# SUMMER SESSION, 1906.

## COURT OF SESSION.

*Friday, March* 9, 1906.

### OUTER HOUSE.

### INLAND REVENUE *v.* HEYWOOD-LONSDALE'S TRUSTEES.

*Revenue—Estate Duty—Settlement Estate Duty—Property Deemed to Pass—Finance Act* 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 2 (1) (*c*), 5 (1)—*Bond Granted by Heir of Entail within Year of Death to Daughter's Marriage-Contract Trustees.*

An heir of entail in possession, who had debarred himself from disentailing save on voluntary consents, arranged for power to charge the entailed estates to a certain amount in favour of certain persons. In virtue of this power he granted a bond and disposition in security for a certain sum in favour of the marriage-contract trustees of a daughter whose portion he wished to increase, the sum to be held by them in terms of the marriage-contract, and within a year of so doing he died. *Held* (1) that the sum in the bond and disposition in security was property deemed to pass on the death of the heir of entail within the meaning of the Finance Act 1894, section 2 (1) (*c*), and was liable for estate duty and (2), being so deemed to pass, inasmuch as it passed under the marriage-contract it was also liable for settlement estate duty.

The Finance Act 1894 (57 and 58 Vict. cap. 30) in Part I, which includes section 1-24, deals with estate duty, and by section 1 imposes such duty upon all the property, real or personal, settled or not settled, which passes on the death of any person dying after 1st August 1894.

Section 2 (1) enacts—"Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (*c*) property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act 1881 as amended by section 11 of the Customs and Inland Revenue Act 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily,' and a reference to a volunteer were omitted therefrom."

Section 38 (2) of the Customs and Inland Revenue Act 1881 (44 Vict. cap. 12) as so amended reads—"The real and personal or moveable property to be included in an account shall be property of the following descriptions, viz.—(*a*) Any property taken as a *donatio mortis causa* made by any person dying after 1st August 1894, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift, *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise, (*b*) . . . (*c*). . . ."

On 17th July 1905 the Lord Advocate on behalf of the Inland Revenue raised an action against John Pemberton Heywood-Lonsdale of Bicester Hall, Oxfordshire, and others, the trustees acting under the antenuptial contract of marriage dated and recorded in 1899 between Captain Henry Heywood-Lonsdale of Shavington, Shropshire, and the Hon. Helena Mabel Hamilton, third daughter of the Right Hon. John Glencairn Carter Hamilton, Baron Hamilton of Dalzell. In it he sought an account of, and to recover estate duty and settlement estate duty on the principal sum in a bond and disposition in security granted in favour of the defenders by the factors and commissioners of Lord Hamilton, dated 4th and 6th and recorded 23rd July 1900. Lord Hamilton died on 15th October 1900. The amount in the bond and disposition in security was £5000.

The pursuer, *inter alia*, pleaded—"(1) By virtue of section 2 (1) (*c*) of the Finance Act 1894, the principal sum in the bond granted by the factors and commissioners of Lord Hamilton in favour of the defenders being property passing on the death of Lord Hamilton, is chargeable with estate duty. (2) Settlement estate duty is also due in

respect of the said principal sum, as it is property settled in terms of the marriage-contract under which the defenders are acting as trustees."

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON).

On 9th March 1906 the Lord Ordinary pronounced an interlocutor repelling the defences, finding that estate duty and settlement estate duty were due on the £5000 as property passing on the death of Lord Hamilton within the meaning of the Finance Act 1894, and ordaining the defenders to lodge an account.

*Opinion.*—"The late Lord Hamilton of Dalzell having, with consent of the next heirs, obtained powers from the Court to charge his entailed estates of Dalzell and Jerviston with a sum of money, granted through his commissioners a bond over the estates in favour of the marriage-contract trustees of his daughter the Hon. Mrs Heywood-Lonsdale for £5000. As this charge was put upon the estate within twelve months of Lord Hamilton's death, and besides is made subject to the provisions of Mrs Heywood-Lonsdale's marriage-contract, the Crown have made claim for both estate duty and settlement estate duty. This claim is resisted by Mrs Heywood-Lonsdale and her marriage-contract trustees.

