send the case back to the Lord Ordinary with authority to allow the Clerk of Court to sign the discharges, we must have before us in writing evidence that the purchasers in the division and sale are willing to accept a discharge of the bonds by the Clerk under the authority of this Court as sufficient to clear this title. That will mean not merely a letter bearing their authority and approving generally of such a discharge, but it must bear direct relation to a draft revised on their behalf. Further, it will be necessary that the discharge itself shall be approved by the Lord Ordinary when the case goes back to him.

LORD CULLEN—I concur.

LORD SKERRINGTON—I concur.

LORD SANDS—I also concur.

Letters written by or on behalf of the purchasers in accordance with the requirements stated by the Lord President having been lodged, the Court pronounced this interlocutor:—

"... In view of the intimation to said claimant of the intention of the Lord Ordinary to report the matter to this Division on said 19th December last, and of there being no appearance by him or on his behalf on said date, and having also seen and considered the holograph letters ... written by or on behalf of the purchasers of the subjects Nos. 47 and 49 Waverley Place, Aberdeen, agreeing to accept such discharge ... if signed by the Clerk of Court on his being specially authorised by the Court to sign the same as being valid and sufficient to all intents and purposes as if the same had been executed and delivered by the said Robert Smith Wallace himself, Authorise and empower John Cairns, Depute-Clerk of Session, to sign the said discharge in place of the said Robert Smith Wallace, and to deliver the same to the agent of the real raiser and decern: Find the claimant and real raiser Charles Williamson (Marian J. Wallace's curator) entitled in terms of article 5 of the joint-minute... to the expenses incurred by him in consequence of the said Robert Smith Wallace's failure to sign the said discharge out of the sum of £600 sterling mentioned in article 3 of said joint-minute ..."

Counsel for the Real Raiser—J. A. Christie—W. A. Murray. Agent—James P. Niven, S.S.C.

Saturday, January 26.

FIRST DIVISION.

INLAND REVENUE *v.* WEMYSS.

Revenue—Super Tax—Assessment—Income Arising from Ownership—Income Arising from Occupation—Income Tax Act 1918 (8 *and* 9 *Geo. V, cap.* 40), *secs.* 5 (1), 19, *and* 27 (1)—*Conditional Occupation, subject to Discretion of Trustees of Trust Property, by Beneficiary Liferenter.*

A testator directed his trustees to maintain and keep in repair his residence and its appurtenances, and not to let them unless in their opinion it should become necessary and expedient to do so, and that so long as they deemed it expedient to retain them in their own hands unlet, the house and appurtenances were to be occupied by his widow (his second wife) while she survived, or until she should relinquish her right of occupancy in favour of the testator's son, which she was given full discretion to do on the son attaining twenty-five years of age. On her death or on her relinquishing the occupation the trustees were to hold the property in trust for the "liferent use" of the son so long as his mother (the testator's first and divorced wife) remained alive, the son to have the right to occupy it so long as the trustees found it expedient to retain it in their own hands unlet. In the event of the son allowing his mother (the testator's first wife) to live on the estate the trustees were to cease to allow him the liferent. The trust was to continue until the trustees had been able to reduce the debts affecting the testator's estate to a certain sum. The testator's widow relinquished her liferent and the son occupied the properties in terms of the trust throughout the financial year ending 5th April 1920. *Held* that in these circumstances the son had a merely personal privilege of residence, and must be considered to have no income in the sense of the Income Tax Acts in respect of said subjects, and accordingly that the annual value of the mansion-house, offices, policies, and shootings did not form part of the income of the son for the purposes of super tax.

Revenue—Super Tax—Marriage-Contract Trust—Income of Beneficiary—Beneficiary Entitled to Income from Shares up to Limited Amount—Surplus Income Applied to Pay off Charges on Trust Estate, thereby Increasing Value of Provisions.

