member of the Reserve in pursuance of the transfer under this Act, or in respect of any alleged failure to comply with any order calling him up from the Reserve for permanent service, that question shall be decided only on proceedings before a civil court." The Lord Advocate contended that this proviso does not apply to the case of the complainers, in respect that there is no question on their averments that as at 21st September 1917 they were deemed to have been enlisted and transferred to the Reserve, the only question raised being whether in respect of the subsequent action of the Government of Russia in concluding peace with Germany the convention has ceased to be operative. I am prepared to sustain this objection. The typical case to which the proviso would apply is the case of a neutral who is served with a calling-up order, and who claims that he has not been enlisted or transferred to the Reserve because of his nationality. But even on the assumption that it applies to the complainers I think the term civil court is used in contradistinction to court-martial, and that the Court pointed to is a civil court which can exercise jurisdiction to try offences, and not the Court of Session, which has no criminal jurisdiction. The Court pointed to, I think, is the Sheriff acting under the Summary Jurisdiction Acts. From his decision there would, of course, be a limited right of appeal to the High Court of Justiciary, including an appeal on a question of law such as the complainers seek to raise. It is not conceivable, I think, that Parliament intended the civil court in this proviso to be a civil criminal court (as it must be) in proceedings in respect of an offence alleged to have been committed by a man as a member of the Reserve, and the Court of Session in proceedings in respect of any alleged failure to comply with the calling-up order. The alternative would be if the complainers' argument were accepted that every person who objected to a calling-up order on any ground of fact or law would be entitled to initiate proceedings in the Court of Session to prevent the authorities from following up the calling-up order. This view was rejected by Neville, J., in *Flint* v. *Attorney-General*, [1918] 1 Ch. 216. In that case it was decided that an action in the High Court for a declaration that the calling-up notice was *ultra vires* did not lie, the High Court not being a civil court within the statutory definition contained in section 190 of the Army Act 1881.

The sequel of that case is instructive, for the Crown took proceedings in a court of summary jurisdiction where a judgment was obtained, and in view of this the Appeal Court declined to entertain an appeal from the judgment of Neville, J. I think in this case the Lord Advocate might very well have followed the same course, which according to the concession made in *Flint's* case would have been a perfectly competent one, and we should then not have been troubled with the present case. The Lord Ordinary's judgment in refusing interdict gave the Crown an opportunity to take such proceedings, and I think they might well have acted on the hint so given. I have therefore come to the conclusion that this action of suspension and interdict is incompetent in the Court of Session, and that it should be refused accordingly.

LORD GUTHRIE was not present.

The Court recalled the interlocutor reclaimed against and refused the note.

Counsel for the Complainers—Christie, K.C.—Stuart. Agent—J. Ferguson Reekie, S.S.C.

Counsel for the Respondents—Lord Advocate (Clyde, K.C.) — Solicitor-General (Morison, K.C.)—Pitman. Agents—Inglis, Orr, & Bruce, W.S.

Tuesday, June 18.

FIRST DIVISION.

[Exchequer Cause.

INLAND REVENUE *v.* SCOTT'S TRUSTEES.

Revenue—Estate Duty—Property Passing on Death—"Interest Purchased or Provided by the Deceased"—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sections* 1 *and* 2 (1) *d.*

Policies of insurance upon the life of the insured, together with other funds, were assigned by him by *inter vivos* deed to trustees, who were directed to pay the premiums and other sums necessary to keep the policies in force. The trustees had, however, full power to sell, assign, or surrender the policies. The trust funds, including the proceeds of the policies, were to be held by the trustees for the daughters of the insured in liferent and their issue in fee. The trustees paid the premiums and kept up the policies till the insured's death. The Crown then claimed estate duty upon (1) the proceeds of the policies, and (2) the portion of the trust estate the income of which had been set free through its no longer having to be expended in paying the premiums. *Held* (*dub.* Lord Sands) that the proceeds of the policies were an interest provided by the deceased arising on his death, and that the portion of the trust estate the income of which had been expended upon the premiums was also an interest provided by the insured accruing on his death, in respect that it ceased at that date to be required for paying the premiums and became available then for the beneficiaries.

