1860.
*April 30th, May 4th, 7th, June 7th.*

LORD SALTOUN, . . . . . APPELLANT.
HER MAJESTY'S ADVOCATE-GENERAL FOR SCOTLAND, . . . . . } RESPONDENT.

*Succession Duty under the* 16 & 17 *Vict. c.* 51.—By this Statute Her Majesty is entitled to succession duty, where the successor is the lineal issue of the predecessor, at the rate of one per centum; and where the successor is the descendant of a brother of the predecessor, to duty at the rate of three per centum.

The Dowager Lady Saltoun executed a deed of entail, dated the 9th June 1846, of certain estates in Inverness-shire in favour of her eldest son, the late Lord Saltoun, and the heirs of his body; whom failing, in favour of his nephew, her grandson, Alexander Fraser, and the heirs of his body. The late Lord Saltoun took as institute. He died without issue on the 18th August 1853; whereupon the said Alexander Fraser, now Lord Saltoun, the above Appellant, took as *nominatim* substitute.

Held, below, that he was chargeable with succession duty at the rate of *three* per centum; the Court being of opinion that the uncle was the "predecessor" within the meaning of the Act.

Held, by the House, (reversing the decree below,) that he was chargeable with duty at the rate of *one* per centum only; their Lordships ruling that the grandmother, and not the uncle, was the predecessor within the meaning of the Act.

*Scope of the Statute.*—Per the Lord Chancellor: In construing the Statute, we must bear in mind that, as it applies to the whole of the United Kingdom, the language of the Legislature must be taken in its popular sense, without regard to technicalities, whether of English or of Scotch law; p. 671.

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Per Lord Wensleydale: It is plain that the Legislature intended the same rule to govern the taxation of succession to property in every part of the United Kingdom; p. 684.

*Principle of the Taxation.*—Per Lord Chelmsford: The general object of the Act is to establish a scale of duty, varying in amount according to the nearness of relationship of the person succeeding to the person from whom the benefit of the succession is derived; p. 686.

Per Lord Wensleydale: The rule as to the rate of payment is fixed at a larger rate where the successor is a stranger in blood, because it may be presumed that he received a more unexpected benefit; p. 685.

*Modes of Succession.*—Per the Lord Chancellor: The second section of the Act seems to me to make a distinction between "taking by purchase" and "taking by descent;" p. 672.

Per Lord Chelmsford: The Act distinguishes between two general modes of acquiring property which confer a succession, viz., disposition and devolution by law; p. 686.

Per the Lord Chancellor: Where the succession is by "disposition," the settlor is the "predecessor," and where by "devolution," the last possessor is the "predecessor;" p. 673.

Per Lord Cranworth: Where a successor derives title by descent, whether as heir general or heir in tail, the person from whom he claims as his ancestor is by a reasonable construction of the Act the predecessor; but when lands are taken by anyone as a purchaser under a deed, the *settlor* must be the predecessor; p. 680.

Per Lord Wensleydale: The entailer is the predecessor with respect to the institute and substitutes. The institute or substitute thus becomes a fresh *stirps* from whom the heirs of the body derive their title by descent; p. 685.

Per the Lord Chancellor: The Appellant is named and described in the deed. He takes by virtue of it directly from the donor, who was unquestionably the "settlor,"

"disponer," and "ancestor," from whom in one sense his interest in the estate was derived; p. 677.

Per the Lord Chancellor: I think the Appellant may be considered in the position of a remainder-man in tail, according to English law, taking *per formam doni*, to whom I conceive that the donor, and not the last person who held under the first estate tail, would be considered the predecessor; p. 677.

Per Lord Chelmsford: I think that the position of the *nominatim* substitute in this entail is precisely analogous to that of a remainder-man in tail, who would no doubt be considered as taking by disposition from the author of the settlement, and not by devolution from the previous tenant in tail; p. 689.

Per Lord Cranworth: I have come to the conclusion that in the case of an English settlement corresponding with that now before the House duty would be chargeable at one, not at three per cent.; p. 682.

Per Lord Cranworth: I think that the uncle was not a person from whom Alexander derived title within the meaning of the statute; p 679.

Per Lord Chelmsford: In the present case, I am of opinion that the Appellant took by disposition from his grandmother, and not by devolution from his uncle, the late Lord Saltoun; p. 687.

Per the Lord Chancellor: I consider it clear that, if the Appellant were to die leaving a son, the son would take by devolution, the Appellant being considered his "predecessor," and so it would go on by devolution from generation to generation, till a new *stirps* came in under the entail; p. 678.

THIS suit commenced with an information by the *Lord Advocate* of Scotland, filed in the Court of Session at Edinburgh, against Lord Saltoun, the Appellant, and informing the said Court that the said Lord Saltoun had become indebted to Her Majesty the Queen in a succession duty at the rate of *three* per cent., which "he had wilfully neglected to pay."

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Lord Saltoun, in defence, insisted that the succession duty legally chargeable against him ought not to exceed the rate of *one* per cent.

The circumstances of the case appear in the following "adjusted case," signed by the respective Counsel of the parties, and presented to the Court below on the 15th of March 1858.

I, the Right Honourable John Inglis, Her Majesty's Advocate, on the behalf of Her Majesty, inform the Court that the Right Honourable Alexander Fraser Baron Saltoun, became beneficially entitled, upon the death of the Right Honourable Alexander George Fraser Baron Saltoun, on the 18th day of August 1853, to certain heritable or real property, situated in the county of of Inverness, in possession, or to the receipt of the income or profits thereof, for a period not less than the residue of his life; that the annual value, after allowance of all necessary outgoings of the said property, was 1,068*l.* 1*s.* 11*d.*; that the value of the said succession, in terms of the statute 16 & 17 Vict. c. 51, amounted to the sum of 16,987*l.* 13*s.* 11*d.*, and the duty payable thereon to the sum of 509*l.* 12*s.* 7*d.*; that the said duty was payable by eight half-yearly instalments, and the periods when these instalments were payable are past, and the said instalments have not been paid to Her Majesty: That the said instalments of duty were finally ascertained on the 18th day of February 1858, and the said Right Honourable Alexander Fraser Baron Saltoun, has wilfully neglected to pay the same within twenty-one days from the said date when such duty was so ascertained, contrary to the statute 16 & 17 Vict. c. 51,—Whereby the said Right Honourable Alexander Fraser Baron Saltoun became indebted to Her Majesty in the sum of 509*l.* 12*s.* 7*d.*, being the amount of the said instalments of succession duty, and liable to pay to Her Majesty the sum of 16*l.* 19*s.* 8*d.* of penalty for neglect as aforesaid of payment of said instalments, and a like sum of 16*l.* 19*s.* 8*d.* for every month after the first month during which such neglect has continued, and shall continue.

