LORD JUSTICE-CLERK—At an earlier part of this argument I was much impressed with the view that nothing had been done sufficient to entitle the Company to place the directors on the register in respect of these shares, but that all that passed amounted only to a contract, imperfect for want of specification.

But I did not sufficiently consider the fact that this being an agreement by the directors to take up the remaining unallotted shares, no formal allocation was necessary. A report was issued by the directors which, *inter alia*, contained a statement that they (the directors) had agreed to take up the unaccepted balance of new shares, which statement was made to enable them to declare that all the new issue had been taken up, and to make up the accounts of the Company on this footing. I think the true view of the case is, that the directors having made this representation are bound to act up to it. Such a representation was calculated to increase the credit of the Company in the market, as indicating the confidence which the directors had in its stability. And when they go on to report that the premiums on the shares had been applied to increase the reserve fund, it is impossible to say that this was not a very important representation to the public. Everyone who transacted with the Company was entitled to believe that these 267 shares had been taken up in *bona fide*. I am therefore for refusing the petition.

LORD ORMIDALE and LORD GIFFORD concurred.

The Court therefore refused the prayer of the petition.

Counsel for Petitioner — Kinnear — Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondents — Balfour — Keir. Agent—J. W. C. Murray, W.S.

Wednesday, January 21.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

Exchequer Cause.

LORD ADVOCATE *v.* REID AND ANOTHER (REID'S EXECUTORS).

Revenue—8 and 9 Vict. cap. 76, sec. 4—Definition of Testamentary Writing—Liability to Legacy-Duty where Annuity Payable out of General Estate—Implied Revocation where Annuitant, if he acted as Factor, was to do so Gratuitously, but in a Subsequent Deed was to get a Suitable Gratification.

The proprietrix of N. executed a bond of annuity in favour of her factor binding her heirs and successors in her lands and estate, "in testimony of my satisfaction with his conduct and management of my affairs while he acted as my factor . . . to make payment to the said W. R. yearly, and each year after my decease, and during all the days of his life, of an annuity of £150 . . . . but declaring it is my desire that the said W. R. shall after my death continue to discharge the duties of factor on the said lands and estate of N., and that without any factor fee: But it is my intention . . . that the said annuity shall be paid to the said W. R. even in the event of his not acting as factor at my death, or ceasing to act as factor at any time thereafter, and that whether such non-acting or ceasing to act as factor shall arise from inability on his part, or from his services not being desired and required, or from any other cause whatever." And then she reserved power to revoke, and dispensed with delivery. In no prior or subsequent deed of the granter was this annuity mentioned; in particular, it was not mentioned in a general trust-disposition and settlement of her affairs other than the estate of N., executed previously, but with codicils executed subsequently; nor in a subsequent trust-disposition and deed of entail of N. The deed of entail of N. referred to a deed of instructions of even date, the fourth direction of which authorised and empowered "my said trustees of N. to appoint W. R., whom failing any one of their own number, or any other person, as factor under themselves for conducting the trust, and to allow such factor a suitable gratification for his trouble." W. R. (who was himself a trustee) acted as factor to the trustees under the deed of 1844, to whom for a certain period the rents of N. belonged, and received the annuity, but no other factor fee. When the estate came to be entailed in terms of the deed of instructions, the institute in the entail did not desire the services of W. R. as factor, but continued to pay him the annuity down to the date of W. R.'s death.

Held (*aff.* Lord Curriehill) (1) that the bond of annuity in question was a testamentary instrument; and (2) that the annuity was a legacy within the meaning of the 4th section of the Act 8 and 9 Vict. cap. 76 (Legacy-Duties Act), and was therefore subject to duty.

Observed that, in the circumstances, even assuming the competency of a contention that the bond of annuity had been revoked by the subsequent deeds of the granter, it failed upon its merits.

Opinion per Lord President (Inglis)—Lord Curriehill, Ordinary, *contra*—that W. R. would not have been entitled to payment of the annuity and also to take benefit from the provision in the fourth head of the deed of instructions empowering the trustees to allow him a suitable gratification for his trouble.

This was a subpœna with a relative Special Case against the executors of the late William Reid, writer, Dundee.

Mrs Bethune Morison of Naughton died on 16th December 1850. On 9th September 1848 she executed a bond of annuity for £150 in favour of William Reid, writer, Dundee, in the following terms:—"I, Mrs Isobel Bethune Morison of Naughton, for the esteem which I have and bear to William Reid, writer in Dundee, my factor, and in testimony of my satisfaction with his conduct and management of my affairs while he has acted as my factor, do hereby bind and oblige myself, and my heirs and successors in my lands and estate of Naughton, to make

