Friday, January 31.

FIRST DIVISION.

BOYD *v.* BOYD.

Expenses—Husband and Wife—Petition for Custody of Children.

A wife presented a petition for the custody of her children. Her petition was ultimately refused, but while the case was pending counsel for the parties had made an arrangement as to the access which she should be allowed in the event of her petition being unsuccessful. The petitioner having moved for expenses, the Court *found* her entitled to expenses down to the date of the interlocutor allowing a proof, and found no further expenses due to or by either party.

Mackellar v. *Mackellar*, February 16, 1898, 25 R. 883, at p. 886, 35 S.L.R. 483 *followed.*

A petition was presented by Mrs Elizabeth Mackenzie or Boyd craving the Court to find her entitled to the custody of the children of the marriage between herself and Robert W. Boyd. There were two children of the marriage, aged three and two.

The petitioner averred that owing to the bad conduct of the respondent he was not fitted to be the custodier of the children. She further stated that the respondent and his mother refused to allow her to see the children.

The respondent lodged answers in which he denied the allegations against his character, and stated that owing to the habits of the petitioner she was not fitted to have the custody of the children. He further averred that owing to the bad conduct of the petitioner he declined to reside longer with her, and that "the respondent has offered to aliment the petitioner while the parties remain in separation at a rate consistent with his means, and to allow her all reasonable access to the children, but so far this offer has been refused."

In August 1901 Mrs Boyd had raised an action of adherence and aliment against the respondent, in which the Lord Ordinary (KYLLACHY) allowed a proof.

On 5th November 1901 the First Division remitted to him to take proof in the present petition.

Thereafter the Lord Ordinary decerned against the respondent for aliment at the rate of 12s. a-week.

While the cause was pending counsel for the parties made an arrangement with regard to the access which should be allowed to the petitioner if she was unsuccessful in the petition.

On 22nd January 1902 the First Division refused the prayer of the petition.

The petitioner thereafter moved for expenses.

LORD PRESIDENT—I think we may here follow the case of *Mackellar*—25 R. 883, at p. 886—not as laying down a general rule, for each case must depend on its own circumstances, but because the course there followed appears to me to have been a reasonable one. As in that case, I think that in this case it would be fair to allow expenses down to the date of proof, because it is very probable that the parties would not have been able to arrange terms as to access except under the stress of legal proceedings.

LORD ADAM—I agree. In cases as to the custody of children there is always involved also the question of access to the children. That is so here. The answers make offer of reasonable access to the children, raising in this way the question as to what sort of access should be given. Now such an offer —an offer of reasonable access—is of a very indefinite character. What appears to be reasonable before coming into Court and after coming into Court may be very different. Here I have little doubt that it was only after the case came into the hands of counsel that the question of access was adjusted.

LORD M'LAREN and LORD KINNEAR concurred.

The Court found the petitioner "entitled to expenses to 5th November 1901, the date of the interlocutor, allowing to both parties a proof . . . and" found "no further expenses due to or by either party."

Counsel for the Petitioner—A. M. Anderson. Agent—J. M. Glass, Solicitor.

Counsel for the Respondent—M'Clure—Lamb. Agent—Andrew Gordon, Solicitor.

Tuesday, February 4.

FIRST DIVISION.

DALRYMPLE *v.* DALRYMPLE.

Revenue—Income-Tax—Annuity Payable under Contract—Right to Deduct Income-Tax—Income-Tax not Paid by Person Paying Annuity—Income-Tax Act 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 40—*Customs and Inland Revenue Act* 1888 (51 *and* 52 *Vict. cap.* 8), *sec.* 24 (3).

In an antenuptial marriage-contract the father of the husband bound himself to pay him a free yearly allowance of £3000. The spouses thereafter entered into a contract of separation whereby the husband, *inter alia*, bound himself to pay to his wife a free yearly allowance of £1000. The only income to which the husband was entitled was the £3000 payable under the marriage-contract. In paying this sum of £3000 the father did not deduct and retain any sum in respect of income-tax. The husband deducted income-tax from the £1000 paid to his wife. The wife claimed payment of the whole of this sum of £1000 without deduction of income-tax.

Held that as the annuity to the wife was chargeable with income-tax the

husband was entitled to deduct the amount of such tax, and that the fact that his father did not deduct income-tax from the annuity of £3000, and thereby made a present of the amount to his son, did not affect the son's right to deduct income-tax from the annuity payable to his wife.