"The circumstances in which the question arises are these—Lord Hamilton of Dalzell was married in 1864, and by his antenuptial marriage-contract, by virtue of the provisions of the Aberdeen Act, he bound himself and the heirs of entail succeeding to him to make payment to the younger children of the marriage of the sum of £12,000, and he further bound himself, and his heirs and successors whatsoever, but that *subsidiarie* only, to make good any part of said provision which might not be properly chargeable on the estates in terms of the said Act of Parliament. This provision was declared to be in full of all claims of legitim, &c.

"Lord Hamilton disentailed the estates in 1894, and in connection with the disentail proceedings he granted a bond of corroboration and disposition of the estates in security in favour of his younger children, who were six in number, including Mrs Heywood-Lonsdale, for the said sum of £12,000. This bond was recorded on 28th February 1894.

"Lord Hamilton re-entailed the estates in 1895 in favour of himself, whom failing, his eldest son the Hon. Gavin George Hamilton, and the other heirs-substitute specified in the disposition and deed of entail.

"Mrs Heywood-Lonsdale was married in 1899, and under her antenuptial marriage contract Lord Hamilton of Dalzell bound himself to pay to the marriage-contract trustees at the first term which should happen after his death the sum of £15,000, but reserving to himself right to prepay this sum at any time during his life. This sum, of which I understand £10,000 was prepaid out of the general estate of Lord Hamilton before his death, and £5000 remained to be paid, was settled for the liferent alimentary use of Mrs Heywood-Lonsdale, and of her husband in succession should he survive her, and for the children of the marriage in fee.

"Should there be no children taking a vested interest at the death of the survivor of the spouses, Lord Hamilton of Dalzell's provision was destined over to the person for the time being holding the peerage of Hamilton of Dalzell.

"Circumstances having occurred which rendered Lord Hamilton of Dalzell desirous of increasing his provision for his younger children, and at the same time of conferring a present benefit upon his eldest son, he arranged, with consent of his three sons and next heirs under the entail, to charge the fee of the entailed estates with a sum of £122,000, for the purpose, *inter alia*, of adding £5000 to the marriage-contract provision of each of his daughters, including Mrs Heywood-Lonsdale, so as to make up their respective provisions to £20,000 each. There were also considerable additional provisions made for the younger sons, and a large sum was paid over to or for behoof of the next heir. The necessary proceedings were taken in January, and the power was granted on 21st February 1900. So far as concerns the present question warrant was granted to Lord Hamilton of Dalzell to charge the entailed estates with a sum not exceeding £122,000 sterling, and that by granting and executing at the sight of the Court, *inter alia*, a bond and disposition in security in ordinary form in favour of the trustees under Mrs Heywood-Lonsdale's marriage-contract for the sum of £5000 sterling 'for the purposes therein specified.' But the obligation in the bond was subject to a resolutive condition in the event of Mrs Heywood-Lonsdale or her issue succeeding under another and independent trust, in which case the sum in the bond was destined over to the person for the time holding the peerage of Hamilton of Dalzell as if Mrs Heywood-Lonsdale had died without issue. The order of Court also provided that in exchange for their bonds and dispositions in security, 'the petitioner's younger children should be bound to discharge the bond and provision in their favour for the maximum sum of £12,000 already existing on record, and to accept the provisions to be made by the said bonds and dispositions in security to be granted as aforesaid in full of all they can ask or claim by the decease of the petitioner or otherwise.'

"By virtue of this power a bond and disposition in security for £5,000 was granted by the commissioners of Lord Hamilton of Dalzell in favour of the marriage-contract trustees of Captain and the Hon. Mrs Heywood-Lonsdale, dated 4th and 6th and recorded 23rd July 1900. This bond was in the usual form applicable to such charges, and bound only Lord Hamilton of Dalzell and the heirs of entail succeeding to him in the entailed estate to pay to the marriage-contract trustees for the purposes of the marriage-contract the sum of £5,000 sterling,

and that at the term of Martinmas next 1900, with interest from the 21st February 1900, the day after that on which the power was granted.

"The power having been granted on the 20th February 1900, and the bond granted in July 1900, Lord Hamilton of Dalzell died on 15th October 1900, not only within twelve months of the granting of the bond, but before the date of payment specified in the bond.

