental being insufficient to make this payment of £15,000, along with the other payments already specified, it was for the defender to consider whether he would risk the venture of continuing to keep up the policies or to sell them. The father had no interest in this question if he got his £10,000 a year. But although it was left optional to the defender to keep up these policies, the doing so was clearly a part of the scheme by which he expected to lift up the decayed fortunes of his family and free his estates from the debt which burdened them.

"The only hope which the defender could have of saving his position was by paying off the debts upon the estates by means of the policies of assurance. At every hazard these policies must be kept up, and the payment of the premiums must have been contemplated, although not expressly made obligatory, as one of the obligations which the defender must discharge. Although the deed of 1876, unlike the former deeds, did not expressly order him, as it did the trustees, to apply the proceeds of the policies in payment of the debts, this was plainly implied in the whole transaction; and therefore in considering what were the annual payments he had to make, as compared with the nett rental that he received, it is only right and proper to take into consideration the premiums of insurance that were to be paid.

"Further, it is a mistake to suppose that the 17th section of the Act of Parliament requires that the person giving valuable consideration in money or money's worth shall give the exact value which the subsequent casualty of an early death shows it to have had. All that the statute requires is, that the contract shall be *bona fide* for valuable consideration in money or money's worth. The contract in question was of this character, and it being so, the Crown is not entitled to duty as claimed in this action."

The pursuer reclaimed, and argued—The deeds of 1876 (conveyance of the estates and the policies to the defender, bond of annuity by him, &c.) stood by themselves, and could not be interpreted by any of those which preceded them. As by these deeds the lands were made over to defender during his father's lifetime, and as he was very substantially benefited by the agreement then entered into, the transaction of 1876 was of a gratuitous character, for which money or money's worth had not been given. As the defender came into possession of £17,000 a year in 1876, the agreement could hardly be called onerous. It was a question, too, whether an out-and-out assignation was a disposition within the meaning of sec. 11 of the statute, and so liable to duty, for if money was paid upon a death it was clearly a succession within the meaning of the statute. In the present case money was paid in consequence of a death, upon an assignation, and that seemed to bring a policy-holder under the provisions of this Act. Where the policy was assigned by the father, who had paid premiums upon it for some time, the son could only be a "successor" for the amount of the premiums paid by his father. Looking at the transaction as a whole, it was clearly a case in which duty was exigible under the Act.

Authorities—*Floyer* v. *Bankes*, 1864, 33 L.J. Ch. 1; *Lord Advocate* v. *Sidgwick*, June 6, 1877, 4 R. 815; *Fryer* v. *Morland*, August 2, 1876, 3 Ch. Div. 675; *Lord Advocate* v. *Earl of Glasgow*, January 15, 1875, 2 R. 317.

Argued for defender—It was unfair to isolate the deeds of 1876 (which only modified an existing agreement) to determine whether the assignation was onerous or not—the whole deeds must be looked at, and it would be found that money or money's worth had been given for these policies. The agreement of 1876 was of great benefit to the late Earl, who got all his debts paid and a handsome annuity secured to him. The policies had never been in the late Earl's own power to dispose of; they belonged first to his trustees for creditors, and then to the defender, to whom they were assigned as a means of liquidating the debt upon the estate. The only party really benefited by the agreement of 1876 was the late Earl, and so the transaction was not in any

sense gratuitous. To make the defender liable the Crown must bring their case up to the closing words of section 17. It is said that the policies were given for the land, but the policies and the land went together for one consideration. The lands were entailed, and the defender by mere survivance would succeed to them all, but free of the debt, so his consent was essential to any scheme for securing the debts upon the land.

At advising—

LORD PRESIDENT—In this case the Crown sue for a sum of £4750 as succession duty at the rate of one per cent. upon the sum of £475,000, being the amount of moneys derived from certain policies of insurance upon the life of the late Earl of Fife, which have been drawn and received by the defender since his father's death. He acquired right to these policies of insurance by an assignation dated the 30th of September 1876, and the question which is raised is substantially this, Whether the defender gave money or money's worth for the assignation which he then obtained? But to answer that question it becomes necessary to consider more deeds than one, because this deed of assignation is only one of five deeds, all bearing the same date, 30th September 1876, and all relating to one transaction and contract between the late Earl of Fife and the present defender. Indeed it is necessary even to go further back than that in order to understand the transaction which was then entered into, because part of the agreement between the parties on the 30th of September 1876, embodied in what is called a deed of agreement of that date, regards the extinction of a trust which formerly existed, and in order to see what is the effect of the extinction of that trust on the rights and interests of parties it is necessary, in the first place, to understand what the object and purposes of that prior trust were. Now these may be stated pretty shortly. The late Earl of Fife had incurred very large debt, and had granted security for it over his life interest as heir of entail in the Fife estates, and of course along with the assignation of his life interest it became necessary also to effect large policies of insurance upon his life, and to provide for the keeping up of these policies by the payment of the premiums of insurance. The amount for which he had so granted security was somewhere about £480,000. The present defender, then Lord Macduff, had also incurred some debt, but to a more limited extent, some £35,000 to £45,000; and it was a very great object undoubtedly to both parties, but more particularly it was a very great object to the late Earl to provide for the payment of this debt in some more satisfactory way, and in some less expensive way than that which had been already done; for nothing can well be more expensive than for a person with a life interest in an entailed estate to have to pay the interest of his debt, and also to keep up relative policies of insurance.