Section 40 of the Income-Tax Act 1853 (16 and 17 Vict. cap. 34) enacts that "Every person who shall be liable to the payment of any rent or any yearly interest of money or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled, and is hereby authorised, on making such payment to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable for every twenty shillings of such payment."

Section 24 of the Customs and Inland Revenue Act 1888 (51 and 52 Vict. cap. 8), sub-sec. (3), enacts:—"Upon payment of any interest of money or annuities charged with income-tax under Schedule D, and not payable or not wholly payable out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income-tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly."

By antenuptial marriage-contract between Viscount Dalrymple and his father the Earl of Stair on the one part and Lady Dalrymple and her mother on the other part, *inter alia*, the Earl of Stair bound and obliged himself "to make payment to the said Viscount Dalrymple during their joint lives of a free yearly allowance of three thousand pounds sterling from and after the date of the said intended marriage, as also to make payment to the said Miss Susan Harriet Grant Suttie during the joint lives of himself and herself and of the said Viscount Dalrymple of a free yearly allowance of three hundred pounds sterling as pin money from and after the date of the said intended marriage."

In consequence of disagreements between Lord and Lady Dalrymple they agreed to live apart, and in October 1893 they entered into a deed of separation and agreement. Article third of the deed provided—"Viscount Dalrymple further agrees to pay to the Viscountess Dalrymple during the period of their joint lives, commencing as at 17th March 1893 and continuing thereafter while they shall live apart from each other, a free yearly allowance of £1300 per annum. . . . Declaring, however, that all payments made or to be made to the said Viscountess after the said 17th of March 1893 by her said husband or by his father in respect of the pin money payable to her in terms of her marriage-contract shall be imputed as payments to account of the said allowance."

The annual payment of £300 for pin money under the marriage-contract was made by Lord Dalrymple in full without deduction of income-tax, but in paying the balance of £1000 he annually made a deduction in name of income tax.

Lady Dalrymple claimed that she was entitled to payment of the full amount of £1300 without any deduction for income-tax, and to recover the total sum already deducted.

A special case was presented to the Court for the purposes of determining the question.

The parties to the special case were (1) Lady Dalrymple and (2) Lord Dalrymple.

The following facts were stated in the case—"Since the date of the said marriage between the first and second parties the Earl of Stair, in implement of his obligations under the marriage-contract, has made payment to the second party annually of the said sums of £3000 and £300 stipulated for in the said marriage-contract. This sum of £3000, subject to deduction of income-tax, if legally deductable, is the only income to which Lord Dalrymple is entitled, but in point of fact he receives from his father *ex gratia* a certain sum in addition thereto. Apart from what he receives from his father Lord Dalrymple has no other income. The said payments are made by the Earl of Stair from income upon which income-tax has been duly paid, but his Lordship does not, in making these payments to his son, deduct anything therefrom in respect of the tax so paid, and the second party does not himself make any direct payment to the Inland Revenue authorities of income-tax on the said sums received from his father, nor does the first party admit that there is any indirect payment thereof."

The first party contended that she was entitled to payment of the full amount of the "free yearly allowance of £1300" without any deduction in respect of income-tax, and to recover payment of the amounts deducted as income-tax.

The second party contended "that the use of the words 'free yearly allowance' in the said deed of separation and agreement did not import any contract by him to pay the said annuity free of income-tax, and indeed that any such contract would be illegal. He further contended that the said annuity being paid out of funds which had already suffered tax at their source he was entitled to retain the tax effeiring to the proportion paid to the first party, who was bound by the Income-Tax Acts to accept said payment under deduction of tax at the proper rate. Even assuming that said payment to the first party was not made out of funds taxed at their source, the second party maintained that he would in terms of the Income-Tax Acts be bound to deduct tax from said payments and to

account therefor to the Inland Revenue, who, however, made no claim that any such payment by the second party was due; and in this event also the first party was bound by said Acts to accept payment under deduction of tax at the proper rate."

The question submitted for the judgment of the Court was—"Is the first party bound to accept payment of the £1000, being part of the free yearly allowance of £1300, under deduction of income-tax, or is she entitled thereto without such deduction and to recover from the second party the total amount of the deductions already made?"