"I am of opinion that the claim of the Crown for estate duty is well founded. The £5000 contained in the bond, whether it be regarded as cash or as an interest to that extent carved out of the entailed estate, did not pass on the death of Lord Hamilton of Dalzell, and therefore the Finance Act 1894, section 1, did not apply. But then section 2 of the Act provides that certain classes of property not passing on the death of the deceased shall be deemed to be included in such property, or, in other words, shall be deemed to pass on the death of the deceased, and the section provides, *inter alia*, sub-section (1) (*c*) that property which would be required to be included in an account under the 38th section of the Customs and Inland Revenue Act 1881, as amended by the 11th section of the Customs and Inland Revenue Act 1889, if these sections were herein enacted and extended to real property as well as personal property (and omitting from the section the words 'voluntary, &c.'), should be so deemed to be included.

"Turning to the Customs and Inland Revenue Act 1881, section 38 (2), as modified and incorporated in the above sub-section, it will be found that, read short, so far as applicable to the present question it provides as follows:—That the property to be included in an account, and therefore to be deemed to pass at the death of a deceased, shall be property of the following descriptions, viz., *inter alia*, any property taken under a disposition made by any person dying after 1st August 1894 purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased. Now, it appears to me to be incontestable that the £5000 contained in the bond in question is property taken under a disposition by Lord Hamilton of Dalzell, who died after 1st August 1894, and that said bond being without consideration purported to operate as an immediate gift *inter vivos* by transfer and that said gift was not made twelve months before Lord Hamilton's death. If so, it is property which is to be deemed to be included in the property passing on his death, and is therefore liable in estate duty.

"I say taken under a disposition by Lord Hamilton, because I must reject the contention, and I think it was the only substantial consideration urged to the contrary, that Lord Hamilton having no independent control of the estate, the 'disposition' was not truly his in fact but only in form. I also accept it, as stated, that Lord Hamilton had debarred himself from disentailing on valued or compulsory consents and could only do so on voluntary consents, but I do not think that this affects the result. As heir of entail in possession he was proprietor subject only to the fetters of the entail. He truly purchased the right to charge by the provisions which he made out of the charge for the next heirs, though it would not have mattered if the right had been conferred on him gratuitously. His right was limited to charging in favour of certain specified parties. But it was in his option whether he would exercise the right. He did exercise the right and thereby conferred a gratuitous benefit or gift upon the grantees. And no one but he could have granted the disposition. The case is, I think, ruled by the decision in the *Earl of Glasgow's* case (January 15, 1875, 2 R. 317, 12 S.L.R. 215), the reasoning in which, though it arose under the Succession Duty Act, and in the reverse order, applies directly and is conclusive.

"I say also 'being without consideration,' for the contention that there was at least part consideration in the discharge and the provisions under Lord Hamilton's own marriage-contract and bond of provision is without foundation. The provision had already been discharged, and the reason for formally repeating the discharge was merely as a means to clear the record.

"Settlement estate duty is, I think, in no different position. Section 5 (1) of the Finance Act 1874 provides that where property in respect of which estate duty is leviable—and I hold that the property in question is in that position—(*a*) 'is settled by the will of the deceased,' or (*b*) 'having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of' it, a further estate duty called settlement estate duty is to be levied. I do not think that it can be questioned that the property in the sum contained in the bond has been settled in the sense of the Act. It has not indeed (*a*) been settled by the will of the deceased, for the bond was in no sense a testamentary instrument—section 22 (1) (*b*). But it was settled by another disposition, and though it did not pass under that disposition on the death of the deceased so as to come directly under section 1 of the Act, it was property which by section 2 is to be deemed to be included in such property. I admit that there is awkwardness in the expression 'passes under that disposition' which is even more elliptical than most of the difficult 'passes' in the Act. But I think that the meaning is sufficiently clear when the terms of section 2 are kept in mind. And I am impressed by the consideration that any other interpretation would impose a hardship upon the ultimate beneficiaries under the settlement by depriving them of the advantage which payment of settlement estate duty confers.

"On the amount being adjusted I shall therefore grant decree accordingly as concluded for, with expenses to the Crown."