The Finance Act 1894 (57 and 58 Vict. cap. 30) enacts—Section 1—"In the case of every person dying after the commencement of this Act there shall . . . be levied and paid upon the principal value ascertained, as hereinafter provided, of all property, real and personal, settled or not settled, which passes on the death of such person, a duty called estate duty. . . ." Sec-

tion 2—"(1) Property passing on the death of the deceased shall be deemed to include the following property, that is to say— . . . (*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

The Lord Advocate, on behalf of the Commissioners of Inland Revenue, *pursuer*, brought an action against Alexander Scott and others, the trustees of the deceased Alexander Whitson Scott, nominated and acting under a trust-disposition and assignation dated 4th February, and recorded in the Division of the General Register of Sasines applicable to the county of Forfar 5th April 1899, *defenders*, concluding for decree upon the defenders to deliver a full and true account (1) of all the sums recovered by them as trustees on the death of Alexander Whitson Scott under and in virtue of the certificates or policies of insurance conveyed to them under the trust-disposition and assignation referred to, including all profits, bonuses, and other additions thereto, and (2) of such portion of the trust estate held by them as was required to produce an annual income equal to the amount of the annual premiums payable in respect of the certificates or policies of insurance, so that the estate duty payable in respect of the sums recovered under the certificates or policies and of the portion of the trust estate referred to might be ascertained, and for decree for £1400.

The *trust-disposition and assignation* of Alexander Whitson Scott, after narrating consideration of a duty upon the truster to provide for his daughters, without prejudice to any testamentary or other provisions which the truster might make in favour of his daughters, conveyed to the defenders —"(*Primo*) . . . [*Certain heritable subjects*] . . . (*Secundo*)—(First) a certificate or policy of assurance granted by the Globe Insurance Company, dated sixth August Eighteen hundred and sixty-two, and numbered 12710, on my own life, for the sum of three hundred pounds sterling, in which certificate or policy I am designed as of number twenty-one Constitution Road, Dundee, in the county of Forfar, manufacturer; (second) a certificate or policy of insurance granted by the Reliance Mutual Life Assurance Society, dated twentieth January Eighteen hundred and sixty-three, and numbered 5006, on my own life, for the sum of three hundred pounds sterling, in which certificate or policy I am designed as of twenty-one Constitution Road, Dundee, linen cloth manufacturer; (third) a certificate or policy of assurance granted by the Scottish Widows' Fund and Life Assurance Society, dated second May Eighteen hundred and seventy-seven, and numbered 46634 Class A 1, a, on my own life, for the sum of three thousand pounds sterling, in which certificate or policy I am designed as of Riversdale, Perth Road, Dundee, manufacturer; and (fourth) a certificate or policy of assurance granted by the said the Scottish Widows' Fund and Life Assurance Society, dated twenty-seventh September Eighteen hundred and eighty, and numbered 52840 Class A 1, a, on my own life, for the sum of three thousand pounds sterling: Together with the said respective sums of three hundred pounds, three hundred pounds, three thousand pounds, and three thousand pounds in said certificates or policies, and all profits, bonuses, and additions which have accrued or may accrue on said certificates or policies, together with all my right, title, and interest in or to said certificates or policies of assurance and sums payable thereunder; but always subject to the whole conditions and others contained or referred to in said certificates or policies, which I have herewith delivered up to my said assignees to be used by them and their foresaids as their own proper writs and evidents; with full power to them to sell, assign, or surrender the said certificates or policies at pleasure, to uplift and recover the proceeds thereof, and to grant discharges therefor, and generally to do everything in relation thereto which I could have done myself before granting hereof (*Tertio*) . . . [*Here followed particulars of investments of a nominal capital value of* £7505.] . . ." It declared "that these presents are granted in trust always and for the purpose of fulfilling my directions following, *videlicet:*—(*First*) I direct my said trustees to pay (1) the expenses of executing their office; (2) the whole premiums of assurance, and other sums necessary to be paid for the purpose of keeping in force the life assurance policies hereinbefore assigned; and (3) all usual and necessary outgoings and expenditure in connection with the whole trust subjects. (*Second*) I direct my said trustees, subject to payment as above mentioned, to hold the whole subjects hereby conveyed, and to pay the net annual proceeds thereof to my daughters."