The first party founded upon the cases of *London County Council* v. *Attorney-General* [1901], A.C. 26, and *Kinloch's Trustees* v. *Kinloch*, February 24, 1880, 7 R. 596, 17 S.L.R. 444, and the second party on *Blair* v. *Allen*, November 17, 1858, 21 D. 15.

The respective arguments of the parties sufficiently appear from their contentions and the opinions of the Court.

At advising—

LORD ADAM—It appears to me that the answer to be given to the question put to us in this case depends upon whether Lady Dalrymple is liable to pay income-tax on the sum of £1000, part of the annual allowance of £1300 payable to her by Lord Dalrymple under the deed of separation and agreement entered into between them.

By sec. 40 of the Act of 1853 it is enacted that any person who shall be liable to the payment of any annuity or other annual payment as a personal debt or obligation by virtue of any contract shall be entitled and authorised, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable for every 20s. of such payment. Is, then, this sum of £1000 payable by Lord Dalrymple in respect of an obligation under a contract to that effect entered into by him? Or is it to be considered as a purely voluntary payment? If the latter is its character, then no income-tax would be payable by Lady Dalrymple in respect of it, and Lord Dalrymple would not be entitled to deduct and retain any sum out of it in name of income-tax. If the former is its character, then I think income-tax is payable by Lady Dalrymple, and that Lord Dalrymple is entitled to deduct and retain the amount.

Prima facie, the annuity is payable under a contract, because it is payable under a deed of separation and agreement entered into between the spouses. No doubt it is a contract revocable by either at any time, but so long as it stands unrevoked I do not think it differs from any other contract in respect of the binding nature of the obligations contained in it. I accordingly think that, standing the contract, Lady Dalrymple would have a title to sue her husband for payment of the annuity due under it, and failing payment, to obtain decree. It appears to me, therefore, that Lord Dalrymple is liable to the payment of this annuity under an obligation by virtue of a contract, and that, consequently, by section 40 of the Act he is entitled to retain therefrom the amount of the income-tax due thereon.

I see nothing in the Customs and Revenue Act 1888 which affects the right of the person paying such annuity to deduct the amount of income-tax therefrom conferred by section 40 of the Act of 1853.

The annuity may be payable entirely out of profits and gains already brought under charge to the tax. In that case the person paying it will be entitled to retain the income-tax deducted for his own benefit. Or it may be payable out of funds not already brought into charge to the tax. In that case the amount deducted as income-tax is payable to the Crown.

Section 24 (3) of the Act of 1888, to which we were referred, enacts that upon payment of an annuity charged with income-tax, and not payable or not wholly payable out of profits and gains brought into charge to the tax, the person by whom such annuity shall be paid shall deduct thereout the rate of income-tax in force at the date of such payment, and shall render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the annuity as is not paid out of profits and gains brought into charge, as the case may be.

It appears to me that the change operated by this section is to make it compulsory on the person paying the annuity to deduct the amount of income-tax therefrom, so far as the annuity was not payable out of profits and gains brought into charge, in place of leaving it optional to him to do so, as it was by the 40th section of the Act of 1853. In either case the amount so deducted is a debt from such person to His Majesty.

It is obvious that a question might arise as to whether or not the annuity had been paid or to what extent it had been paid out of profits and gains already brought into charge, but that appears to me to be a question entirely between the Crown and the person paying the annuity, with which the person in receipt of the annuity has nothing to do.

In my view, accordingly, it is irrelevant in this case to inquire from what source Lord Dalrymple obtained the money with which he paid the annuity.

If the Crown are of opinion that the annuity is paid out of profits and gains already brought into charge to the tax, or, in other words, has been taxed at its source, it will probably allow Lord Dalrymple to retain the amount deducted by him as income-tax. On the other hand, if the Crown thinks that is not so, then they will call him to account.

I am accordingly of opinion that if the annuity is to be treated as a voluntary payment by Lord Dalrymple no income-tax is due thereon, and therefore that Lord Dalrymple would not be entitled to deduct anything in name of income-tax. But if it is a voluntary payment, then I do not see that Lady Dalrymple is entitled to more than he chooses to give her. But if, as I

think, it is not to be treated as a voluntary payment, but a payment made under obligation to that effect in virtue of a contract, then I think he is entitled to deduct the income-tax therefrom.