Counsel for the Pursuer—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Solicitor of Inland Revenue (P. J. Hamilton-Grierson).

Counsel for the Defenders — Younger, K.C.—Chree. Agents—Hamilton, Kinnear, & Beatson, W.S.

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*Saturday, May* 12.

## SECOND DIVISION.

[Sheriff Court of Perthshire at Dunblane.

## M'ALLAN *v.* PERTHSHIRE COUNTY COUNCIL, WESTERN DISTRICT, DUNBLANE.

*Master and Servant—Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—*Accident Arising Out of and in Course of Employment—Workman Doing Work outwith Scope and Time of his Ordinary Duties under Voluntary Arrangement with Fellow-Workman—Cases of Emergency.*

A county council were repairing a road by means of a steam roller, the hour for the daily commencement of operations being 7 a.m. The engineman, who otherwise would have had to come on duty before that hour, for his private convenience arranged with a surfaceman, one of his fellow-workmen, that the latter should do the work of breaking up the engine's fire and getting up steam. The work for which the surfaceman was employed by the county council, and which did not begin until 7 a.m., was to sweep and put "blinding" on the road while it was being rolled. He was accidentally injured while getting down from the engine before 7 a.m. *Held* that the accident did not arise out of and in the course of his employment in the sense of section 1 (1) of the Workmen's Compensation Act 1897.

Lord M'Laren's statement, in *Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732, 37 S.L.R. 526, of the law applicable to the case where a workman is injured while doing something outwith the strict scope of his employment in a case of emergency, *approved*.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1 (1) enacts—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

In an arbitration upon a claim by John M'Allan (respondent) against The Perthshire County Council, Western District, Dunblane (appellants), under the Workmen's Compensation Act 1897, the Sheriff-Substitute at Perth (SYM) awarded compensation. At the request of the defenders he stated the following case:—"The appellants are the authority having control of the roads in the Western District of Perthshire, and the respondent, who is sixty-five years of age, was employed by them in road mending from 24th July till the beginning of September 1905, at a wage of 3s. 6d. per day. On 21st August 1905 the respondent when stepping down from a steam roller belonging to the appellants received an injury to his left leg below the knee, which ultimately resulted in periostitis of the leg. He thereafter presented an application for compensation under the Workmen's Compensation Act. At the date of and for some time prior to the accident the appellants' steam roller was being used in repairing the road between Kippen Station and Thornhill, which crosses the river Forth at the Bridge of Frew. The roller was under the charge of an engineman named M'Callum, assisted by a man named M'Arthur, who acted as fireman and flagman. It was exclusively the duty of M'Callum and M'Arthur to work, clean, oil, and fire the engine. The work of repairing the road was under the charge of M'Diarmid, a foreman surfaceman, who acted under the directions of the road surveyor, and the duty of the respondent was to sweep and to put 'blinding' on the part of the road on which the roller was working. The respondent was subject to the orders of M'Diarmid, but also occasionally required to take the directions of M'Callum, the engineman, as to the particular piece of road which was to be prepared for the roller. For the sole use of the engineman and fireman the appellants provided a moveable wooden hut, which at the date in question was stationed at the Bridge of Frew. Instead, however, of occupying the hut at night, the engineman and fireman, who were living in Doune, cycled backwards and forwards to their work, and allowed the respondent to sleep in the hut. The respondent, who had been lodging at Thornhill, was glad to get leave from the engineman to stay all night in the hut. The hour for commencing work was 7 a.m. It took a short time, however, to get up steam, and therefore the fire of the engine needed to be attended to before 7 a.m. In order to save him from returning before that hour in the morning, the engineman arranged with the respondent to break up the engine fire in the mornings before he arrived. The said arrangement was a mutual convenience to the engineman and the respondent. In accordance with this arrangement between him and the engineman the respondent, about 6·30 a.m. on the morning of the 21st August, went on to the engine which was drawn up near the side of the road for the purpose of attending to the fire. It was when he was stepping down from the engine a few minutes later, and before seven o'clock, that he sustained the injury to his leg. It was not part of the duty for which the respondent was employed or paid to attend to the engine or to work before 7 a.m. Having regard to the manner in which the