Now, this could only be done of course by disentailing the estates, and the present defender became twenty-five years of age somewhere about the year 1874, and thereby became entitled, in concurrence with his father, to disentail the estates. But the object of that disentail being to burden the estates with this very large sum of debt, approaching to half-a-million of money, it involved upon the part of the eldest son, the apparent heir, a very great sacrifice of his prospective interest. When he was twenty-five years of age his father was sixty. Undoubtedly it might have happened that his father might have lived to enjoy the estate for a considerable number of years afterwards, but still the natural expectation of course was that the defender should survive his father, and should inherit the estate, which he would have received unincumbered by any of this large amount of debt. The debt would have been paid off by the insurances which had been effected on the father's life, and the estate would have come unencumbered to the defender. Moreover, in the position in which he was placed, it would have come to him substantially as a fee-simple estate, for he would have been in a condition to disentail immediately upon his succession without any consents. So that in the transaction into which the parties entered for securing the late Earl's debt upon the fee of the entailed estate there was certainly a very great sacrifice made by the present defender. Now, it was for the purpose of carrying out this arrangement that the trust-deed of 1875 was made. The trust-deed was of course preceded by a disentail of the whole lands, and the deed conveys the estates to trustees, and assigns to them also the policies of insurance upon the life of the late Earl, and also certain policies of insurance which had been effected upon the defender's life in security of the debt contracted by him which I have already mentioned. The trustees are directed, after paying the expenses of the trust, to raise £520,000 for payment of the debts owing by the late Earl and the defender, and they are directed also when they have raised that sum of money to take a conveyance from the creditors, who had taken the security of the life interest in the policies—to obtain from them a conveyance or assignment of the life interest and of the policies of insurance. They are to provide for the interest of the moneys borrowed by them and for the premiums of insurance, and after that they are to pay the residue of income to Lord Fife. Then after some declarations about jointure and provisions, the trustees are directed, in the seventh place, after the death of the late Earl, "to receive and realise the several sums of money which shall thereupon become payable under and in respect of the policies of assurance on my life hereby assigned, and of any others effected under the trusts hereof, and all other sums of money due to me the said Earl, or to which I may be entitled, and which form part of the trust-estate, and apply the same in payment and satisfaction of all sums of money borrowed for the purpose of paying my debts under the trusts hereof, and in defraying and discharging all claims, liabilities, and expenses of every description incurred by them, or to which they may be liable in or about the trust hereby created, or in winding-up the same and in obtaining a full and sufficient discharge of all their actings and intromissions, and thereafter to pay over the balance or surplus, if any, to me the said Viscount, whom failing to the heirs, executors, or assignees of me the said Earl of Fife." And lastly, they are to convey the estate on the Earl of Fife's death to his son, the present defender, and to such other persons as may be named by the father and son by any deed of nomination, but failing any