It is said, however, that this case must be treated on the footing that the Crown makes no claim to payment of the income-tax on the £1000, and that Lord Dalrymple denies liability therefor in respect that the money out of which it is paid has already been taxed at its source.

Assuming that to be so, the normal state of matters would be that Lord Stair would be entitled to retain the income-tax payable on the £3000, and in the same way Lord Dalrymple would be entitled to retain the income-tax payable on the £1000—the result being that Lady Dalrymple would pay the income-tax on her £1000 which she enjoys, Lord Dalrymple the tax on the £2000 which he enjoys, and Lord Stair would be recouped the income-tax on the £3000 which he has paid but does not enjoy, while the Crown would receive the tax on the whole £3000.

But it is said, as I understand, that as Lord Stair does not deduct the income-tax on the annuity of £3000 payable by him to his son, he thereby enfranchises, so to speak, from payment of income-tax the whole £3000 for the benefit of all having interest in it; and, as Lady Dalrymple's annuity forms part of it, that she is entitled to the benefit of Lord Stair's non-deduction of income-tax to a corresponding extent.

What Lord Stair does is, that in addition to the annuity of £3000 which he is under obligation to pay to his son he makes him certain farther voluntary payments and does not deduct the income-tax on the £3000. I should have thought that the effect of that was simply that Lord Stair made his son a present of the amount of income-tax which he was entitled to deduct as well as of these other voluntary payments.

Why this transaction between Lord Stair and his son should be supposed to operate for the benefit of Lady Dalrymple, so as to liberate her from payment of income-tax, I am unable to see.

It will be observed that in this matter Lady Dalrymple is claiming solely as a creditor of Lord Dalrymple, and is in no different position from any other creditor to whom Lord Dalrymple was bound to pay an annuity. He is not bound to pay the annuity of £1000 to Lady Dalrymple out of this £3000 or out of any particular sum, although it happens that in fact he does because he has no other funds out of which to pay it.

It will be further observed that while Lord Stair is under obligation to pay this annuity of £3000 to Lord Dalrymple, he has no concern, so far as appears from the case, with what Lord Dalrymple may do with it after it is paid to him; in particular, Lord Stair is under no obligation to pay or to see that any part of it is paid to Lady Dalrymple.

The case appears to me to be a simple one. Lord Stair was entitled to deduct the amount of income-tax due on the £3000 and to keep it to himself. He was a creditor of his son to that extent, and entitled to repay himself by retaining the amount out of the annuity. He does not do so, and thereby, as it appears to me, makes a gift of the amount of his debt to his debtor. Why this should operate for the benefit of Lady Dalrymple, to relieve her from payment of income-tax, I have never been able to see. Certainly Lord Stair has not paid Lady Dalrymple's income-tax *eo nomine*. I do not see why it is to be presumed that Lord Stair enfranchised from income-tax the whole £3000 into whosesoever hands it should come because he made his son a present of the income-tax on the £3000 due by him.

I think, therefore, that the first question should be answered to the effect that the first party is bound to accept payment of the £1000 under deduction of income-tax.

LORD M'LAREN—The question to be considered is, whether Lord Dalrymple, the second party, is entitled to make a deduction on account of income-tax from the annuity which he agreed to pay to Lady Dalrymple under the contract of separation set forth in the case.

It does not seem to me to be open to doubt that Lady Dalrymple's annuity is charged with income-tax under Schedule D of the principal Act. By section 100 of that Act (5 and 6 Vict. cap. 35) it is provided that the last-mentioned duties (Schedule D) shall extend to every description of property or profits which shall not be contained in either of the Schedules A, B, or C; and an annuity payable under a contract is clearly a profit in the sense of the Act. In subsequent statutes, to which I shall presently refer, annuities are recognised as profits charged with income-tax.

The first party does not say that she proposes to pay the income-tax affecting her annuity directly to the Inland Revenue Department, and the only question as it appears to me is, whether Lord Dalrymple is entitled to deduct or retain the income-tax under the statutory provisions which make the debtor obligant in an annual payment a collector for the Crown. The material enactments on this subject are those contained in 16 and 17 Vict. cap. 34, section 40, and 51 Vict. cap. 8, section 24, sub-section 3.

By the first of these enactments every person who is liable to the payment of any annuity or other annual payment is empowered on making such payment to deduct and retain thereout "the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act."