II. The Right Honourable Marjory Lady Saltoun, only child of the deceased Simon Fraser of Ness Castle, and of Kings Arms Yard, Coleman Street, in the City of London, Esquire, and Dowager of the late Right Honourable Alexander Baron Saltoun, executed a deed of tailzie of the lands of Ness Castle and others, to which the present case refers, dated 9th June 1846, registered in the register of tailzies on the 26th November 1846. The destination in the entail is "to and in favour of the Right Honourable Alexander George, now Lord Saltoun, my only surviving son, and to the heirs of his body; whom failing, to Alexander Fraser, Esquire, Captain in Her Majesty's 28th regiment of Foot,

presently in the East Indies, eldest son of my deceased son, the Honourable William Fraser, sometime merchant in London, and the heirs of his body; whom failing, to David Fraser, second son of the said deceased Honourable William Fraser, and the heirs of his body; whom failing, to William Fraser, third surviving son of the said deceased Honourable William Fraser (his son Simon being lately deceased without issue), and the heirs of his body; whom failing, to James Fraser, fourth surviving son of the said deceased Honourable William Fraser, and the heirs of his body; whom failing, to Mary Fraser, eldest daughter of the said deceased Honourable William Fraser, and the heirs of her body; whom failing, to Mary Fraser, second daughter of the said deceased Honourable William Fraser, and the heirs of her body; whom failing, to Elizabeth Fraser, third daughter of the said deceased Honourable William Fraser, and the heirs of her body; whom failing, to Margaret Fraser, fourth daughter of the said deceased Honourable William Fraser, and the heirs of her body; whom failing, to Eleanor Fraser, fifth daughter of the said deceased Honourable William Fraser, and the heirs of her body; whom failing, to Catherine Fraser, sixth and youngest daughter of the said deceased Honourable William Fraser, and the heirs of her body; whom failing, to the Honourable Mrs. Eleanor Fraser, otherwise Grant Macdowall, spouse of William Grant Macdowall, Esquire, of Arndilly, my only surviving daughter, and the heirs of her body; whom all failing, to my own heirs and assignees whomsoever, the eldest heir female, and the descendants of her body, excluding heirs portioners, and succeeding always without division through the whole course of the female succession."

III. The maker of the entail, the Right Honourable Marjory Lady Saltoun, died on the 15th day of November 1851, and the Right Honourable Alexander George Fraser Baron Saltoun, her eldest son, institute in the entail, was infeft in the said lands of Ness Castle and others, conform to instrument of sasine in his favour, proceeding on the deed of entail, recorded in the general register of sasines, &c. the 23rd of November 1846. He died on the 18th day of August 1853, without lawful issue, and the Defender in the present action, the Right Honourable Alexander Fraser Baron Saltoun, son of the Honourable William Fraser, a younger son of the entailer, was served as "nearest and lawful heir of tailzie and provision in special to the said deceased Alexander George Fraser Lord Saltoun," in the said lands and others, conform to decree of service, dated 19th June 1854, and he, the Defender, was infeft thereon, conform to instrument recorded in the general register of sasines, &c. 29th June 1855. The decree of service by the Sheriff of Chancery finds that the late "Right Honourable Alexander George Fraser Lord Saltoun died last vest and seised as of fee" in the said lands of Ness Castle, and others. The Defender succeeded to the said lands of Ness Castle

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and others upon the death, on the 18th August 1853, of the said Alexander George Fraser Lord Saltoun.

IV. The Defender is lineal issue of the maker of the entail, and is liable to duty at the rate of one per cent, if the maker of the entail shall be held to be the predecessor. He is a descendant of a brother of the immediately preceding heir of entail in possession, and is liable to a duty at the rate of three per cent., if such immediately preceding heir of entail in possession shall be held to be the predecessor.

V. By 16 & 17 Vict. c. 61. s. 2., the income of property to which a person becomes beneficially entitled by reason of a disposition, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person, are each a succession, and the predecessor is described as follows: —"And the term predecessor shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

VI. The Defender became entitled to, and has drawn payment of, a proportion of the second half of the rents of the said lands of Ness Castle and others, for crop 1853, corresponding to the period from the 18th August 1853 to the term of Martinmas 1853 (11th November 1853), and also the whole rents for crops 1854, 1855, 1856, and he has become entitled to the whole rents for crop 1857, and has drawn payment of part of them.

VII. The annual value of the said lands of Ness Castle and others, after making allowance for the necessary outgoings, in terms of the statute, is 1,068*l.* 1*s.* 11*d.*, and the value of an annuity of that amount for payment of the succession duty upon the life of the Defender, who was of the age of thirty-four at 18th August 1853, is the sum of 16,987*l.* 13*s.* 11*d.*, and the amount of each of the eight half-yearly instalments of succession duty thereon, at the rate of three per cent., is the sum of 509*l.* 12*s.* 7*d.*, and at the rate of one per cent. is the sum of 169*l.* 17*s.* 6*d.*

VII. The Lord Advocate claims succession duty upon the Defender's succession to the said lands of Ness Castle and others, at the rate of three per cent. according to his relationship to Alexander George Fraser Baron Saltoun, on the ground, among others, that the said Alexander George Fraser Baron Saltoun, having been feudally vested in the fee of the lands under the deed of entail, and the Defender having made up title to him by being served as his nearest and lawful heir of tailzie and provision, and procured himself infeft upon the decree obtained in such service; the said Alexander George Fraser Baron Saltoun, was the ancestor or other person from whom the interest of the Defender was derived.

IX. The Defender maintains that the entailer is the predecessor of all the heirs taking under her entail; and, therefore, as he is lineal issue of the entailer, he is only liable for duty upon his suc-

cession to the said lands of Ness Castle and others at the rate of one per cent. The heirs of entail get no right from each other, as they can neither give to, nor take anything from, each other. Although they serve to each other, it is to take up a right conferred on them by the entailer. They all make up their titles under the entail, and the provisions of the entail expressly exclude them from making up their title in any other manner. They can obtain no right to the lands, therefore, but by virtue of the disposition contained in the entail, and as that was granted by the entailer, their title consequently is derived from her. The party to whom they serve gave, and could give them nothing—it is the entailer, through the entail, from whom their right is derived.

On the 20th March 1858, Lord *Ardmillan*, Ordinary in Exchequer Causes, after hearing Counsel, pronounced the following Interlocutor:—

Finds that the entailer, Marjory Lady Saltoun, is to be considered as the "predecessor" of the noble Defender within the meaning of the statute 16 & 17 Vict. c. 51: Finds that the noble Defender is the grandson of the said entailer; and therefore finds that succession duty is due by the Defender at the rate of one per cent. only, and decerns.