payment to the said William Reid yearly, and each year after my decease, and during all the days of his life, of an annuity of one hundred and fifty pounds sterling, and that at two terms in the year, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas after my decease for the half-year preceding such term, and the next term's payment thereof at the term of Martinmas or Whitsunday thereafter, and so forth yearly and termly and proportionally thereafter during the life of the said William Reid, with one-fifth part more of each term's payment of liquidate penalty in case of failure, and the legal interest of the said annuity from and after the said respective terms of payment during the not-payment thereof: But declaring it is my desire that the said William Reid shall after my death continue to discharge the duties of factor on the said lands and estate of Naughton, and that without any factor fee: But it is my intention, and it is hereby specially provided and declared, that the said annuity of one hundred and fifty pounds shall be paid to the said William Reid at the terms and in the manner above set forth during all the days of his life, even in the event of his not acting as factor at my death or ceasing to act as factor at any time thereafter, and that whether such non-acting or ceasing to act shall arise from inability on his part or from his services not being desired and required, or from any other cause whatever: And I reserve power to alter or revoke these presents in whole or in part at any time of my life, or even on deathbed: And I dispense with the delivery hereof, declaring that these presents in so far as not revoked or altered shall be valid and effectual though found lying in my own custody or in the custody of any other person for my behoof undelivered at the time of my death: And I consent to the registration hereof," &c.

On 10th January 1844 Mrs Bethune Morison executed a testamentary trust-disposition and deed of settlement by which she conveyed to trustees her whole estates, heritable and moveable, with the exception, *inter alia*, of the estate of Naughton. She also assigned to the trustees the rents of Naughton due at her death; and in the event of her death between the terms of Whitsunday and Martinmas the whole rents of that crop, and also the rents for the first two crops after her death. To this trust-disposition and settlement she added various codicils of dates both prior and subsequent to the above bond of annuity, but neither in the trust-disposition and settlement nor in any of the codicils was there any reference to or provision made for payment of the annuity.

The estate of Naughton had been previously settled by a disposition and deed of entail executed by the testatrix on 23d March 1837. On 22d December 1849 she executed a testamentary trust-disposition, in which she recalled and annulled this disposition and deed of entail of 23d March 1837, and disponed to and in favour of certain trustees the estate of Naughton in trust for the purposes contained in a deed of instructions executed by her of even date with this trust-disposition. The trust-disposition contained an assignation of the rents for the third crop after the truster's death, and for all crops thereafter. The deed of instructions referred to directed the trustees to pay to Adam Alexander Duncan, during the first three years after the truster's death, sums for his maintainance, not exceeding in all the sums which they were to receive from the truster's general trustees under a codicil dated 22d December 1849 to the testamentary trust-disposition and deed of settlement of 10th January 1844. Neither in the trust-disposition of 22d December 1849 nor in the deed of instructions, was there any reference to or any direction or provision for payment of the above annuity. The deed of instructions directed the trustees, as soon as they thought proper, but at latest within six months after the death of the survivor of the truster and the said Adam Alexander Duncan, to settle and secure the estate of Naughton by a deed or deeds of strict entail in favour of the said Adam Alexander Duncan (if alive at the date of executing the said deed or deeds of entail), and to certain other persons named in their order, the fetters of the entail to apply equally to the institute and the heirs of entail. The deed of instructions further contained the following direction:—"In the fourth place, I hereby authorise and empower my said trustees of Naughton to appoint the said William Reid, whom failing any one of their own number, or any other person, as factor under themselves for conducting the trust, and to allow such factor a suitable gratification for his trouble."

Up to the death of Mrs Bethune Morison Mr Reid was factor on her estate of Naughton. Accounts of household expenses were also paid through him, and Mrs Morison drew upon him from time to time for such sums as she required for her personal use. The net annual rental of the estate was about £1600. For some years prior to her death Mrs Morison allowed Mr Reid a sum of £100 annually for the performance of these duties. In the account which he rendered of his intromissions as factor for 1850, the year of Mrs Morison's death, he took credit to himself for a sum of £100, under the heading "Factor's fee and for general trouble."

Mr Reid was a trustee under the general trust-disposition of 1844, and also under the Naughton trust-disposition of 1849, and he accepted the office and acted under each trust. He acted as factor on the Naughton estate after Mrs Morison's death till the term of Martinmas 1853, on behalf of the trustees under the trust-disposition of 1844, to whom the rents of the lands payable during that period belonged. In the first annual account of his intromissions to these trustees he took credit for a sum of £150 as payable to him under the bond of annuity, and as a substitute or equivalent for a factor fee on the rents of Naughton. The trustees thereafter resolved, "without going into any question of the bond," and without prejudice to "the pleas either of Mr Reid or the Naughton estate trustees in the event of any after question," to sustain the charge for the years during which they were entitled to draw the rents—Mr Reid to collect the rents during these years and to have no claim for factor fee. This arrangement was acted upon.

On 24th February and 1st March 1853 the trustees under the testamentary trust-disposition of 22d December 1849 executed a disposition and deed of entail of the estate of Naughton in favour of Mr Duncan and the series of heirs named in the deed of instructions containing the

usual conditions and prohibitions, which were made binding on the institute as well as on the heirs of entail, all as provided by the deed of instructions. The deed of entail contained no reference to the bond of annuity, and the annuity is not by the deed of entail or by the infeftment following thereon or otherwise charged upon the lands of Naughton, or on any other real or heritable estate belonging to Mrs Morison.