The pursuer *pleaded*—"2. The said sums and portion of the trust estate having passed on the death of the deceased, within the meaning of the Finance Act 1894, the defenders are liable in estate duty in respect thereof, with interest as concluded for, in terms of the conclusions of the summons."

The defenders pleaded—"The pursuer's averments so far as material being unfounded in law and in fact, the defenders are entitled to be assoilzied."

On 25th March 1918 the Lord Ordinary (CULLEN) pronounced this interlocutor—"Repels the defences: Finds that estate duty is payable by the defenders in respect of (1) the sums received by them on the policies of insurance referred to on record; and (2) the portion of the trust estate required to yield an annual income to meet the premiums on said policies, as property passing on the death of Alexander Whitson Scott within the meaning of the Finance Act 1894; and decerns and ordains the defenders to deliver accounts accordingly, as concluded for in the summons."

Opinion, from which the *facts* of the case appear—"The deceased A. W. Scott, by the trust-assignation and disposition of 1899 mentioned on record, made over to trustees,

inter vivos, various assets belonging to him, including four policies of insurance on his life, to which the present case relates. The premiums on these policies had been paid by him prior to the granting of the said deed.

"By the said deed the deceased directed the trust estate to be held for his six daughters in liferent and for their surviving issue in fee, with power to each daughter to dispose by will of the share of capital effeiring to her in the event of her leaving no issue.

"The first purpose of the deed of 1899 was for payment of the expenses of the trust. The second was that the trustees should, out of the income of the trust estate, pay the premiums necessary to keep the said policies in force. Further on in the deed the deceased conferred powers on the trustees in their discretion to sell, assign, or surrender the policies.

"The trustees acted on the authorisation given them to keep up the policies, and paid out of the income of the trust estate year by year the necessary premiums until the death of the deceased, which occurred in 1914. After his death they received the proceeds of the policies.

"The Crown now claims estate duty on these proceeds, founding on section 2 (1) (*d*) of the Finance Act of 1894.

"The defenders do not dispute that policies of life insurance on the life of a deceased are a species of 'interest' falling within the scope of section 2 (1) (*d*). They say, however, that the policies in question were not provided by the deceased himself within the meaning of that enactment. Their view is that from and after the granting of the deed of 1899 the premiums of insurance were provided not by the deceased but out of estate which had ceased to belong to him, and that without any 'concert' or 'arrangement' with him. The Crown does not say that this is a case of concert or arrangement, but maintains that the proceeds of the policies were provided wholly by the deceased himself.

"I am of opinion that the contention for the Crown is right. After the granting of the deed of 1899 the premiums on the policies were *de facto* paid out of money provided by the deceased for the purpose. They were so paid on his mandate, given to the trustees in the second purpose of the deed. They were not paid on the mandate of the beneficiaries. The position of the beneficial interests under the deed did not permit of the beneficiaries having any control in the matter. It is true that the trustees were given power to deal with the policies otherwise by way of sale, assignation, or surrender. If they had exercised that power, the fund which has accrued to them, and which gives rise to the present action, would never have come into existence. In point of fact they did not exercise that power, but exercised the alternative power given to them by the deceased of keeping up the policies out of the first of the free income of the trust estate. As they did so, it seems to me that the premiums, after the date of the deed of 1899, were provided by the deceased just as much as the premiums paid prior thereto. The deceased put a fund into the hands of the trustees for the purpose of paying the premiums after the date of the said deed; and *de facto* the trustees applied that fund in paying the premiums acting on the mandate of the deceased, and not on any mandate from the beneficiaries.