In explanation of this Interlocutor, the *Lord Ordinary* appended to it the following Note:—

There is no question of feudal title involved in the point here raised, which turns on the construction of the 16 & 17 Vict. c. 51, and the sole question is, who is the "predecessor" of the noble Defender within the meaning of this statute? It provides, by section 10, that "where the successor shall be the lineal issue of the predecessor," the duty shall be one per cent.; and "where the successor shall be a descendant of a brother of the 'predecessor,'" the duty shall be three per cent. The noble Defender is heir of entail in possession, and is the grandson of Marjory Lady Saltoun, the entailer—her lineal issue. He is the nephew of the last Lord Saltoun, the son of a brother. If the word "predecessor" in the Act means, with reference to the entailed succession, the entailer whose will and deed created that succession, then Lady Saltoun was "predecessor," and the Defender, as her "lineal issue," is liable in succession duty at the rate of one per cent. only. If the word "predecessor" in the Act means the last heir of entail feudally vested in the estate, and to whom the Defender's title is completed as heir of tailzie and provision, then the last Lord Saltoun was "predecessor," and the Defender, as his nephew—

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"descendant of a brother"—is liable in duty at the rate of three per cent.

The Lord Ordinary is of opinion that the entailer is the "predecessor" within the meaning of this statute, and to the effect of regulating the rate of succession duty. The second section of the statute explains the manner in which, for the purposes thereof, successions shall be deemed to be conferred by "disposition," and by "devolution by law;" and then proceeds to define the three terms "succession," "successor," and "predecessor." The definition of "predecessor" is as follows:—"The term predecessor shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." This definition is framed to meet the case of succession to the beneficial interest in property, real or personal (sect. 1), conferred by "disposition," and the case of such succession conferred by "devolution by law." The first four terms used in the definition, viz., "settlor," "disponer," "testator," "obligor," apply to the first class of cases, and denote the makers of deeds conferring succession. The term "ancestor" seems rather to be applicable to the case of intestate succession, and to denote the person from whom such succession is derived by devolution by law. The last part of the definition, viz., the other person from whom the interest of the successor is derived, is that which is founded on by the Lord Advocate, and it is said to apply to the last Lord Saltoun, to whom the Defender was served heir of tailzie and provision. The Lord Ordinary does not think that construction correct. The predecessor is the person *from* whom the interest is derived, not *through* whom it is derived; and the succession so derived is the "beneficial interest in property," not merely the formal feudal title. It can scarcely be doubted that the successive heirs of entail, being heirs *provisione hominis*, derive the beneficial interest in the estate from the entailer. The deed of entail is the foundation of their right; their service to each other is a mere mode of completing the feudal title; the heir serving as heir of tailzie and provision takes nothing from the preceding heir to whom he serves; it is in virtue of the entail, and by appointment of the entailer, that he takes the entailed estate. The entailer is as truly the person from whom each successive heir derives his right as he is the "settlor" or "disponer" under the previous part of the definition. The immediately preceding heir of entail who could "confer" no interest, and from whom no interest could be "derived," does not appear to the Lord Ordinary to be within the definition of "predecessor."

The provision in the latter part of the fourth section of the statute, in regard to a succession under a power of appointment, where the person "creating the power," and not the person exer-

cising the power, is specially denoted as the "predecessor,"—thus having regard to the true source of the interest, seems to support the view now explained; and in the opinions of the Court in the case of *Stirling* v. *Ewart*, 14th February 1842 (4 Dun. 648), further confirmation of the same view, as applicable to entailed succession, is to be found. Every succeeding heir of entail is, according to that decision, an "heir of the investiture," and derives his right from the entailer. The relation which heirs of entail bear to each other is not that which is meant to be denoted in the definition given in the second section of this statute as the relation between predecessor and successor. Taking that part of the definition which is said to be most favourable to the demand of the Crown, that relation is derivative, not merely successive. The predecessor is not the person after whom the owner takes, but from whom he "derives the interest." The true meaning or idea involved in the word "derived," is not mere sequence, but flowing from a source. To trace the source from which the successor derives the succession is the way to find the "predecessor;" and the source or spring of such deriving is to be found in the investiture, in the original constitution or creation of the beneficial interest which is the subject of the succession, not in the successive steps in the mere progress or transmission of the feudal title. To reach the predecessor we must pass by the heirs who, in succession, enjoy under the investiture, and go to the author and maker of the investiture. To reach the true source from which the succession is derived, we must seek the fountain of the stream —not pause at each successive pool, where the flowing current stays and settles for a time.

On the whole matter, and after attentive consideration of the statute, the *Lord Ordinary* is of opinion that duty at the rate only of one per cent is here exigible.

The *Lord Advocate* having presented a reclaiming note to the First Division of the Court against the above Interlocutor, their Lordships pronounced this Interlocutor:—

*2d June* 1858.—The Lords having advised the reclaiming note for the Lord Advocate, and heard Counsel for the parties thereon and on the whole cause, they, in respect of the importance and general application of the question at issue between the parties. Appoint the parties forthwith to box the printed papers in the cause to the Judges of the Second Division of the Court, and to the permanent Lords Ordinary, with a view to the hearing of the cause, by one Counsel on each side, before the whole Court, on the question whether the Interlocutor of the Lord Ordinary should be adhered to?

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The cause having been accordingly heard by the whole Court, two of the consulted Judges, namely, Lord *Ardmillan* and Lord *Neaves* (*a*), were for ad-

(*a*) Lord Neaves' opinion was as follows:—

The statute declares that any beneficial interest in property which may open to a party on the death of another, in respect of a disposition, or by devolution of law, shall constitute a "succession;" and the terms "successor" and "predecessor" are defined by the statute in words intended to cover the different varieties of these two classes of cases; while the rate of duty is made to depend on the kind of propinquity between the successor and the predecessor. By the law of Scotland a disponer has the power to designate in the disposition the persons or classes of persons who shall succeed as heirs to the disponee. These heirs so substituted take no present estate or interest in the property by means of the disposition. The whole fee of the property is conferred on the institute or disponee, and descends successively to the several heirs in their order, as heirs of each preceding holder of the estate. Correctly speaking, therefore, every heir of entail succeeds, not to the entailer, but to the immediately preceding heir or proprietor of the estate, and the two stand to each other, in the relation of successor and predecessor, and of heir and ancestor. In the present case, it may be particularly noticed, that Lady Saltoun, the entailer, never had, or could have, an heir of her own under this entail, for she gave it immediately in fee by disposition to her eldest son, who was infeft in her lifetime, and the present Lord Saltoun takes it as heir of entail of his uncle. But the difficulty arises from the enactments which speak of rights arising by reason of a disposition, and this "either originally or by way of substitutive limitation," as constituting one kind of succession, opposed to a devolution by law; and which define the "successor" to be the party so taking, either by disposition or by devolution, and the "predecessor" to be the "settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." If it be asked whether the present Lord Saltoun takes this property by reason of a disposition, or by devolution of law, it seems difficult to deny that he takes it by the first means, and not by the second; and if he takes it by reason of a disposition, it seems equally difficult to hold that, in the sense of the statute, the predecessor is any other than the disponer, from whom the right is thus derived—*i.e.*, the entailer. He takes, indeed, as a substitute, or substituted heir of the previous holder, the first Lord Saltoun, but his position in this respect seems to fall under those words of