The first rents of the Naughton estate falling to Mr Duncan, the institute of entail, were payable at Whitsunday 1854. In January 1854, at Mr Duncan's request, Mr Reid handed over the papers connected with the Naughton estate, and he did not afterwards act as factor on the estate, his services not being required by Mr Duncan; but Mr Duncan and his successor in the estate of Naughton continued to pay Mr Reid the annuity conferred on him by the bond of annuity half-yearly at Whitsunday and Martinmas. Mr Reid died on 31st July 1869, and the following entry occurred in the inventory of his personal estate sworn to by the defender Mr William Reid as executor-nominate, and recorded in the Commissary Court Books of Edinburgh 15th September 1869—"14. Proportion of annuity of one hundred and fifty pounds per annum payable to deceased under bond of annuity by said Mrs Morison for period from 15th May to 31st July 1869, 77 days, £31, 12s. 10d.; less tax, 15s. 10d.—£30, 17s."

No legacy-duty was paid upon the annuity of £150, and this Special Case was brought by the Lord Advocate on behalf of the Crown, and by Mr William Reid, W.S., and Mr J. C. Reid, William Reid's executors, to have it determined "whether to any, and, if to any, to what extent the said annuity of £150 was a legacy by the said Mrs Isobel Bethune Morison to the said William Reid, and as such liable to legacy-duty."

The Lord Advocate stated "that the said annuity of £150 was, within the meaning of the Legacy-Duty Acts, a legacy from Mrs Morison to Mr William Reid, taking effect either at the death of Mrs Morison, or at all events from the time when Mr Reid ceased to act as factor for the Naughton trustees; that as the said annuity was satisfied or paid to the said William Reid without deduction of the duty, and as the duty was not paid by him, it was a debt due and owing by him at the time of his death to Her Majesty, for which the defenders as his executors are liable."

The defenders stated "that the said bond of annuity was not a will or testamentary instrument of the said Mrs Isobel Bethune Morison, and that the annuity of £150 was not a legacy to any extent, in respect that it was not given out of the personal estate of the said Mrs Isobel Bethune Morison or out of or charged upon her real or heritable estate, or out of any moneys to arise by the sale, mortgage, or other disposition of her real or heritable estate, or any part thereof."

By the Act 8 and 9 Vict. cap. 76, sec. 4, it was enacted that "From and after the passing of this Act every gift by any will or testamentary instrument of any person which by virtue of such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of, or which gift is or shall be payable, or shall have effect or be satisfied out of, or is or shall be charged or rendered a burden upon, the real or heritable estate of such person, or any real or heritable estate, or the rents and profits thereof, which such person hath had or shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any moneys to arise by the sale, burden, mortgage or other disposition of any such real or heritable estate, or any part thereof, whether such gift shall be by way of annuity or in any other form, and also every gift which shall have effect as a donation *mortis causa*, shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and shall be subject and liable to said duties accordingly."

The Lord Ordinary (CURRIEHILL) found that the annuity of £150 was a legacy by Mrs Bethune Morison to William Reid, and as such liable in legacy-duty.

"*Note.*—In the Special Case as presented to the Court the defenders maintain that the bond of annuity out of which the present question arises was not a will or testamentary instrument of Mrs Isobel Bethune Morison, the granter, but at the debate they gave up that defence and admitted that the bond was a testamentary instrument. They, however, maintained in argument (although the point is not raised, or even indicated, in the Special Case) that according to the sound construction of Mrs Morison's later testamentary writings the bond in question was revoked, not indeed expressly, but by implication, by one or more of these writings. They also maintained, that even assuming the bond not to have been revoked, the annuity was not a legacy to any extent within the meaning of the Legacy-Duties Acts, in respect that it was not given out of the personal estate of Mrs Morison, or out of or charged upon her real or heritable estate, or out of any moneys to arise by the sale, mortgage, or other disposition of her real or heritable estate, or any part thereof.

"The material facts of the case are shortly as follows—[*states facts ut supra*].

"At this date [*i.e.* 22d Dec. 1849], therefore, the testamentary writings of Mrs Morison, in so far as not expressly revoked by her, were the following—viz. (1) her general trust-settlement (dated in 1844) of her whole estate, excluding the lands of Naughton, but including the rents of Naughton for two crops after her death; (2) her bond of annuity in favour of Mr Reid, dated in 1848; (3) her special trust-settlement of 11th December 1849, conveying Naughton to trustees, but excluding the rents thereof for the first two crops after her death; (4) her deed of instructions (also of 22d December 1849), referred to in her trust-settlement of Naughton; and (5) codicil of the same date to the general trust-settlement of 1844.

"It must not be forgotten that by her Naughton trust-settlement Mrs Morison expressly revoked her prior entail of that estate, but that she did not expressly revoke or even refer to the bond of annuity. It is thus clear that she knew how to express her intention when she did intend to revoke a prior testamentary writing. When, therefore, we find in the Naughton trust-settlement an express revocation of the entail of 1837, an unexpressed intention to revoke another testamentary

writing, viz., the bond of annuity, will not be implied unless it shall very clearly appear from the whole terms of the later settlement that it is inconsistent with the subsistence of the earlier bond, and was truly intended to supersede it. The defenders, however, maintain that the effect of the later settlement, and of the relative deed of instructions and codicil, was to revoke the bond of annuity, because, as they allege, effect could not be given to it consistently with the instructions and codicil.