"There is a second claim for the Crown arising out of the same circumstances. On the death of the deceased it was no longer necessary for the trustees to take from the income of the trust estate the amount annually required to pay the said premiums. Thus the income falling to the liferenters was thereafter correspondingly increased. The Crown maintains that this augmentation of income is subject to estate duty under said section 2 (1) (*d*) of the Act of 1894. Under this head of claim the Crown does not invoke section 2 (1) (*b*), but says that the said augmentation of income is an 'interest' provided by the deceased within the meaning of section 2 (1) (*d*). The word 'interest' used in section 2 (1) (*d*) is very comprehensive. The deceased provided a liferent right to his daughters by the deed of 1899. If I am right in the view which I have taken of the first question in the case, it follows that the benefit of the liferent right was, under the mandate he gave to the trustees, capable of being *pro tanto* postponed until his death, and it was in fact so postponed, with the effect that on his death, and in consequence of his death, an interest accrued to the liferenters which they had not previously enjoyed. The net spread by the Act is very wide, and I do not see any good ground of escape from the view of the Crown that the said augmentation of income so accruing to the liferenters on the death of the deceased was an 'interest' provided by him within the meaning of said section 2 (1) (*d*).

"I am accordingly of opinion that the Crown is entitled to succeed under both heads of the claim now presented."

The defenders reclaimed, and argued—The only interest provided was an interest under an irrevocable *inter vivos* deed. That was not an interest provided by the deceased accruing or arising on his death in the sense of the Finance Act 1894 (57 and 58 Vict. cap. 30), section 2 (1) (*d*). If the deceased had purchased a fully paid-up policy on his own life and handed it to a beneficiary, or if he had put under trust for another policies on the life of a third party, no estate duty would have been payable. Here what was given to the daughters was in the settlor's lifetime put entirely beyond his control; in such a case either there was no provision of an interest by the deceased, or the beneficial interest did not arise upon the settlor's death but on the creation of the trust. Section 2 (1) (*d*) was directed against a subtraction from a man's means during his life which was to reappear amongst his means at his death—*Lethbridge* v. *Attorney-General*, [1907] A.C. 19, *per* Lord Loreburn, L.C., at p. 23. Further, the respondent's case was that the deceased and he alone was the provider of the interest, but the interest was not provided by the deceased; he had parted with all say in the matter.

The defenders were not bound to keep up the policies; they might have ceased paying the premiums and surrendered the policies; they had no peremptory mandate from the deceased to continue to pay the policies. Either the trustees were the providers, or the trustees and the deceased. The fact that the defenders had chosen to continue paying the premiums was immaterial. To make the deceased the provider it would have been necessary to show that he had bound the defenders under an absolute obligation to continue to pay the premiums, whereas here the defenders had an absolute discretion to do so or not—*Attorney-General* v. *Dobree*, [1900] 1 Q.B. 442; *Attorney-General* v. *Murray*, [1904] 1 K.B. 165, *per* Cozens-Hardy, L.J., at p. 172; *Attorney-General* v. *Robinson*, [1901] 2 I.R. 67; *Richardson* v. *Attorney-General*, [1909] 2 I.R. 597; *Attorney-General* v. *Lethbridge* (*cit.*), *per* Lord Macnaghten at p. 19. On the second conclusion of the summons the pursuer could not succeed, for his claim was really one for a double payment of the same duty. The money which up to the death of the assignor had been spent on the premiums had all along been devoted to provide a beneficial interest for the daughters, and when payment of it ceased at death no new interest was created. The Act did not strike at cesser of interest or augmentation of interest; section 7 (7) did not apply.