hering to the Interlocutor complained of, while four of them, namely, Lord *Kinloch*, Lord *Cowan*,

the Act which refer to parties acquiring right by reason of a disposition, by way of "substitutive limitation." These words are not known as having a technical character in the law of Scotland; but viewed as ordinary phraseology, they seem to refer to a substitution of heirs, and thus cover the case which here arises. The disposition and destination in question is made to and in favour of the late Lord Saltoun, the disponer's son, "and to the heirs of his body, whom failing, to Alexander Fraser, Esq.," the Respondent, the entailer's grandson. The late Lord Saltoun is thus the disponee, and the first heirs substituted to him are the heirs of his body as a class. This class of heirs might have taken, and the estate might thereby have descended to the issue of the late Lord Saltoun, and to their issue for generations, exactly in the line which it would have followed at common law. Now, supposing that the first Lord Saltoun had been a collateral relation, or a stranger to the entailer, I cannot think that under this statute each of his descendants, succeeding, it may be, in a direct line from father to son for centuries, would always come to be considered as the successor to the original entailer, and thus have to pay a corresponding and larger succession duty than is due from a child succeeding to its parent. In the destination to the "heirs of his body" after the first Lord Saltoun, the deed does not specify the individuals who are to succeed; and any person taking under that clause would do so, not simply by reason of the deed, but by reason further of his being at common law the heir of Lord Saltoun's body. But in the special case here under consideration the present Lord Saltoun is not called, and does not take, as an heir-at-law of any kind. Technically and feudally speaking, he is an heir of his deceased uncle, that is, an heir of tailzie and provision to him. But it is not in any respect as one of his legal heirs that he succeeds, nor has the law any part to perform in creating his claim to succeed. He takes the estate as a new substitute, called *nominatim* by the entailer. While, therefore, I should be prepared to hold that parties not called by the deed *nominatim*, but taking merely in respect of a certain legal character, as heirs of the body or the like to their immediate ancestor, ought to be held as the successors of that ancestor by devolution or force of law in the sense of this statute; I am of opinion, on the other hand, that a party like the present Lord Saltoun, who takes not as one of a class of legal heirs to the party immediately preceding him, but as a substitute individually named in the deed or destination, is to be held, in the sense of the statute, as a successor to the entailer, from whose special favour he thus derives his right.

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Lord *Mackenzie*, and Lord *Murray*, were for altering it (*a*).

Of the four Judges of the First Division to whom belonged the decision of the cause, the *Lord President* and Lord *Ivory* agreed with the *Lord Ordinary*, while Lord *Curriehill* and Lord *Deas* were for altering his Interlocutor.

On the 16th Dec. 1858 the First Division pronounced the following judgment (*b*) :—

Having resumed consideration of this cause with the opinions of the consulted Judges, in conformity with the opinions of the majority of the whole Judges, consulted and consulting: Recall the Interlocutor of the Lord Ordinary reclaimed against; Find that Alexander George Fraser Baron Saltoun, deceased, is to be considered as the predecessor of the noble Defender within the meaning of the statute; find that the noble Defender is the son of a brother of the said deceased Alexander George Fraser Baron Saltoun; and therefore find that succession duty is due by the Defender at the rate of three per centum, and decern; find the Defender liable in expenses, &c.

Against this judgment the Appeal was tendered to the House by the present Lord Saltoun, who had for

(*a*) Lord Wood and Lord Benholme were prevented by indisposition from attending. The office of Lord Justice Clerk was vacant.

(*b*) In delivering judgment, the Lord President made the following remarks :—

In this statute succession by devolution of law is put in contrast to succession by disposition,—that is to say, it is dealt with as a totally different class of succession, and we must determine to which class this succession belongs. Is it derived from a disponer by disposition, or is it derived from an ancestor by devolution by law? I think that devolution by law applies to the case where the property would devolve on the party by the ordinary rules of legal succession or of right if the law were left to its own course uncontrolled. I desire to limit my present judgment to the very different case where the party claiming the succession is in a position to say, "I am named in this disposition. The succession is, by that deed, conferred on me upon the death of A. without issue. That event has taken place. The technicalities of conveyancing and other requirements of feudal tenure in Scotland must no doubt be resorted to in order to make up a formal title; but I derive my right from the disposition.'

his Counsel Mr. *Rolt*, Mr. *Anderson*, and Mr. *W. J. Tayler*.

The *Attorney-General* (*a*), the *Lord Advocate* (*b*), Mr. *Hanson*, and Mr. *Russell*, of the Scotch Bar, appeared for the Respondent.

The following were the opinions of the Law Peers.

*Lord Chancellor's opinion.*

The LORD CHANCELLOR (*c*):

My Lords, in construing the statute on which this case depends, we must bear in mind that it applies to the whole of the United Kingdom, and that the intention of the Legislature must be understood to be, that the like interests in property taken by succession should be subjected to the like duties wheresoever the property may be situated. The technicalities of the laws of England and of Scotland, where they differ, must be disregarded, and the language of the Legislature must be taken in its popular sense.

Looking to the contents of this deed of entail, and the events which have happened, we are to say, who was the "predecessor" of the Appellant within the meaning of the second section of 16 & 17 Vict. 51.; whether his grandmother, the Dowager Lady Saltoun, the entailer, or his uncle, the late Lord Saltoun, the last possessor, of the entailed estate.

Relying on the feudal law still prevailing in Scotland, and the forms of Scotch conveyancing, it has been contended, on the one side, that the "entailer" must always be considered the "predecessor," because the interest of every substitute as well as of the institute is derived from the entail.

On the other side it has been urged that the last preceding possessor under the entail must be considered the "predecessor," because he had the whole

(*a*) Sir Richard Bethell. (*b*) Mr. Moncreiff.
(*c*) Lord Campbell.

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*Lord Chancellor's opinion.*

fee in him, whether he held under a strict entail, with irritant and resolutive clauses, or under a simple destination; and that the next substitute being served heir to him, although a stranger in blood, is his successor, and derives his interest from him.