By his antenuptial marriage contract a husband who was vested under his father's settlement in a reversionary right to shares which were burdened with certain charges, one of which had been created by himself, conveyed his whole right in the shares to the marriage-contract trustees, subject to a

reserved right which he subsequently exercised to burden the shares with a further charge, under direction to the trustees to pay the income arising from the shares to him and to his wife on his predeceasing her, and to hold the capital for the children of the marriage. In the event of his wife predeceasing him without children being alive the capital was to revert to the husband, who had also a right to have the shares made over to him at any time on payment by him to the trustees of their face value, the sum so paid to be held by the trustees for similar purposes. In the event of certain of the shares producing dividends exceeding 12½ per cent. the excess was to be retained by the trustees and applied to reduce the charges created by the husband. Further, provisions were made that when these charges were paid off the husband was to get the free income from the shares unless the dividends exceeded a higher rate, in which event accumulations were to be made in accordance with certain directions, whereby the husband might eventually benefit. Dividends from the shares exceeded 12½ per cent., and the excess was employed by the trustees in paying off the charges, the effect being to increase the value of the provisions referred to. *Held* that the direction to employ the excess in paying off the charges was irrevocable, and that such excess did not therefore form part of the husband's estate for the purposes of super tax.

The Income Tax Act 1918 (8 and 9 Geo. V, cap. 40) enacts—Section 5 (1)—"For the purposes of super tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemption or abatement under this Act, but subject to the provisions hereinafter contained." Section 19—"For the purpose of a claim under the preceding provisions of this part of this Act, the income arising from the ownership of lands, tenements, hereditaments or heritages shall, subject to any allowance, reduction, or relief granted under this Act, be deemed to be the annual value thereof estimated in accordance with the rules applicable to Schedule A, and the income arising from the occupation of lands, tenements, hereditaments and heritages shall, subject to any allowance, reduction, or relief granted under this Act, be deemed the assessable value thereof estimated in accordance with the rules applicable to Schedule B, and where a claimant is both owner and occupier, the amount of the annual value under Schedule A, added to the amount of the assessable value under Schedule B, shall be deemed to be the income arising from these lands, tenements, hereditaments or heritages." Section 27 (1)—"Any person who claims exemption, abatement, or relief under the preceding provisions of this part of this Act shall . . . deliver to the assessor . . . a notice of his claim together with a declaration . . . setting forth—(*a*) all the particular sources from which his income arises. . . ."

The Commissioners of Inland Revenue, *appellants*, being dissatisfied with a decision of the Commissioners for the Special Purposes of the Income Tax Acts amending an assessment made upon Captain Michael John Wemyss of Wemyss Castle, *respondent*, to super tax on the sum of £18,499 for the year ending 5th April 1921 to £8760, obtained a Case for appeal. The amendment of the assessment excluded the annual value of Wemyss Castle and grounds which the respondent had occupied during the financial year, according to the terms of his father's settlement, and the balance of the income of certain securities which had been conveyed by the respondent to his marriage-contract trustees.

The Case stated—"1. The following *facts* were admitted or proved:—(1) Under a trust-disposition and settlement made on 10th May 1904 the late Randolph Gordon Erskine Wemyss, father of Captain Wemyss, settled and disposed of the whole of his property, as therein directed. The directions with reference to the Wemyss Castle estate were contained in the following clause:—'In the fourth place I direct my trustees to maintain and keep in good repair the said estates of Wemyss, Little Raith, and Torry, with the buildings, fences, and others thereon, and specially to maintain and keep in good repair my mansion-house of Wemyss Castle, the chapel, and the offices, policies, and grounds connected with the Castle. It is my desire that the said mansion-house and policies of Wemyss Castle and the shootings shall not be let unless in the opinion of my trustees this course should become necessary or expedient, and so long as my trustees consider it expedient to retain the said Castle, offices, policies, and shootings in their own hands it is my desire that the same shall be occupied by the said Lady Eva Wemyss while she survives as her residence in Scotland unless and until she shall consider it desirable to relinquish the occupancy thereof as aftermentioned. And so long as the said Castle, offices, policies, and shootings are occupied by her, I direct my trustees, in addition to any sum which they may pay for the upkeep thereof, to pay to her monthly a sum of £200 for general household and stable expenses, or such other sum as they in their sole discretion may consider necessary. While thus expressing my wish that the said Lady Eva Wemyss shall have the liferent use and enjoyment of the said Castle, offices, policies, and shootings, I leave it to her, having full confidence in her discretion and judgment, to decide whether at any time she shall relinquish the occupancy of the said said Castle, offices, and grounds in favour of my son Michael John Wemyss; said discretion shall not, however, be exercised before the said Michael John Wemyss shall have attained the age of twenty-five years complete, and it shall not at any time be in the power of the said Michael John Wemyss to call upon the said Lady Eva Wemyss to exercise the discretion hereby conferred