"Let us see, then, what is the import of these later writings—[*narrates import of these as above*].

"It is in these circumstances that the defenders maintain that the bond of annuity was revoked, because, as they allege, the existence of that bond is quite inconsistent with the subsequent disposition and deed of instructions executed by Mrs Morison in regard to her estate of Naughton. They say that the provision of the deed of instructions above recited, authorising and empowering her Naughton trustees to appoint Mr Reid as their agent and factor, and to give him a suitable gratification for his trouble, would not have been inserted by Mrs Morison in her trust-disposition of Naughton if she had not believed that by executing that settlement she had revoked the bond of annuity. They say that the bond of annuity showed that it was Mrs Morison's intention that the annuity should be accepted by William Reid as in lieu of factor fee, and that he should continue to act as factor on the estate, and they argue that if that intention had not been departed from, it was unnecessary and useless to give to the Naughton trustees express power to appoint him as their paid factor. I confess that I do not see the force of that reasoning. It humbly appears to me that Mrs Morison in executing her deed of instructions to her Naughton trustees in 1849 had fully in view the bond of annuity which she had in the previous year executed in favour of her agent and factor Mr Reid; that she was aware that in it she had expressed a desire that he should continue to act as factor, but without a factor fee; and that if by the Naughton trust-deed and deed of instructions she had intended to alter the provision in the bond of annuity at all, it was merely to the effect that during the subsistence of the Naughton trust her trustees might not only employ Mr Reid, who was one of their number, as the factor in the trust, but might allow him a suitable gratification for his trouble.

"In short, this clause, upon which the defenders found as a revocation of the bond of annuity, appears to me to be rather intended to confer upon Reid an additional benefit. Whether if Mr Reid had acted as factor, and had insisted upon a factor fee being paid, he would have been entitled to claim full payment of the annuity, is a question not *hujus loci*, though I must say that it rather appears to me that he would not have been barred from claiming the benefit of both provisions, and that the fourth head of the deed of instructions was intended to enable Reid both to act as factor and to claim factor fee in addition to his annuity.

"It must also be observed that the provision for his acting as factor for the Naughton trustees was not, like the annuity, intended to apply to the period of his whole life. He was only to receive a factor fee if he acted as factor for the trustees during the subsistence of the trust—a trust which might have terminated six months after the death of Mrs Morison herself. It therefore appears to me to be impossible to hold that this lady, who to the end seems to have had the strongest desire to confer a permanent benefit on Mr Reid, her factor, not only during the subsistence of her trust, but after the estate had been conveyed to the heirs of entail, has by implication revoked the life annuity of £150 per annum by simply declaring that her trustees might appoint the annuitant their factor, and pay him a factor fee while the trust lasted, which it might possibly have done for a period no longer than six months. I am therefore of opinion that on the first point now pleaded by them the defenders are not entitled to prevail.

"As regards the second question—namely, Whether the bond of annuity is to be regarded as a legacy within the sense and meaning of the Legacy-Duty Acts?—I am of opinion that the question must be answered in the affirmative. It appears to me that the bond of annuity and the Naughton estate trust settlements and deed of instructions of 22d December 1849 must all be read together as one settlement; and if so, the payment of this annuity is a condition upon which the institute and successive heirs of entail took the estate. It is true that the annuity is not directly made a charge upon the estate; but, on the other hand, an obligation is imposed upon the heirs succeeding to the estate to pay the annuity. That a party taking benefit and receiving payment either of a single sum or of an annuity in virtue of such a condition is truly a legatee, may be held to have been settled by the case of the *Attorney-General* v. *Wyndham*, 1 Hurlstone & Coltman, 563. In that case the testator devised his real estate to his nieces, with the provision that his nephew should have the option of becoming the purchaser at the price of £10,000 consols, and that upon his investing that amount in the names of trustees for the nieces' benefit, the real estate should enure to the use of the nephew in fee-simple, and that the nieces should convey the same to him accordingly. It was there held that upon the option being exercised the £10,000 consols were liable to duty, as being a legacy to the two nieces arising from the 'disposition' of the testator's real estate within the meaning and language of the Act. It appears to me that the fact that the 'disposition' of the estate of Naughton by the testator is contained in the three documents referred to, in place of being in a single deed, is immaterial to the present question; and I am of opinion that the annuity of £150 was derived to Mr Reid from the disposition of Naughton by Mrs Morison, first to her testamentary trustees, and thereafter to her heirs of entail.