I shall abstain from attempting to lay down any general rule by which the question of *predecessorship* is to be determined; but I have no difficulty in saying, that in my opinion neither of these rules can be laid down to operate universally; as each would lead to consequences which the Legislature cannot be supposed to have intended.

Of these consequences I will give examples, which might be easily multiplied. The entailer being considered the predecessor of every successor, from generation to generation, if the entailer settles the estate by a strict entail on a stranger in blood and his issue,—son succeeding father, brother succeeding brother, or nephew succeeding uncle, for hundreds of years,—the heir who succeeds under the entail, whatever may be his propinquity to the last possessor, must pay succession duty at the rate of ten per cent. The last preceding possessor being invariably considered the "predecessor" in Scotland, and the same rule being applied to England, if there were an English settlement, with successive estates tail in remainder, on the failure of one estate tail, the remainder-man, however nearly related to the donor, would pay succession duty according to his propinquity to the last preceding possessor, who may have been a stranger to him in blood.

But the second section of the Act (*a*) seems to me

(*a*) "II. Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act,

to make a distinction, both as to Scotland and England, between what English lawyers call "taking by purchase" (*a*) and "taking by descent." Seeking to use language which might be adapted to the technicalities of the law of property in both portions of the island the section divides succession into succession by "disposition" and succession by "devolution." All successions by the one and by the other are subjected to the duty; but the rate of duty is to be regulated by considering who is the predecessor; and this may be determined by considering whether the succession is by "disposition" or by "devolution."

In fixing the rate of duty to be paid by the successor the Legislature was perhaps influenced by a consideration of the probability he before had of enjoying the inheritance, and by a consideration of the probability of his being able to pay a heavier duty without hardship, if the property came to him from a distant relation or from a stranger.

This object, I think, will best be obtained by holding that where the succession is by "disposition" the *settlor* is the "predecessor," and where by "devolution" the *last possessor* is the "predecessor."

either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession;' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

(*a*) The word "purchase" has in law a meaning more extended than its ordinary sense; it is possession to which a man cometh not by title of descent; a devisee under a will is accordingly a purchaser in law; Williams on Real Property, p. 69.

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If the successor takes by "disposition," the degree of relationship between him and the last possessor could hardly have been an ingredient in fixing the rate of duty to be paid by him; and this ought to be regulated by the relationship between the donor and the donee. Such is the rule where the donee takes immediately as the first object of the bounty of the donor, and there seems no reason why the same principle should not prevail where a substituted donee takes not as heir of the first donee, but only *per formam doni*.

No doubt questions may arise whether the successor takes by "disposition" or "devolution;" but I have not the smallest doubt that in this case the Appellant takes by "disposition," and not by "devolution." Without at all relying on his being a *purchaser* according to the phraseology of English lawyers, I would submit the question to any well-educated English gentleman.

Lady Saltoun, by her deed of entail, first gave the estate to her eldest son and the heirs of his body; then to "Alexander Fraser, Esquire, Captain in Her Majesty's 28th regiment of Foot, eldest son of her deceased son, the Honourable William Fraser." This is the Appellant, and it is entirely by the "disposition" in his favour that he is now the owner of Ness Castle. It did not devolve upon him directly from her, and he certainly does not take from the "disposition" of his uncle, who had no power to alter the line of succession.

The word "derived," with which the second section concludes, is certainly most important, and to make Lady Saltoun the "predecessor" of the Appellant, his interest must be *derived* from her.

Some Scotch lawyers say his interest must be derived from his uncle, who had the whole fee in him; but "derived" is not a *vox signata* either in the law of Scotland or of England, and being of flexible

signification, it has been happily selected by the learned framers of this Act of Parliament (I presume) with a view that it might apply both to "disposition" and "devolution," one meaning of "derivation" given by Dr. Johnson being "the transmission of anything from its source," and to "derive" he says, is "to receive by transmission."

The great obstacle with the Scotch Judges in the way of this reasoning was the doctrine, that every succeeding substitute takes from the last possessor, who in contemplation of law had the whole fee in him, though substantially he may have been only tenant for life; and that, when the Appellant was served heir, he could not derive any interest from his grandmother, because in her lifetime she had denuded herself of all interest whatsoever in the entailed premises. But I think we may look at the state of things at the making of the entail, when, having disponed an estate to her eldest son and the heirs of his body, Lady Saltoun had substantially in her the rest of the fee, and she carved out of it another estate tail to her grandson Alexander and the heirs of his body.

At any rate, let us attend to the correspondence on this subject between Lord *Hardwicke*, and Lord *Kames*, and to the decision of this House in the celebrated case of *Gordon of Park* (*a*), and we shall

(*a*) The case of *Gordon of Park* and the correspondence between Lord Hardwicke and Lord Kames are thus referred to by Lord Ivory in delivering his opinion below:—"I have only further to refer to a passage, which I am sorry the parties at the bar did not think it necessary to deal with, but which I have along thought most important, with reference to this question. It is a passage from a letter by Lord Hardwicke to Lord Kames (Elucidations, p. 384), in which he deals with the question of forfeiture of the estates of Gordon of Park for treason. And the question there involved the same difference between the English estates in remainder and the Scotch tailzied succession, as I have just been referring to.

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learn that such subtle technical rules are to give way for the purpose of doing justice and fulfilling the

It was impossible to hold that they were the same. But the Statute of Union had ordered that the laws of treason should be administered as much as possible alike in the two countries; and the question was, whether Gordon had forfeited for himself alone and his heirs, or for all parties called as substitute heirs of entail. It was held that those who succeeded to the estate as his heirs should be held to be forfeited, but that the estate itself was not carried off. That although, according to our feudal notions, Gordon was in the full fee of the estate when he committed the treason, he was not so to the effect of possessing and exercising the whole unlimited rights of a proprietor. The question was how to deal with the estate after he was gone; and that created the puzzle, because in England the next party took it as a free estate, untouched by forfeiture; and here is what Lord Hardwicke says: 'The knot lay here, to avoid forfeiting the whole fee; for as your law places that fee in tenant in tail, and don't admit of a division of it into particular estates and remainders, there was more a colour from legal reasoning to carry it to that large extent than to make a man who had a fee in him to forfeit for his life only. But I could not satisfy my own mind that this large extent was either agreeable to the intention of the Legislature, or a just and equitable measure between the two nations. How was this to be avoided? By expounding the Act by analogy, and if you will apply your usual penetration to this point, you will find that there is often no other possible way of making a consistent sensible construction upon statutes conceived in general words, which are to have their operation upon the respective laws of two countries, the rules and forms whereof are different. These general views will probably always be taken from the language or style of one of these countries more than from the other, and not correspond equally with the genius or terms of both laws. You must then, as in other sciences, reason by analogy, or leave at least one-half of the statute without effect.' Now that seems to me to be a most valuable exposition, which practically guided the House of Lords in that question of treason, and bears on the application of the principle of construction in the present case. We are here precisely, as in the case of *Park*, dealing with the laws of both countries. We are dealing with a statute in which the phraseology of the one country has been used more or less in reference to the other, and the question is, how are the two systems to be reconciled so as to give the statute an equal operation in both countries? The answer then was, by analogy; and you are to seek, as between the two countries, something which will enable you not to introduce a punish-