upon her. Should this discretion be exercised by the said Lady Eva Wemyss, the said Michael John Wemyss shall, during the subsistence of this trust, only be entitled to occupy the said Castle, offices, policies, and shootings so long as my said trustees shall find it expedient to retain the same in their own hands unlet. Further, should the said Lady Eva Wemyss relinquish the occupancy of the said Castle, offices, policies, and shootings during the subsistence of this trust, I direct my trustees to pay to her the sum of £10,000 sterling to enable her to provide another residence for herself, and should she so relinquish the occupancy after the said estates have been disponed to my said son as after mentioned, then he in like manner shall be bound to pay to her the said sum of £10,000 for the aforesaid purpose.' (2) The following direction was also inserted:—'In the fourteenth place, after the death of my said wife or after her relinquishment of her occupation of Wemyss Castle, policies, and others mentioned in the fourth purpose hereof, I direct my trustees to hold said Castle, policies, and others in trust for the liferent use of my said son Michael John Wemyss so long as his mother Lady Lilian Mary Paulet or Wemyss shall remain alive.' (3) In the year ended 5th April 1920 Captain Wemyss was over the age of twenty-five, but Lady Eva Wemyss was still alive and the trust-disposition and settlement above referred to was still in operation. By a deed of renunciation, dated 29th January 1919, Lady Eva Wemyss relinquished and renounced her right of occupancy of the mansion-house of Wemyss Castle and the offices, policies, and shootings pertaining thereto, in favour of Captain Wemyss. Throughout the financial year ended 5th April 1920 Captain Wemyss was in occupation of Wemyss Castle. The Castle was furnished for occupation, and Income Tax Schedule A upon it and Income Tax Schedule B on the grounds were paid by the trustees, who have also paid for the repairs of the Castle. (4) By an antenuptial contract of marriage made by Captain Wemyss upon his marriage in the year 1918 he transferred to trustees his whole right, title, and interest in 6000 preferred ordinary shares and 4000 deferred ordinary shares in the Wemyss Collieries Trust, Limited (which shares were at the time held by the trustees of an earlier settlement for the purpose of securing a jointure or annuity to Lady Lilian Wemyss) upon trust to pay to himself the income of such shares (after payment of the said jointure), but declaring that 'in the event of the interest, dividend, bonus, or other income paid on the said deferred ordinary shares exceeding the rate of 12½ per cent. free of income tax in any year the trustees shall retain any income exceeding such rate, and apply it from time to time (subject to a further payment of £500 per annum to the husband during the lifetime of the said Lady Lilian Mary Paulet or Wemyss) in reducing or discharging, *in the first place*, the charge on the said shares in favour of the Royal Bank of Scotland, being No. 4 in the schedule, and in the second place, the reserved charge being No. 5 in the said schedule, if it shall have been exercised until such charges shall be entirely discharged and extinguished.' (5) In the year ended 5th April 1920 the dividends on the said deferred shares exceeded 12½ per cent., and the balance of the income was applied by the trustees, as directed by the above clause, towards discharging the charge on the said shares in favour of the Royal Bank of Scotland. (6) A copy of the trust-disposition and settlement and a copy of the antenuptial contract of marriage . . . form part of this case. (7) The super-tax assessment appealed against was made in a sum sufficient to include the annual value of Wemyss Castle and grounds as assessed under Schedules A and B of the Income Tax Acts, and the whole of the income derived from the said shares in the Wemyss Collieries Trust, Limited, less only the jointure payable to Lady Lilian Wemyss. The said assessments under Schedules A and B had been made in the name of Captain Wemyss. (8) At the hearing of the appeal it was agreed before us that under the trust-disposition and settlement, dated 10th May 1904, Captain Wemyss had no power himself to let the Castle and grounds.