"That such was the view of Mr Reid himself, and of all the parties interested, is, I think, clear from what took place after Mrs Morison's death in 1850. Under the terms of her settlement the crops of 1851 and 1852 fell to her general testamentary trustees, and in 1853 the special Naughton trustees executed a deed of entail of the lands of Naughton in favour of Adam Alexander Duncan. Up to that time, and indeed until the beginning of 1854, Mr Reid continued to act as factor on the estate of Naughton, and he charged no factor fee during that time, but he drew the annuity of £150. In January 1854 Adam Alex-

ander Duncan, the institute of entail, dispensed with the services of Mr Reid as factor on the estate. Mr Reid intimated more than once to Mr Duncan that he was ready and willing to act as factor on the estate, in accordance with the wishes of Mrs Morison, but the heir of entail did not employ him. Mr Duncan Morison, and after his death Miss Catherine Duncan Morison, the succeeding heir of entail, continued to pay the annuity regularly to Mr Reid until his death on 31st July 1869; and in the inventory of his personal estate given up by the defenders the following entry occurs:—'Proportion of annuity of £150 per annum, payable to deceased under bond of annuity by said Mrs Morison for period from 15th May to 31st July 1869, 77 days, £31, 12s. 10d.; less tax, 15s. 10d.—£30, 17s.' There is thus no doubt whatever that from Mrs Morison's death until his own death in July 1869 the annuity was paid to Mr Reid by Mrs Morison's successors to the estate of Naughton under and in respect of the said bond of annuity. The defenders no doubt now maintain that these payments were voluntary acts on the part of Mrs Morison's successors, and that although they regarded the deed as revoked by Mrs Morison, they continued to pay the annuity out of respect (as they say) to the expressed wishes of Mrs Morison. I confess that in my opinion this argument contradicts itself, because if they believed that it was Mrs Morison's intention to revoke this annuity to Mr Reid, her successors in paying the annuity were violating instead of fulfilling her wishes.

"On the whole matter, I am of opinion that the question in the Special Case must be decided in favour of the Lord Advocate."

William Reid's executors reclaimed, and argued —(1) The annuity in question was not a legacy. In the first place, it was not a gift, for if Mr Reid's services had been desired by the proprietor of Naughton, he could not have refused and yet been entitled to the annuity—*Lord Curriehill* v. *The Executors of Currie.* Nor did mere postponement of payment till the testator's death made it testamentary—*Duguid* v. *Caddel's Trustees.* Nor had revocability that effect—Sugden on Powers (ed. 1861), p. 213, note. The annuity was not made a burden upon the estate of Naughton, and so was not within the Act 8 and 9 Vict. cap. 76, sec. 4. (2) The annuity was revoked. It was not mentioned in any subsequent deed of Mrs Morison, and it was inconsistent with the fourth direction in the deed of instructions of 1849.

Authorities—*Lord Curriehill* v. *Executors of Currie*, March 2, 1624, M. 2937; *Lyon* v. *Gray*, Jan. 25, 1751, M. 3599; *Duguid* v. *Caddel's Trustees*, June 19, 1831, 9 S. 845; *Brown* v. *Advocate-General*, June 28, 1852, 1 Macq. 79; *Miller* v. *Angus*, Feb. 3, 1859, 21 D. 377; *Lord Advocate* v. *Meiklam's Trustees*, July 13, 1860, 22 D. 1427; Sugden on Powers (ed. 1861), p. 213, note (chap. 7, sec. 3), and the cases there cited.

Argued for the Lord Advocate—The annuity was a legacy—*Advocate-General* v. *Ramsay's Trustees*, Feb. 3, 1823, 2 Crompton, Meeson, & Roscoe, p. 224, note; *Advocate-General* v. *Trotter*, Nov. 12, 1847, 10 D. 56; Hanson on Legacy and Succession Duties, p. 61. [The Court did not desire argument on the question of revocation.]

At advising—

Lord President—The question in this case is, Whether the annuity which was left to Mr Reid by the late Mrs Morison of Naughton is chargeable with legacy-duty under the Acts of Parliament imposing that duty? and that question must be solved, I apprehend, by reference to the 4th section of the Act 8 and 9 Vict. cap. 76, which is enacted for the express purpose of defining what is a legacy—that is to say, what is a legacy for revenue purposes?

Now, the first requisite to make a legacy is that it shall be a gift by a will or testamentary instrument, and a will or testamentary instrument has been very authoritatively defined, for the purposes of the Revenue Acts, to be "a writing, whatever the form, or however by law it might require to be executed, if it remains dormant during the life of the person executing it, if it be revocable until his death, and if it only comes into active power at his death." Such was the definition given by Chief-Baron Shepherd in the Court of Exchequer in England at a very early period in the case of the *Advocate-General* v. *Ramsay's Trs.*, and that definition has been accepted and acted upon by the Scotch Court of Exchequer at a more recent period—in 1847—in the case of the *Advocate-General* v. *Trotter*, and by the English Court of Exchequer in the *Attorney-General* v. *Evans*, 2 Crompton, Meeson, & Roscoe, 221.

Then, in the second place, the gift must be payable out of some portion of the testator's estate, or out of some estate of which the testator had a power of disposal. I shall examine more minutely immediately the different classes of gifts of this kind which are enumerated in the fourth section of the Act of Parliament, but in the meantime it is desirable to ascertain whether the bond of annuity with which we are dealing here is or is not a testamentary writing within the meaning of the statute and of the definition which I have just quoted.