*Lord Chancellor's opinion.*

intentions of the Legislature. Without infringing the genuine principles of Scottish feudal law, which I wish ever to hold sacred unless where they have been relaxed by the Legislature, I think that the Appellant may be considered in the situation of a remainderman in tail, according to English law, taking *per formam doni*,—to whom I conceive that the donor, and not the last person who held under the first estate tail, would be considered the "predecessor."

In the present case, the Appellant is named and circumstantially described in the deed, he takes directly from the donor by virtue of the deed, and she unquestionably was the "settlor," "disponer," and "ancestor," from whom in one sense his interest in the estate was derived.

I would not by any means presume to express any opinion beyond what is necessary for this particular

ment greater in the one country than in the other: and if in England, a remainderman was not divested by the forfeiture of the estate in another remainderman, so here we may apply that same principle of construction by analogy, and finding, as we were informed from the bar, that in England the beneficial interest draws back to the giver of that interest, we may equally refer the beneficial interest back to the maker of the entail. And, accordingly, I would put the question, suppose this statute had existed in the time of Gordon of Park, and the new *stirps* which was saved by Lord Hardwicke's interpretation of the Treason Act, holding the fee of the estate not to be so carried by Gordon as to be forfeited by him for all substitute heirs; suppose this substitutive heir—who had got the estate on no other principle than that the laws of both countries might be reconciled—had been taxed on his succession, could he have said, 'My predecessor is Gordon. It is through him that I take the succession?' That would have been a very dangerous position for him to take, for the only condition on which he gets the estate is that he is so separated from Gordon that he cannot be affected by his treason as preceding heir. That is an illustration to my mind of the greatest force in the present case; and, upon the whole matter, I have only to say that I am compelled to adhere to my original opinion, and am for adhering to the Interlocutor of the Lord Ordinary."

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case, but, I may say that in harmony with the decision which I venture to propose, viz., that here the maker of the settlement is the "predecessor," and not the last preceding possessor,—I consider it equally clear that if the Appellant were to die leaving a son, the son would take by "devolution," the Appellant being considered his "predecessor," and so it would go on by devolution from generation to generation, till a new *stirps* came in under the entail.

*Lord Chancellor's opinion.*

I ought to add, that my opinion is not in the remotest degree influenced by the argument that in a doubtful case we ought to decide so as that the smaller fiscal burden may fall upon the subject. In this case it is a pure accident that the entailer is the direct lineal ancestor of the substitute; and in another case, to be decided on the same rule, the substitute may be a stranger in blood to the entailer, and nearly related to the institute, and thus he might be liable to a duty of ten per cent. instead of one per cent.

Upon the whole, I must advise your Lordships to reverse the Interlocutor appealed against, and to declare that the succession duty due from the Appellant to the Crown is at the rate of one per cent. only.

*Lord Cranworth's opinion.*

Lord CRANWORTH:

My Lords, although the question in this case arises on an appeal from a Scotch decision, yet it cannot be disposed of satisfactorily, without considering it in its bearings on the whole of the United Kingdom. What we have to determine is the true construction of an Act of Parliament imposing a tax on the succession to property in every part of the United Kingdom, and it may safely be assumed that the intention of the Legislature was to make its operation equal wherever it was to be put into force; and if, therefore, we can come to a satisfactory conclusion as to what would

*Lord Cranworth's opinion.*

have been the duty payable in England or Ireland on a succession arising on a settlement as nearly as possible the same as that now before us, we shall arrive at a solution of the difficulty we have to deal with.

Suppose, then, that Lady Saltoun had, by a settlement of lands in England, made according to our forms of conveyancing, conveyed real estate to the use of her eldest son, Lord Saltoun, in tail, or to him for life, with remainder to his first and other sons in tail, with remainder to Alexander Fraser, eldest son of her deceased son William, in tail, or for life with remainder to his first and other sons in tail, with remainders over, and that Lord Saltoun, having survived his mother, had died without issue, so that the limitation in favour of Alexander should have taken effect, at what rate of succession duty would he be chargeable? If his uncle, Lord Saltoun, was his predecessor, he would be chargeable at three per cent., if his grandmother was his predecessor then he would be chargeable at one per cent. only.

The Act says that the predecessor is the "settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is derived." The interest of Alexander certainly would not have been derived in the case I have put from any testator, obligor, or ancestor. The words "settlor" and "disponer" may for the present purpose be treated as synonymous; and, therefore, the predecessor must have been either the *settlor* or the *other person* from whom the interest of Alexander was derived. The grandmother certainly was the settlor from whom the interest of Alexander was derived. Was his uncle, Lord Saltoun, another person, or the other person within the meaning of the statute, from whom his interest was derived? And if he was, then which of the two was his predecessor? I think that the uncle

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*Lord Cranworth's opinion.*

was not a person from whom Alexander derived title within the meaning of the statute. He was not a person answering that description, unless we can understand the Act to describe the person in possession on whose death the successor comes into the enjoyment of the estate as the person from whom the interest of the successor is derived, *i.e.*, that for the purposes of the Act the interest of the successor is always to be considered as derived from the person on whose death his title accrues in possession. I think it impossible so to construe the Act. On such a construction the word "settlor" never can have any operation. That word "settlor" evidently is meant to apply only to a person creating a settlement by deed in his life-time. For in the case of a settlement by will, the word "testator" would apply. And, if, in the case of a remainder coming into possession under a settlement by deed, the person dying in the enjoyment of the preceding estate is the predecessor of the remainder-man, the settlor never can be a predecessor, and the introduction into the Act of the word "settlor" will have been useless.

Where a successor derives his title by descent, whether as heir general or heir in tail, there, by a reasonable construction of the Act, the person from whom he claims as his ancestor is the predecessor, so that it then becomes unimportant to consider from whom the title was originally derived, by settlement or will. The settled lands are, by the hypothesis, passing in a course of descent, and the ancestor is the predecessor. But when the lands are taken by any one as a purchaser under a deed, the settlor must be the predecessor, for the reason I have mentioned, that is, that otherwise a settlor never can be the predecessor.