"2. It was contended on behalf of Captain Wemyss—(1) That by reason of the decisions in *Tennant* v. *Smith*, [1892] A.C. 150, and *Inland Revenue* v. *Sutherland*, 1894, 21 R. 753, Captain Wemyss was not bound to include the annual value of the Castle and grounds in his statement of income, and that the right of occupancy given to him under the trust-disposition and settlement was not of such a nature as to make the annual value of the Castle and grounds part of his income for the purposes of income tax; and (2) that by the antenuptial contract he had for onerous consideration deprived himself of so much of the income from the shares referred to as the trustees are required to retain and apply in discharging the charge on the said shares in favour of the Royal Bank of Scotland, and that the income so retained and applied by the trustees was not his income for the purposes of income tax.

"3. On behalf of the Commissioners of Inland Revenue it was contended—(1) That the right conferred on Captain Wemyss by the fourteenth purpose of the said trust-disposition and settlement was a right of liferent and not a mere right of occupancy—*Johnstone* v. *Mackenzie's Trustees*, 1912 S.C. (H.L.) 106; *Glover's Trustees* v. *Glover*, 1913 S.C. 115—and that he was therefore bound to include the annual value of Wemyss Castle and grounds as part of his income; (2) that the provision in the marriage contract for payment of the excess income to the Royal Bank being entirely outside the marriage consideration was not binding and was revocable—Bell's Prins. (10th ed.), sec. 1942; *Barclay's Trustees* v. *Watson*, 1903, 5 F. 926; *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88; *per* Lord Watson at pp. 94 and 95; (3) that the said provision was simply a trust for payment of a private debt, and that Captain Wemyss had accord-

ingly not divested himself of the excess income—*Byres' Trustees* v. *Gemmell*, 1895, 23 R. 332, *per* Lord M'Laren at p. 337; and (4) that Captain Wemyss was accordingly bound to include for the purposes of super tax the whole of the income received by his marriage-contract trustees from the said shares."

The antenuptial marriage contract of Captain Wemyss provided, *inter alia*—"And further considering that by trust assignation . . . the father of the husband on the narrative therein contained, assigned, transferred, and conveyed 10,000 ordinary shares in the Wemyss Collieries Trust, Limited, now and then represented by 6000 preferred ordinary shares, and 4000 deferred ordinary shares in the said Wemyss Collieries Trust, Limited, to and in favour of . . . trustees for the purposes therein mentioned, but subject *primo loco* to the payment from the income or capital of the said shares of a jointure or annuity of £3500 in favour of Lady Lilian Mary Paulet or Wemyss, the mother of the said husband, all as narrated therein. . . . And further, considering that the husband having attained the age of 25 years has acquired in terms of the said trust assignation a vested right or interest in the said shares but subject to the jointure or annuity as aforesaid, and that the husband has granted or joined in granting certain charges over the said shares by way of additional security for various loans and advances and hereby reserves to himself power to charge the said shares to the further extent of £8000, all as set forth in the schedule annexed hereto. And further, considering that by indenture made the 18th July 1913 between the Honourable Eva Cecilia Margaret Erskine Wemyss of Wemyss Castle, in the county of Fife (commonly called Lady Eva Wemyss), of the one part and the husband of the second part, the said Lady Eva Wemyss covenanted with the husband that if and so long as (during her life) he should be deprived of any income (which he would otherwise receive from the said shares) under and by virtue of any of the charges 1, 2, and 3 of the schedule annexed hereto, the said Lady Eva Wemyss would pay to the husband such a proportion of the amount by which his income shall be thereby reduced as the whole income for the time being of the shares in the Wemyss Collieries Trust, Limited, to which she is entitled under her marriage settlement, bears to the income which the husband would otherwise receive under the trust assignation. And further, considering that on the treaty for the marriage it was agreed that the husband should settle his whole right, title, and interest under and by virtue of the said trust assignation, and in particular his whole right, title, and interest in the said shares but subject to the jointure or annuity and to the charges above mentioned. Therefore the husband hereby assigns, conveys, and transfers to . . . trustees under these presents. . . . (*First*) His whole right, title, and interest, present and future, under and by virtue of the said trust assignation, and in particular his whole right, title, and interest, present and future, in and to the said 6000 preferred ordinary shares and 4000 deferred ordinary shares in the Wemyss Collieries Trust, Limited, and in and to the price and proceeds thereof, if and when sold, but subject always to the aforesaid jointure or annuity and charges; and (*second*) his whole right, claim, and interest under the said indenture made 18th July 1913 between the said Lady Eva Wemyss and him . . . but in respect the said shares are presently held by . . . the trustees now acting under the settlement, in the English form, made the 19th day of December 1899 between the said Randolph Gordon Erskine Wemyss of the first part, the said Lady Lilian Mary Paulet or Wemyss of the second part, and the trustees named in said settlement of the third part . . . it is hereby declared that the said shares shall not be transferred to the names of the trustees under these presents until the death of the said Lilian Mary Paulet or Wemyss shall happen, but the husband shall grant all necessary writings so that the income derived from the said shares, but subject as aforesaid, shall be paid to the trustees acting under these presents, which right, title, and interest above conveyed and the proceeds thereof and the assets representing the same from time to time and the income arising therefrom, but subject as aforesaid, shall be held by the trustees in trust always for the following purposes, viz.:— . . . (*Second*) For payment to the husband during his lifetime of the free income (subject to the provisions hereinafter mentioned), including in such income all income accrued but unpaid at the time when the trust estate falls under the operation of these presents, but declaring that in the event of the interest, dividend, bonus, or other income paid on the said deferred ordinary shares exceeding the rate of 12½ per cent., free of income tax in any year, the trustees shall retain any income exceeding such rate and apply it from time to time (subject to a further payment of £500 per annum to the husband during the lifetime of the said Lady Lilian Mary Paulet or Wemyss) in reducing or discharging in the first place the charge on the said shares in favour of the Royal Bank of Scotland, being No. 4 in the schedule annexed hereto, and in the second place the reserved charge, being No. 5 in the said schedule, if it shall have been exercised, until such charges shall be entirely discharged and extinguished: Declaring that if the husband shall not have exercised his reserved power to make the said charge No. 5 in the said schedule by the time the charge in favour of the Royal Bank of Scotland shall have been fully discharged and extinguished he shall forfeit all right to make it, and the power reserved to him as hereinbefore mentioned shall be cancelled. And after discharging the said charge in favour of the Royal Bank of Scotland, and the reserved charge if it shall have been exercised, the trustees shall pay to the husband the whole free annual income until the income paid on the said deferred ordinary shares shall exceed the rate of 15 per cent.