Argued for the respondent—There could be no question that the policies were an interest. Further, they were an interest provided by the deceased. The defenders had an option to surrender the policies, but they had not done so; they had, following the deceased's directions, paid the premiums out of money provided by him. That was enough to make the section applicable—*Robinson's* case (*cit.*), *per* Palles, C.B., at p. 89; approved in *Murray's* case (*cit.*). The reasoning in *Richardson's* case (*cit.*) was in favour of the respondent. The truster had a right to see that the defenders did not pocket the money, and if all the beneficiaries failed the truster's right to the funds would have revived. Further, there was no inconsistency between an *inter vivos* trust and passing of property and accruing of interest at death. On the second conclusion a beneficial interest did arise at death, for the policies were current contracts running up to death, and the premiums were like instalments of the price which was not paid fully until death. Consequently at death a beneficial interest arose, equivalent to the amount of the trust funds necessarily set aside to produce enough to pay the annual premiums. It was quite legitimate to tax the fruit, *i.e.*, the policies, and the tree which produced it, *i.e.*, the premium fund.

LORD PRESIDENT—I am of opinion that both sums referred to in the conclusions of the summons constitute property passing at the death of the deceased, and that therefore duty is payable, as the Lord Ordinary has found. On the death of the late Mr Scott, and in consequence of his death, the sum of £11,364, 1s. 6d. was paid to the trustees under the deed of assignation which he granted in the year 1899. The source of origin of that sum, as well as its destination, is clear. The source of origin was four policies of insurance, the proceeds of which were paid to the trustees at Mr Scott's death; and by the deed of assignation to which I have referred, dated as far back as 1899, he assigned these four policies to his trustees, and directed them to pay the proceeds at his death equally amongst his daughters in liferent and their children in fee. The income, in short, was to be paid to the daughters, and the capital sum was to be divided at their death equally among their children. It is, no doubt, true that during the continuance of the trust discretionary powers were conferred upon the trustees of selling or assigning or surrendering these policies, but none of these powers was exercised. On the contrary, the trustees continued to pay the premiums throughout the whole period of the trust until the truster's death, and thereupon this money passed as an interest to the daughters and their children. It seems to me therefore that it is plainly property passing on the death of the deceased, and if we are asked for a further definition and description of such property then we find it in the sub-section referred to on record, which sets out, read short, that any interest provided by the deceased, by himself alone, arising on the death of the deceased is dutiable. It appears to me that these words apply in exact terms to the proceeds of these four policies of assurance. The deceased died, and on his death the interest passed in terms of his trust assignation.

The second sum which is the subject of dispute is the capital sum which was devoted to raising an income requisite to pay the premiums upon the policies. £239 odds of annual income was set free at the testator's death, or no longer required when the policies became payable, and the capital sum out of which that £239 was paid was property of the deceased which he handed over to his trustees in 1899 and directed them in express terms to devote to the payment of the premiums of the four policies of insurance. It appears to me exactly the same as if he himself had paid out of his own funds during all those years all those premiums upon his four policies. They were as much paid by him when they were paid indirectly by virtue of his direction under the trust deed as if they had been paid by his own cheques at the time. If that be so, then it is plain on principle and authority that this was once more an interest provided by him arising on his death and passing at the date of his death in terms of the trust assignation. In short, its origin and its destination are just as clear as are the origin and destination of the £11,000 odds. I agree with the reasoning of the Lord Ordinary and with the conclusion which he has reached, and I am for affirming his judgment.