Now, the granter of the bond binds and obliges herself and her heirs and successors in the lands and estate of Naughton to make payment to William Reid of an annuity of £150 sterling, commencing at the first term of Whitsunday or Martinmas after her decease for the half-year preceding such term, and so forth. She then declares that it is her "desire that Mr William Reid shall after my death continue to discharge the duties of factor on the said lands and estate of Naughton, and that without any factor fee,"—that is to say, she desires him to perform the duties of factor in consideration of the annuity which she is giving him by this bond; and then she declares further that "the said annuity of £150 shall be paid to the said William Reid at the terms and in the manner above set forth during all the days of his life, even in the event of his not acting as factor at my death, or ceasing to act as factor at any time thereafter, and that whether such non-acting or ceasing to act shall arise from inability on his part or from his services not being desired and required, or from any other cause whatever."

Now, I apprehend that while it might be questioned whether Mr Reid would be acting

fairly up to the tenor of this deed if he capriciously and without any reason declined to discharge the duties of factor while the heir of entail in possession of the estate was anxious that he should do so, and he was under no personal inability to act, I think the general purpose and intention of the testator is very clearly expressed to be that the payment of the annuity is not to be dependent upon his rendering the services which she wished and expected.

Then there follows a reservation of a power to "alter and revoke these presents," and a clause dispensing with delivery, and declaring "that these presents, in so far as not revoked or altered, shall be valid and effectual, though found lying in my own custody, or in the custody of any other person for my behoof, undelivered at the time of my death."

Now, I cannot entertain the smallest doubt that this is a testamentary instrument. It does not dispose of the maker's estate generally; but that is not the least necessary to make it a testamentary instrument. An instrument giving one a legacy, even of small amount, is a testamentary instrument, and a bond of annuity is just as much a testamentary instrument as any other form of gift or obligation. It answers the description of a testamentary instrument if it is dormant during the life of the maker, comes into operation for the first time after his death, and remains within his power and revocable during his life. This instrument satisfies all these conditions, and therefore I think it is impossible to deny that it is a testamentary instrument. The argument is quite in vain, as was attempted to be made, that there may be a testamentary instrument which is not revocable, and that there may be an instrument which though revocable is not a testament. That may be all true enough, but the revocability of a testamentary instrument is not its only characteristic, and it will not do to follow the course which the Dean of Faculty adopted, as he expressed it, of taking the thing to pieces and ascertaining whether anyone of the requisites of a testament will make a testament. It requires all the elements which are specified in the definition to make a testamentary instrument, and they are all present here. If it be said that because this deed is in the form of an obligation it is therefore not a testament, I should answer that a testament may be onerous and may be obligatory, and further, that every testament is obligatory upon the executors of the testator, if not upon the testator himself; and that is just the effect of this testament. Because it does not come into operation until the death of the testator, it can only bind the successors of the testator, who are thereby expressly taken bound.

Then, again, it is said that because some service is demanded as a condition of the legacy being payable, or some service at least expected as a condition, that deprives it of the nature of a testament. I answer to that again, that such an element is of no moment whatever, because the testator gives the legacy and says—"I expect in return for that, that my legatee shall perform some office or duty for behoof of my estate." That does not in the least degree deprive the instrument of the character of a testament, or the legacy of the character of a legacy. In short, I cannot see any room to doubt that what Mr Reid here got was a gift by a testamentary instrument.

But then it is said it is not a legacy within the meaning of the 4th section of the Act, which I have already referred to; and that requires a careful examination certainly of the words of the enactment—"From and after the passing of this Act every gift by any will or testamentary instrument of any person, which by virtue of such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of." Now, this is the first case. It is not required that there should be any direction in the testamentary instrument that the legacy is to be payable out of a particular fund or out of the estate generally. No such direction is necessary. It is quite sufficient if the testator expresses in any form whatever his desire to leave a legacy or bequest to A B. That makes it a legacy payable out of her estate, or a legacy which shall have effect against her estate, or a legacy which shall be satisfied out of her estate; and these alternatives are introduced only for the purpose of meeting every possible form of bequest—the effect of which is to be that it will be received out of the moveable estate of the testator, or out of some other moveable estate which she has power to dispose of. Then we come to the case of a legacy which is to have effect against the real estate, and the words precisely correspond to the others—"or which gift is or shall have effect or be satisfied out of, or is or shall be charged or rendered a burden upon, the real or heritable estate of such person, or any real or heritable estate, or the rents or profits thereof which such person" has the power to dispose of. Now, the words here are exactly the same as in the case of moveable estate, *mutatis mutandis*. The gift is said in this latter case to be payable and to have effect or be satisfied out of the real estate of the testator; but then there is this alternative—"or rendered a burden upon the real or heritable estate of such person, or any real or heritable estate" which he may be entitled to affect. Now, it is quite plain that these two alternatives do not mean the same thing. To create a burden upon a real estate is a perfectly intelligible thing, and it always means that the estate is so charged that the heritable estate affords a security to the creditor in the obligation, or a legatee in the legacy. But there is quite a different class of cases contemplated in the first limb of this clause; and that is where without any burden upon the real estate at all the gift is of such a nature that it is payable, or shall have effect or be satisfied, out of the real estate. Now, observe it is not that the legacy is directed to be paid or satisfied out of the real estate, but that in point of fact when the testamentary instrument comes to be administered and given effect to, then the legacy falls to be paid out of that portion of the testator's estate.