such deed of nomination, then they are to execute a disposition and deed of entail of the lands and estates, subject to the then existing burdens and incumbrances, to the defender as institute, and the heirs-male of his body, and to certain other heirs in their order; but under the *proviso* that the disposition and deed of entail shall contain an express provision and declaration that the defender may by himself alone," without consent or concurrence of any other person, revoke and cancel, or alter and innovate, the same at any time at my sole will and pleasure." Now, such is in substance the trust-deed which was put an end to by the agreement with which we are more immediately concerned. This trust, it will be observed, proceeded upon the fact that a disentail had been made, and the trustees were directed to borrow money upon the fee of the estate which is conveyed to them for the purpose of paying off the debts both of the late Earl and of the defender, his son. They are then to hold the estate during the Earl's lifetime to provide for the interest of the debt, to pay the surplus rents to the then Earl, and upon his death substantially to convey the estate and the policies of insurance to the present defender. Now, it appears to me that in so far as regards the agreement embodied in that trust-deed, it was an agreement very much in favour of the late Earl. It relieved him from enormous embarrassment, and, on the other hand, while it was probably an expedient arrangement so far as the entailed estate was concerned, and the interests of the defender also, it was still an agreement and a trust arrangement which involved, along with the disentail which necessarily preceded it, a very great sacrifice upon the part of the defender as the next heir of entail. And now we come to the agreement immediately in question. It is dated the 30th of September 1876, and the various deeds of conveyance and assignment, of which the assignment of the policies of insurance was one, all bear the same date, and form part of the same transaction. Now, this agreement proceeds upon the consideration that the trustees had so far carried out the purposes of the trust as to borrow £520,000 upon the security of the estates conveyed to them, and it recites further, that the first and second parties—*i.e.*, the father and son—consider it to be for their benefit and advantage that the trust should be brought to a close on the terms and conditions hereinafter agreed upon, and that the whole estates, funds, and effects of every description, heritable and moveable, presently held in trust, and so forth, should be conveyed and made over to the defender, but always under the burden and reservation as thereinafter expressed. The heads of the agreement are, in the first place, that the estate shall be conveyed to the present defender, and also that there should be conveyed to him the policies of insurance on the life of the late Earl and of the defender. At the same time the defender is to execute and deliver a bond of annuity of £10,000 a year in favour of his father; he is to undertake during his father's lifetime to keep up the three mansion-houses of Duff House, Innes House, and Mar Lodge; and he "further undertakes and binds and obliges himself and his heirs and executors to pay and so free and relieve the first and third parties—*i.e.*, the late Earl and the trustees—of the whole annuities, debts, claims, demands, and obligations of every kind exigible from or due by the first party or the third parties, as trustees foresaid, as well those secured upon the estates as those standing upon personal obligation, and on payment to procure the said parties formally discharged thereof." The result of this may be stated in a very few words. The defender acquires right to the estates and right to the policies of insurance, and, on the other hand, he comes under an obligation to pay his father during his lifetime £10,000 a year, and to undertake the whole obligations both of his father and of the trustees. One would think, then, that it cannot be very difficult to see what sort of a transaction this was in figures, and accordingly we have, I think, upon the admission of the parties, a pretty clear result brought out. There were certain annuities payable by the late Earl during his lifetime, amounting to £5107, and that, with the £10,000 which defender undertook to pay to his father during his lifetime, amounted to an annual expenditure of £15,107. It is also admitted that in addition to the debts which had been secured over the fee of the estate the Earl had incurred certain recent debts—personal debts—amounting to £51,000. Under the agreement the obligation for these was undertaken by the defender, and the interest of 5 per cent. upon that amount of debt is £2550. Then there was an undertaking for the maintenance of the three mansion-houses, which is estimated by the parties to cost annually £3250. Now, these different annual burdens amount in gross to £20,907. But then there must be taken into account, besides, that the interest upon the bonds secured over the estate, which amounted, along with the premiums of insurance upon the lives of the two parties, to no less than £36,736. And taking these two sums together, which represent the annual burden undertaken under this agreement by the defender, you have a gross sum of £57,653, which exceeds by a considerable amount the actual free rental of the estate. Therefore the effect of this agreement was, among other things, that the defender took upon himself the ownership and all the corresponding burdens of this estate, with the result that the income of the estate was more than swallowed up by the annual burdens that he had to meet. No doubt, prospectively, there was something to be looked for, because there was the estate itself, to which in any event he would have succeeded, and there was also the amount of the insurances which are now in question. But if you take into account the fact that the defender undertook not only such annual burdens as these, but also a very considerable amount of capital debt owing by the late Earl beyond that which had been provided for by a charge upon the fee of the estate, and further that he took the fee of the estates with that incumbrance of £520,000 upon it instead of receiving it, as he would do in the ordinary course of succession, free and unincumbered, one cannot help seeing that the position in which the defender consented to place himself by this transaction was not a very favourable one by any means. But the more important question, I think, as regards the present claim, which is founded entirely upon the assignation of these policies of insurance to the defender, which followed as part of this last agreement—the more important question appears to me to be to consider whether he received the full value of £475,000 by means of the agreement of 1876. Now, it appears to me that it is quite impossible