LORD MACKENZIE—I also am of opinion that the Lord Ordinary is right upon both points. The question arises upon the effect

of an *inter vivos* trust-disposition and assignation made by the deceased, by which he conveyed over to trustees heritable properties, policies of insurance, and certain investments. The policies of insurance were current contracts involving, on the one hand, payment of premiums, and on the other hand the right, if the contract was fulfilled and the policy kept up, to receive the capital sums upon the death of the assured. The duty was placed upon the trustees, after a direction to pay his debts, to pay the whole premiums of insurance and other sums necessary for keeping the life insurance policies in force, and then, subject to payment as directed to hold the subjects and pay the net annual proceeds to his daughters. The capital of the trust funds was to go as directed in the third purpose of the *inter vivos* deed. I think it is impossible to contend with success, as Mr Constable argued, that inasmuch as the trust deed irrevocably dedicated certain funds to certain purposes, therefore an interest was not provided by the truster. The trustees were merely the mandataries of the truster for the carrying out of the trust purposes. As regards the payment of premiums of insurance quite a different question would have arisen had the direction been to pay the income of the trust funds to the beneficiaries with an option to them to say whether or not the policies of insurance were to be kept up, because then the trustees would have been paying the premiums of insurance, not as mandataries of the truster but as mandataries of the beneficiaries themselves.

It is said that the whole beneficial interest passed when the trust was created. I am unable, looking to the terms of the trust deed, to take that view. It is quite consistent with the setting up of an *inter vivos* trust that certain interests created should pass only at the death of the truster. Nor can I assent to the argument that in consequence of the special terms of this *inter vivos* deed, which conferred a power on the trustees to surrender the policies, it was they and not the truster who were providing the funds for the premiums. In point of fact the trustees did continue to fulfil their part of the current contracts, and they did not consider it necessary to surrender the policies, and the result was that on the death of the truster the value of the current policies was enhanced, and it is upon the capital value so created that the Crown is entitled to charge duty.

Upon the second point it seems to me that that deals with the same fund as the first point, looked at from a different point of view. I do not think it can be said that the claim of the Crown involves taxing the same thing twice over, because what is dealt with under the first head is a capital value created by the yearly payment in bygone years of the sum of £239 odds, and what is dealt with under the second question is the right in the future to receive annually the £239. There is no double taxation of the same fund. The interests in the capital and the interests in the liferent are not in the same persons. I think that the Lord Ordinary has taken the correct view in holding that there was an augmentation of the interest which went to the liferentrices upon the death of the truster. Upon these grounds I am of opinion that the Lord Ordinary's judgment should be affirmed.

LORD SKERRINGTON—I am of opinion with your Lordships that the Lord Ordinary has come to a right decision upon both points.

LORD SANDS—I confess that I have certain doubts in this case, but my views are not so clear as to lead me formally to dissent. I may, however, state what my doubts are. This policy belonged after the creation of the trust to certain trustees for behoof of certain beneficiaries. Now no doubt when a man dies who has insured his own life the policy upon his life is part of his estate, and in respect of that part of his estate a beneficial interest accrues to his executors. But I confess I entertain some doubt as to whether, where one already holds as one's own property a policy of insurance on the life of another party, any beneficial interest that was not in the holder before accrues to him at the time of the death of the person whose life is insured. The policy which he had *in bonis* simply matures.

My second doubt concerns the premiums, and it is this—substantially I think the income of the portion of the trust estate here in question was being applied for the beneficial interest of this family of daughters just as much before the father's death as it is being applied now. In accordance with his directions it was applied in one way before his death, namely, to preserve policies for their benefit, and now it is being applied in another way, also for their benefit, namely, for their maintenance and support. I confess I entertain some doubt whether in these circumstances within the meaning of the statute a beneficial interest really accrued to the daughters on the father's death in respect of the cesser of the necessity to pay premiums on these policies. But as I said my views are not so clear as to warrant me in formally dissenting from the judgment which your Lordships propose.

LORD JOHNSTON was absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—The Lord Advocate (Clyde, K.C.)—R. C. Henderson. Agent—Sir Phillip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders (Reclaimers)—Constable, K.C.—C. H. Brown. Agents—Buchan & Buchan, S.S.C.