Now, if a testator makes two legacies, and binds his executors in the payment of the one, and his heir in the payment of the other, can there be the smallest doubt how this clause in the Act of Parliament would apply to these two cases? There would be nothing but a personal obligation in the one case any more than in the other. The executor

would be bound to pay the one, and the heir would be bound to pay the other; but as the executor would pay it out of the executry estate, so the heir would pay it out of the real estate; and thus the legacy in the latter case would come to have effect and be satisfied out of the real estate inherited by the heir. It is nothing in answer to that to say that a personal obligation on the heir may be satisfied out of either estate. That is very true, but if he satisfies it out of either estate, the effect is exactly the same as far as he is concerned. It is not laid as a burden upon him personally, and without reference to his succession, but as a burden because of his succession to the testator, and because he receives that estate of the testator which would enable him to satisfy the legacy. Therefore it appears to me that a gift of this kind, laid upon the heirs and successors of the granter in a certain specified real estate, is within the meaning of these words of the Act of Parliament which I have just read, and upon that also I entertain no doubt.

There is but one other point remaining, and it is a question which has been raised in argument and not in the Special Case; and I must say it strikes me as a very singular argument. When this lady died, Mr Reid was alive and entered upon the enjoyment of his annuity under the bond with which we are dealing, and he drew that annuity for very nearly twenty years, and during sixteen at least of these years he was not even performing the duties of factor, so that he was really taking a perfectly gratuitous provision under the operation of this bond of annuity all that time. And if I am right on the construction of the statute, and of the instrument with which we are dealing, he was undoubtedly liable to pay legacy-duty on the annuities so received, and it was not paid. And when his executors were asked for payment of this legacy-duty which ought to have been paid, and was not paid, during his lifetime, the answer which they make is—"Mr Reid had no right to receive these annuities, because the instrument under which he received them was revoked by the testator, and had no effect when she came to die." Now, I am very much startled by the consideration of whether it is possible to allow such a plea to be maintained in answer to the demand of the Crown in this case, and I should have desired to have heard more argument on the subject if it had been necessary. But fortunately, although this is a very startling contention on the part of the defender, it is very easily disposed of, and disposed of upon its merits, because I quite agree with the Lord Ordinary that there is not the slightest ground for holding that there was any revocation. I therefore waive further consideration of the question whether the defenders would have been allowed to retain these annuities in the circumstances in which they are placed as the representatives and executors of the gentleman who drew the annuity.

The lady, after she had executed the bond, no doubt made further settlements, but they were settlements very much of the same character as those which she had executed, and which were in subsistence at the time she made the bond. They were arrangements for the general settlement of her estate, both the heritable estate of Naughton and her general estate, and as far as concerns the general estate she left her deed standing, but in regard to Naughton she recalled the deed of entail which she had previously executed, and in place of that she left the estate of Naughton to trustees, to be entailed in accordance with a relative deed of instructions, and that purpose was carried out after her death by these trustees. Now, there is nothing at all inconsistent in the general purpose of the testator between the settlement she had made before granting the bond of annuity and the settlement she made afterwards. I believe it is the case that the heirs called under the second arrangement were different from those called under the first, but that does not at all interfere with what may be called the general scheme in that deed. And therefore how the mere execution of deeds of that kind after the bond of annuity was made can be held to operate as a revocation of that bond I am really not able to see.

There is just one clause in the deed of instructions which has been founded on, and which requires a word of observation. The trustees, who are vested with the estate of Naughton for the purpose of being entailed, are authorised and empowered by this clause "to appoint the said William Reid, whom failing any one of their own number, or any other person, as factor under themselves for conducting the trust, and to allow such factor suitable gratification for his trouble." Now, this clause was perhaps rendered necessary in the view of the testator because of the change she had made in the form of settlement of the estate of Naughton—formerly it was to go direct to the heirs of entail under an instrument of tailzie which she herself had made, and the heirs of entail, including the institute, were the persons bound under the bond of annuity. But the trustees under this deed were not bound under the bond of annuity, and therefore it naturally suggested itself that they should receive some instruction on this subject. Well, she says here in effect—"So long as the estate remains in the hands of these trustees, and the deed of entail is not executed, and the estate does not pass into the hands of the institute, I authorised them to appoint either William Reid or any one of their own number to act as factor in conducting the trust." That is a sort of interim arrangement, and nothing more—an interim arrangement during what she previously contemplated would be the short subsistence of this trust. And if the matter had stood there, without the words about allowing the factor a fee or suitable gratification, I do not suppose any argument would have been founded on the clause at all. But she does use the words "and to allow such factor a suitable gratification for his trouble." Now, I do not agree with the counsel for the Crown in saying that this was a suggestion to them that that they should give Mr Reid something additional to the annuity that had been left him. I think it is hardly possible to conceive that that was the meaning of it. But my notion is, that these words were added for this reason, that as, failing Mr Reid, she desired, or at least had no objection, that the factor to be appointed should be one of the trustees, it was absolutely indispensable, unless she intended the trustee so appointed to act gratuitously, to give the trustees the power to make him a suitable gratification for his trouble, and I think it is in that view, and that view alone, that these words were added.