to contend for that, because the defender had a very large, if not an exhaustive, interest in these policies of insurance before that deed of agreement was entered into at all. Under the trust-deed, which was put an end to by the agreement of 1876, the policies were held by the trustees, but the reversionary interest in these policies was in the defender. He had not the direct title to them which he acquired by the assignation now in question, but he had just as good an interest in them of a beneficial character under the operation of the trust, and unless the Crown show that he acquired a larger pecuniary interest in these policies by the transaction of 1876 than he did under the trust arrangement which preceded it, I do not see how by that assignation he received anything without value. He received nothing except what he had substantially got before under the trust arrangement, and got certainly for a very valuable consideration—the consideration, among others, of disentailing the entailed estate, and allowing the late Earl's debts to the amount of £520,000 to be made a burden upon that estate. Therefore it seems to me that it is quite impossible to say that this is a gratuitous grant of these policies in favour of the defender, or that he did not give money's worth for them, since this assignation is merely one of the modes of carrying out a very onerous and complicated transaction, which assumed first one form under the trust-deed, and then a second form under the agreement of 1876. Upon the whole matter, therefore, I entirely agree with the judgment of the Lord Ordinary, and think that the duty is not due.

Lord Deas—A question of a general kind has been alluded to in the course of this discussion, whether any assignation *inter vivos* which is quite gratuitous can give rise to a claim of succession duty? But it is not necessary to say anything about that in this case, because the parties have fairly joined issue upon the footing that this is to be shown to be a transaction for money or money's worth, and we are to decide upon that question of fact. Now, for the reasons stated in the course of the discussion, and now stated very distinctly by your Lordship, I am very clearly of opinion that this was undoubtedly a transaction for money or money's worth. It is necessary, in order to see exactly how the matter stands, to examine not only the trust-deed of 1876, but also the various deeds which preceded it. Now, I think that we have had given to us by your Lordship a very accurate and distinct summary of all these deeds, and that being so, it would be useless for me to repeat what has been so carefully narrated. I entirely concur in the result at which your Lordship has arrived, that this was a transaction for money or money's worth, and that being so no succession duty is due.

Lord Mure—I am of the same opinion. The question which we have to determine is, Was this a gratuitous transference, or was it one for money or money's worth in the sense of the statute? I do not desire to go into the details of this transaction, which have been so fully narrated by your Lordship, but an examination of the deeds makes it perfectly clear that the defender made a great personal and present sacrifice in undertaking the burden of his father's debts, and that the father from beginning to end was greatly benefited by the transaction. The family estates were heavily burdened, and money was being raised at great expense to pay the annual interest upon the debts, and upon the policies of insurance upon the life of the late Earl. When the time came at which the son was able to disentail the lands he executed the necessary deeds, and took upon himself, and put upon the estate, his father's and his own debts; he took over also the policies of insurance upon his father's life as the means by which his father's debts were to be liquidated. The minute of admissions puts the facts of the case quite upon the surface, and the memorandum to which we were referred so frequently makes matters still clearer.

The clauses of the trust-deed show that the trustees had to pay off the debt of the late Earl with the proceeds of the policies on his life, and it could in no way alter the transaction if the present Earl, then Lord Macduff, in taking over the debt, took over also the means of satisfying it. All therefore that the assignation did was to make a transfer *inter vivos*. On these grounds I concur with the Lord Ordinary and your Lordships, and think that the defender should be assoilzied from the conclusions of the action.

Lord Shand—I am also of the same opinion, and I agree with your Lordships in thinking that in the decision of the present question the deed of 1876 is not to be taken by itself. If, indeed, the late Earl had been the unrestricted owner of the policies in question at the time when the deed of 1876 was granted, then there might have been more room for the Crown's argument that the policies were to be viewed as a succession in the person of the defender, but even then it would have been difficult to to have treated them as something separate from the rest of the estate as the Crown has sought to do. The late Earl could not have made a gift of these policies, because they had been appropriated to pay his debts, and thus they could not be constituted a succession, because the defender had a most material interest in them, and had acquired a right to them under the deeds of 1874, 1875, and 1876. I am of opinion that the transactions prior to 1875 and 1876 were both onerous, and that the rights to these policies were acquired under both sets of deeds for which money or money's worth was given. Under the first arrangement a provision was made for the present Earl's debts, as well as for those of the late Earl, being made a burden upon the property. This arrangement, I think with my brother Lord Mure, was of much greater importance to the late than to the present Earl, and the same remark is applicable to the deed of 1876. The result of it all comes to be, that whereas under the previously existing state of matters the late Earl had an enormous personal debt and an income of £5000 per annum, by the new arrangement he got £10,000 per annum and was relieved of his debt and the upkeep of the mansion-houses.

The rental of the estate was then about £50,000 per annum, and the present Earl undertook burdens to the extent of £58,000 per annum. In these circumstances I think that it would be very difficult to say that the transactions were not onerous in their character, and for money or money's worth. No doubt the late Earl died within a short time of the completion of these arrangements; had he lived for a number of

years I can only say that it would have been a most serious matter for the present Earl. Nor can I have any doubt that the transaction would never for a moment have been entertained had the policies of insurance not been assigned to him as a means of liquidating the large amount of debt he had undertaken for his father. On the whole matter I am clearly of opinion that these policies were onerously acquired by the present Earl of Fife, and that this therefore is not a succession within the meaning of the Succession Duty Act.