This is illustrated by several clauses in the Act.

Clause 3 enacts that where there are joint tenants, not having become so as successors, and one of the joint tenants dies, he shall be deemed to be the predecessor in respect of the interest passing to the survivor or survivors. This provision was unnecessary, if, as being the person last in the enjoyment of the property, he was, within the meaning of clause 2, the person from whom the interest of the successor is derived. And the principle is well illustrated by the subsequent part of the clause, which provides that where the joint tenancy has arisen from a joint succession, which would be the case if an estate were devised to two as joint tenants, or were settled on two as joint tenants in remainder, after a preceding particular estate for life, then, on the death of one of the joint tenants, the title of the survivor shall be deemed to be a title derived from the same predecessor from whom the joint title was derived. In the case provided for by the first branch of the clause it was necessary to make a special provision, because there was no person from whom the interest of the survivor was derived. In the second, as by the hypothesis there was a person from whom the joint interest was derived, it was only necessary to say that the same person should be deemed predecessor in respect of the interest accruing by survivorship, excluding in that case the predeceasing joint tenant.

The fourth clause evidently proceeds on the same principle. Any person having an absolute power of apportionment is, on principles easily understood, treated as owner; but if his power is only to apportion among particular objects, then the author of the power is the predecessor obviously, on the ground that it is from him that the interest of the appointees is derived.

So again, by the 5th clause, where any property is subject to any charge, or estate or interest terminable

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on the death of any person, the additional value conferred by the death of such person is to be deemed a succession derived, not from the person dying, but from the predecessor from whom the property charged was derived, and there are many other clauses leading to the same result. See particularly clauses 12 and 13.

I have on these grounds come to the conclusion that in the case of an English settlement corresponding, as exactly as the laws of the two countries permit, with that now before the House, duty would be chargeable at one, not at three per cent.

If that be so, the presumption is irresistible, that the same rate of duty is payable on the succession arising under the corresponding Scotch Settlement. It could not have been intended that the burden imposed on the succession to property should be differently estimated on one side of the Scotch border, and on the other; and then the only question is, how this can be reconciled with Scotch law.

The opinions of the majority of the Scotch Judges rested on the ground that the Appellant derived title from his late uncle; that the institute and every successive substitute has in him, according to the law of Scotland, the whole fee; and that whether the heir of provision succeeds by reason of his being heir of the body of the institute, or of his being specially designated in the deed of tailzie as a substitute called *nominatim* on failure of heirs of the body, either of the institute or of a preceding substitute, the result is the same. In both cases the relation of the person dying in possession to the person who succeeds him in the enjoyment of the estate is that of heir and ancestor. And this being so, the majority of the Judges held that duty must be charged on the principle that the ancestor is to be treated as the predecessor within the true

intent and meaning of the second section of the Act.

*Lord Cranworth's opinion.*

This reasoning would be unanswerable, if the duty were to be assessed on feudal principles. But this is not the case; the principle is correctly enunciated by Lord *Ivory*. It is true that a substitute designated by name to take the estate on failure of heirs of the body of the institute, or of a preceding substitute, takes as heir of provision; but he does not take "*by devolution of law*" according to the true intent and meaning of those words as used in the statute; he becomes a new *stirps*, taking by disposition of the disponer, as he would have done if all who preceded him in the enjoyment of the estate had been mere life-renters.

This decision, though it would do violence to some of the best established doctrines of Scotch law, if the present question were one of conveyancing, may yet be well admitted in the construction of an Act intended to impose corresponding duties on successions happening under two different systems of law. Lord *Hardwicke* held that where a statute (the Act of Union) had said that a particular law (that of treason) should be administered as nearly alike as possible in the two countries, we were at liberty to disregard in the application of that law the rules prevailing in Scotland as to the tenure of land and the feudal rules of forfeiture. Though the statute now under consideration does not contain any express declaration similar to that in the Act of Union relative to treason, yet it must be assumed that such a principle was implied, though not expressed; and on these grounds I have come to the same conclusion as my noble and learned friend on the woolsack, namely, that the Interlocutor ought to be reversed.

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*Lord Wensleydale's opinion.*

Lord WENSLEYDALE:

My Lords, I take the same view of this case as my two noble and learned friends, who have preceded me, and they have explained the reasons upon which their opinion is founded so fully and clearly that I have very little to add.

I think it plain that as only one rule is given in the Succession Duty Act, the Legislature has intended that the same rule is to govern the taxation of succession to property in every part of the United Kingdom, notwithstanding the differences of the law which regulates the transmission of real estate in one of them, and technical distinctions which really make no substantial difference must be overlooked, and all the subjects of each kingdom must have been meant to be taxed equally in the same circumstances. The problem is therefore to determine what rule best accords with the intentions to be collected from the statute. Upon the best consideration I have been able to give to the subject, I think a very reasonable rule may be deduced with sufficient clearness from the words of the Act, construing them according to the established rule.

By the second section a succession may be constituted in two ways, either by reason of a disposition or by a devolution. The person entitled to that succession is a successor. The predecessor may be the settlor, or disponor, or obligor, when the disposition is by deed, or the testator where by will; or he may be the ancestor where the succession is by devolution. The addition of the words "other person" was probably made *pro majore cautelâ* perhaps, though indeed unnecessarily, to include the case of any other person by whom a disposition might be made of the estate, or from whom a devolution might take place,

who might not strictly come within any of those descriptions.

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*Lord Wensleydale's opinion.*

In England and Ireland I think it clear that where there is an entail giving an estate tail to one, with a remainder to another, the donee or remainder-man who takes by purchase is the successor, and the entailer the predecessor; but with respect to the heirs of the body, the donee in tail is the ancestor, and the heir of the body is the successor. It seems to me that we ought to hold, in analogy to that, that the entailer of a Scotch entailed estate is the predecessor with respect to the institute and the substitutes; and the institute and substitutes respectively the successors; and again, the heir of the body of the institute and of each substitute is the successor to them respectively; and thus the same rule will apply to real estates in every part of the United Kingdom. The institute or substitute thus becomes a fresh *stirps* from whom the heirs of the body derive their title by descent.

It is true that by the technical rule of the Scotch law each succeeding substitute takes the whole fee, and must be served heir to the preceding owner, and in that sense takes by devolution, whereas in England and Ireland each remainder-man takes a part of the same estate, and takes it from the settlor; but notstanding this technical distinction, substantially the position of the respective parties is the same in all parts of the United Kingdom, and they should be taxed in the same way.