I am therefore of opinion that there is no reason for saying that there was any intention on the part of the testator to revoke; and on these grounds I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—I am of the same opinion upon all the points. I think with your Lordship that this document—this bond of annuity—comes clearly under the definition given by Chief-Baron Shepherd of a testamentary writing, and adopted in Scotland in the case of the *Advocate-General* v. *Trotter*, and the case of *Evans* in England.

As to the revocation, I quite agree with your Lordship that there is no revocation. That being the opinion I have formed, I need not say any more in addition to the views your Lordship has so distinctly expressed.

Lord Mure—I am of the same opinion, and after the full explanation your Lordship has given of the points in the case, I think it unnecessary to say almost anything more.

It appears to me that on the face of the deed itself what is provided for this gentleman is substantially a provision by way of annuity, to be paid to the annuitant during his life whether he continues to act as her factor or not. That is quite plain from the terms of the deed itself; and it is testamentary because it falls plainly within the definition your Lordship has read from the opinion of Chief-Baron Shepherd as to what a testamentary writing really is. It is not to take effect until the death of the lady herself, and until that death it is by the terms of the deed made expressly revocable by her. I am very clearly of opinion that it is a testamentary writing.

With reference to the question whether it falls within the provisions of the statute, I agree with your Lordship in thinking that the clause referred to covers it. I think the Act of 55 George III. cap. 184 contains words which are equally distinct, for it describes a legacy as given "out of his or her personal or moveable estate, or out of or charged upon his or her real heritable estate," &c. The 8th and 9th of Victoria, cap. 76, contains these words also, and section 4, which professes to remove certain doubts, adds certain other words to that part of the statute, which affirm the view your Lordship has expressed; for it says—"or which gift is or shall be payable, or shall have effect or be satisfied out of, or is or shall be charged or rendered a burden upon, the real or heritable estate of such person, or any real or heritable estate, or the rents or profits thereof" which such person has the power to dispose of. These words "rents and profits" are not to be found in the Act of 55 Geo. III. cap. 184, and I think they may be applied to the particular heritable estate out of which the annuity is to be paid. In this deed it is expressly said the annuity is to be binding on heirs and successors in the lands and estate of Naughton. These lands and estate were entailed, and it was only out of the rents and profits of that estate that they would naturally fall to be paid.

I therefore think it clear it is a payment to be made out of the rents of the estate of Naughton. The entail existing at the date of the deed was superseded, but the estate was still to be made the subject of an entail on the part of the trustees by the testamentary disposition of 1849. It therefore was entailed, and remained entailed, during the time Mr Reid drew the annuity.

Lord Shand—I concur in the opinions delivered by your Lordships, and shall only add an observation upon one point.

Your Lordship has explained the grounds upon which it appears to me that the legacy or annuity here in question falls within the provisions of the 8th and 9th of Victoria, inasmuch as it is declared to be payable or satisfied out of the real or heritable estate of the deceased person. I concur with what your Lordship has said. I think these words are sufficient for the case. But it must be observed that the Lord Ordinary has put his judgment on the subsequent part of the clause 8 and 9 Vict.—I mean the concluding words, which provide that a legacy shall be chargeable with duty if it be a gift payable out of any moneys to arise by the sale, burden, mortgage or other disposition of any such real or heritable estate, or any part thereof. I agree with the Lord Ordinary in thinking that these words would have been sufficient for the decision of this case. If a testator leaving heritable estate provides that part of it is to be sold or mortgaged, and thus creates by a direction of conversion of heritage a personal fund for the payment of legacies, the legacies so payable are chargeable with duty. If in place of directing the estate to be either mortgaged or sold, the disposition provides that the disponee shall keep the estate himself, to create a fund out of it which shall be applicable to legacies or annuities—as, for example, if a testator provides, "I convey the estate to so-and-so, provided always he shall make forthcoming a sum of £50,000, to be allocated in payment of the following legacies,"—that is just as much a partial conversion of the heritable estate for the purpose of creating personal estate with a view to payment of legacies as if the estate had been mortgaged or sold. That seems to have been the ratio of the decision in the English case referred to by the Lord Ordinary; and I think the principle is sound. It so happens that in this case the condition is not attached to the particular deed conveying the estate—I mean the trust-disposition, or the entail to be made in conformity with the instructions in the trust-disposition; but the bond of annuity which creates the charge, and the disposition, must, I think, be taken together, and I think the annuity comes under the terms of the statute—as money to arise by the sale, burden, mortgage, or other disposition of any real or heritable estate. I think this annuity arises substantially out of the disposition of that estate, and that therefore it is chargeable with legacy-duty. But while that is my opinion, I agree with your Lordship in holding that the earlier part of the clause in the statute is quite sufficient and leads to the same result.

The Court adhered, with expenses since the date of the Lord Ordinary's interlocutor, and remitted to the Lord Ordinary with power to decern for expenses.

Counsel for Reclaimers — Dean of Faculty (Fraser) — Jameson. Agents — Drummond & Reid, W.S.

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