The Court adhered.

Counsel for the Crown—Lord Advocate (Balfour, Q.C.)—Lorimer. Agent—D. Crole, Solicitor of Inland Revenue.

Counsel for Defender—Trayner—Keir. Agent—John K. Lindsay, S.S.C.

Friday, November 30.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

WIGHT AND OTHERS *v.* BURNS.

Reparation—Master and Apprentice—Shipping Law—Shipmaster's Right to Chastise Apprentice—Damages for Cruelty.

The personal representatives of a deceased apprentice seaman sued the master of a vessel in which he had served for damages in respect of cruel treatment alleged to have been used towards him during the voyage. The Court *assoilzied* the defender on the ground that the proof did not disclose any conduct on his part amounting to such wanton cruelty or oppression as would render him liable in damages.

Observed (*per* Lord Young) that a court of justice will not review the discretionary powers of a ship's-captain to chastise an apprentice sailing under him for misconduct at sea, unless it is shown that the former has been actuated in such chastisement by a desire wantonly to ill-treat the apprentice.

Process—Title to Sue—Actio personalis moritur cum persona.

Question, Whether the personal representatives of the deceased had a title to sue for damages for the alleged cruel treatment used towards him?

Solatium.

Held that the parents and brothers and sisters of a deceased person had no title to sue the master under whom he had served as an apprentice for *solatium* to their feelings, which they alleged were wounded by the defender's cruel treatment of the deceased.

This action was raised against Edward Burns, master of the ship "James Wishart," of Leith, by the father, mother, brother, and sisters of a youth named David Wight, who was an apprentice seaman on board the defender's ship, and who was at the age of sixteen accidentally drowned at Hamburg on the 11th September 1881. The pursuers sued as the whole living personal representatives of David Wight, and as individuals. The ground of action was that the deceased had been cruelly treated by the defender when serving on board his ship on a voyage to Rangoon and home in 1880-81. The pursuers concluded for £250 as damages and *solatium*. The following specific acts of cruelty were alleged to have been committed on the lad during the voyage:—(1) Flogging of such a severe nature with a rope and with a large leather strap that his body was a mass of bruises. (2) "When the ship was off the Cape of Good Hope, the lad, while greasing the mast, lost his hold, and slid down to the deck; the defender then took a handful of grease out of the pot and slapped it into the boy's mouth. He then compelled him to strip entirely naked, and walk several times ound the deck in presence of the crew, and thereafter to assist for over four hours at the capstan, he being all the time perfectly naked, and exposed to the sight of the crew and the inclemency of the weather, and thereby subjected to great humiliation, pain, and suffering." (3) On another occasion the defender had the lad stripped naked, and painted with red lead over the face and body, and made him walk round the deck in this condition. This was done—the pursuers alleged—at least six times without any apparent justification or motive except wanton cruelty. (4) The defender applied a poultice at boiling heat to a boil on the leg of the lad, who having, in the agony caused thereby, torn off the poultice, the defender clapped it over his face. The boy's leg bore for days a large mark, as if burned, in consequence of this treatment.

The pursuers averred that they were deeply wounded in their feelings by the acts complained of. They also averred that the deceased had intended, had he reached home, to institute proceedings against the defender.

The defender admitted that he chastised the lad on several occasions when he had disobeyed orders or had been guilty of misconduct, but he denied that such chastisement was cruel or immoderate.

The pursuers pleaded—"(1) The deceased David Wight being entitled to damages and *solatium* in respect of the defender's wrongful and njurious conduct, the pursuers, as his personal representatives, are in the circumstances entitled to prosecute his claim. (2) The defender having, by the actings libelled on, deeply wounded the feelings of the pursuers, the parents and relatives of the deceased, is liable to them in *solatium*."

The defender pleaded—"(1) No title to sue. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) The pursuers' whole material averments being unfounded in fact, the defender should be assoilzied with expenses."

The Lord Ordinary (Adam) pronounced this interlocutor:—"Repels the second plea stated for the pursuers: Further, finds that the pursuer James Wight, as executor of the deceased David Anderson Wight, has a title to sue this action, and to that extent and effect only sustains the first plea-in-law stated for the pursuer, and to the like extent and effect repels the first plea-in-law stated for the defender: *Quoad ultra* sustains the said plea stated for the defender: Grants leave to the defender to reclaim.