The rule as to the rate of payment is evidently fixed at a larger rate where the successor is a stranger in blood, because it may be presumed that he received a more unexpected benefit, and would therefore be willing to pay more of it by way of tax; and in the case of relations, a similar reason may have influenced the Legislature in imposing a greater duty on the

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more distant relative. It cannot make distinctions as to particular cases, it must act by general rules, and generally speaking, the provision is reasonable.

*Lord Wensleydale's opinion.*

I come, therefore, to the conclusion, that the Appellant, who derived the estate as substitute from his grandmother, the settlor or disponer, is liable only to one per cent. duty; and that therefore the judgment of the majority of the Judges of the Court of Session ought to be reversed.

*Lord Chelmsford's opinion.*

Lord CHELMSFORD:

My Lords, if it had not been for the great difference of opinion among the learned Judges of the Court of Session, I should not have considered this case to be one of much difficulty.

Had it been necessary upon this occasion to lay down a general rule applicable alike to England and to Scotland, when the law of succession to real property differs so much in the two countries, it would, perhaps, not have been easy to discover such an interpretation of the Act as would be of uniform application to every case which might possibly occur.

The general object of the Act is to establish a scale of succession duty, varying in amount according to the nearness of relationship of the person succeeding to the person from whom the benefit of the succession is derived. There would be a presumption, therefore, in the outset in favour of an interpretation of its provisions which regarded the relation to the person from whom the interest originally proceeded rather than to him through or after whom it merely falls in succession. The Act distinguishes between two general modes of acquiring property which confer a succession, viz., disposition and devolution by law; and if we are able to ascertain in each case in which of these two ways the property is derived, we shall always be

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*Lord Chelmsford's opinion.*

able to determine the amount of the succession duty to be paid. In the present case, I am of opinion that the Appellant took by disposition from his grandmother, Lady Saltoun, and not by devolution by law from his uncle, the late Lord Saltoun.

In construing the Act it must be remembered that the thing to be regarded is the beneficial interest only, for it is in respect of persons becoming "beneficially entitled" that the succession duty is to be paid. This renders it necessary, when the Act is to be applied to Scotland, to look to something beyond the mere acquisition of the feudal title. For by the law of that part of the kingdom, the service as heir to any person is no proof that the property came by disposition or devolution from the so-called ancestor. In the present case, for instance, the entail is one which is strictly fettered with irritant and resolutive clauses, so that the institute could not in any way hinder or prejudice the right of succession of the substitutes; and yet, the institute though virtually merely a life-renter is regarded as having the fee in him, and the Appellant is compelled by law to be served heir to him, and is called in the decree of special service the nearest heir of tailzie and provision of the deceased Lord Saltoun, although the deed of tailzie was in no respect the act and deed of the assumed ancestor, and the Appellant claims nothing from or through him.

These considerations will go far to determine the question whether the late Lord Saltoun was the predecessor of the Appellant within the meaning of the Act. The specific words explanatory of the term "predecessor" (as my noble and learned friend Lord *Cranworth* has shown) do not apply to him, and he can only be brought within the definition under the general words "other person from whom the interest of the successor is or shall be derived." It is difficult

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to see in what sense the interest (which from the context must mean the beneficial interest) can be said to have been derived from the late Lord Saltoun, who neither gave the succession nor could have prevented its falling to the Appellant. The clauses in the Act relating to joint tenancy and powers of appointment appear to me strongly to illustrate the intention of the Legislature, that the predecessor is to be ascertained by looking to the source from which the interest flows to the party succeeding. This is shown in the third section, by the distinction made between the survivorship of joint tenants, where they are in by a title not conferring a succession, and where a succession is taken jointly,—that in the first case, the accruing interest shall be deemed a succession to the person on whose death the accruer takes place, and in the latter that it shall be deemed a succession derived from the predecessor from whom the joint title shall have been derived; and in the 4th section, a person having a general power of appointment, which gives him an absolute right of disposition over the property equivalent to the ownership of it, is to be deemed to be entitled at the time of his exercising the power to the property or interest appointed as a succession derived from the donor of the power; whereas, where there is a limited power of appointment, the donee of the power has no interest in the property, and therefore the Act makes the appointee to take from the person creating the power as his predecessor. And these sections show that the Legislature meant to use the word "derived" in the sense of "having its source or origin from," and selected it as best adapted to embrace both modes of acquiring a succession, viz., by disposition and by devolution.

If the question in this case had arisen as to the succession of the heir of the body of the institute,

there might have been some difficulty in determining whether he took by disposition from the settlor or by devolution from his ancestor, because the entail being fettered with irritant and resolutive clauses, the heirs of the body could not be deprived of their succession by any act of their ancestor; and both ancestor and heirs would take in the same manner as a succession of usufructuaries, each of whom during his life would have enjoyed the beneficial interest, but none of them could have lawfully disposed of the property. The interest of the heirs of the body in such an entail seems to be rather more like that which belongs to first and other sons in an English settlement than to that of heirs of the body creating an entail, the whole power over which is vested in the tenant in tail, as it would be in Scotland, in the case of a simple destination. But whatever may be the proper view of such a supposed case, I think that the position of the *nominatim* substitute in this deed of tailzie is precisely analogous to that of a person who in an English settlement is named as the remainder-man in tail after a previous estate tail, and who, there can be no doubt, would be considered as taking by disposition from the author of the settlement, and not by devolution from the previous tenant in tail.

*Lord Chelmsford's opinion.*

I agree therefore with all my noble and learned friends that the Succession Duty payable by the Appellant is to be at the rate of one per cent., and that the Interlocutor appealed from ought to be reversed.

Mr. *Rolt:* My Lords, I think the Crown will hardly oppose our having costs. We were decreed to pay the costs in the Court below, and we ought to have the costs either here or in the Court below, as your Lordships may think fit.

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Mr. *Solicitor-General:* On the part of the Crown, I should not presume to argue the question of costs, but leave it entirely to your Lordships.

Lord CHELMSFORD: I should be very much disposed to think that the Appellant should have costs either here or in the Court below.

Lord CRANWORTH: The costs below of course.

The LORD CHANCELLOR: Clearly it is not according to our course of proceeding to give the costs of the appeal when the judgment is reversed.

Mr. *Rolt:* The costs in the Court below, it would be quite according to your Lordships' course of proceeding to give us.

The LORD CHANCELLOR: Yes, I think so.

Mr. *Rolt:* That will be added to the declaration.

The LORD CHANCELLOR: I think we all agree in that.

*Interlocutor reversed, and the Cause remitted to the Court of Session with a Declaration that the duty demandable from the Appellant is at the rate of one per centum, and that the costs in the Court below are to be paid to the Appellant.*

WATKINS, HOOPER, BAYLIS, AND BAKER.—J. TIMM.