It is assumed, I think, that the person who is liable in payment of the annuity has already paid income-tax on his whole income without deducting the annuity, and he is allowed to allocate the payment by retaining the annuitant's proportion. But if we suppose the case of an obligant who has made the deduction in settling with his creditor before his own income has

been brought into charge the result would be the same. He would not be allowed to deduct the amount of the annuity in settling with the Crown, because it never could be intended that a debtor should retain his creditor's income-tax merely to put the money in his pocket; he can only retain it subject to his obligation to account to the Crown. Apparently the enactment was not considered to be sufficiently explicit to meet all cases of this description, and accordingly, by the second enactment cited, it is provided that upon payment of any interest of money or annuities charged with income-tax under Schedule D, "and not payable or not wholly payable out of profits or gains brought into charge to such tax," the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income-tax in force at the time of such payment, "and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted," &c.; and then it is declared that such amount shall be recoverable as a debt to the Crown.

I may here observe that while, according to the policy of the Income-Tax Acts, the duty is generally collected at its source, no obligation is laid on the creditor who submits to the deduction to see to the application of the money, nor is he entitled to make conditions, except that he may demand a certificate from his debtor that income-tax has been deducted, and this certificate will be a good discharge to him in case he should be called on by the Inland Revenue for a direct payment. It is assumed that the officers of the revenue know how to collect the duty at its source, and the annuitant is discharged by making payment (by way of deduction) to the person through whom he receives the annuity.

Under one or other of the two enactments cited Lord Dalrymple, as I think, is charged with the duty of collecting the income-tax due by Lady Dalrymple in respect of her annuity. If he pays the annuity out of funds which have not been "brought into charge to such tax," *e.g.*, out of a voluntary allowance made by his father, then he must account to the Inland Revenue department for the amount deducted in virtue of the provision of the Act 51 Vict. cap. 8. If he pays it out of profits or gains which have been brought into charge, then he is entitled to make the reduction to recoup himself (or whoever has paid the duty on his behalf) for the income-tax which has already been paid to Government. In the one case he is to collect the tax for the Crown, in the other case he pays the tax by anticipation and then collects for himself.

Now, it is stated in the case that Lord Dalrymple's income is derived in part from an annuity of £3000 payable to him by his father, the Earl of Stair, and made obligatory by marriage-contract to which Lord Stair was a party, and in part from a further voluntary allowance which Lord Stair provides to his son. Lord Stair of course pays income-tax on his entire income, and he would be entitled to deduct income-tax from the obligatory allowance of £3000; but he does not in fact make the deduction, because he wishes to provide for his son more liberally than he is under obligation to do.

Lord Dalrymple does not directly pay the tax on any part of his income, nor, as I conceive, is he liable in such payment; because with respect to the obligatory allowance Lord Stair pays it for him, and with respect to the voluntary allowance it is not a profit or gain in the sense of the income-tax statutes. It is on this circumstance that the argument for the first party is founded. She contends that as Lord Dalrymple has not paid and does not propose to pay income-tax on his own income he is not entitled to make the deduction from the share of his income which he is bound to pay to her.

The question is no doubt a fair subject for legal argument, but according to the best of my judgment the argument of the first party is not sound. I think it is a fallacy to say that the second party has not paid income-tax on his annuity of £3000. It has been paid for him by Lord Stair, and I think that in a question with a third person anyone is entitled to say that he has paid a debt if it has been paid for him, especially if it has been paid according to the ordinary course of settlement of such transactions. If a banker or agent makes a payment on behalf of a client, that is a good payment by the client. Lord Stair has paid his son's tax in ordinary course according to the provisions of the Income-Tax Acts, and I think it is not a relevant answer that Lord Stair is not asserting his undoubted right to recover the amount from his son. Again, if it is supposed that the lady's annuity is paid out of the voluntary allowance, she is equally bound under the Act 51 cap. 8 of the late Queen to submit to the deduction, and it will then lie with the Inland Revenue Department to call for an account if they think they have a case. For these reasons I think the question ought to be answered in favour of the second party.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court affirmed the first alternative of the question.

Counsel for the First Party—Lorimer—Forbes. Agent—Richard Lees, Solicitor.

Counsel for the Second Party—Dundas, K.C. — Blackburn. Agents — Dundas & Wilson, C.S.