free of income tax in any year, in which event the trustees shall retain any income exceeding the said rate of 15 per cent. free of income tax, and shall accumulate and invest it from time to time until the capital sum of £5000 shall have been so accumulated and invested, declaring that any income derived from such accumulations or investments made therefrom shall be added to the capital or principal sum and invested along therewith until the accumulated fund shall amount to £5000, when the income therefrom shall be paid to the husband: And after the trustees shall have so accumulated and invested the said capital sum of £5000 they shall pay the whole free income of said shares to the husband until the income paid on the said deferred ordinary shares shall exceed the rate of 17½ per cent. free of income tax in any year, in which event the trustees shall retain any income exceeding the said rate of 17½ per cent. free of income tax, and shall accumulate and invest it until they shall have accumulated and invested a further sum of £5000 in the same manner and under the same conditions as are provided for the accumulation of the £5000 first above mentioned: And after the trustees shall have accumulated and invested such further capital sum of £5000 (making £10,000 in all) they shall pay to the husband the whole free income of said shares as well as the income derived from the said accumulated fund of £10,000: And it is hereby further provided and declared that in the event of the income paid on the said deferred ordinary shares falling below the rate of 12½ per cent. free of income tax in any year, the trustees shall be entitled to make up such income to the said rate of 12½ per cent. free of income tax from the capital or income of any accumulated fund they may be holding as aforesaid at the time, and pay such sum to the husband in addition to the said sum of £500 per annum if the said Lady Lilian Mary Paulet or Wemyss is then surviving, but this provision shall only apply if the trustees shall at the time when the income on the said deferred ordinary shares shall fall below the said rate of 12½ per cent. free of income tax have accumulated funds in hand and only to the extent thereof, and in the event of the accumulated fund being so drawn upon the trustees shall, so soon as the income paid on the said deferred ordinary shares shall again exceed the said rate of 12½ per cent. free of income tax, make up out of such excess income the amount so drawn, and continue to accumulate and invest in the terms and on the conditions hereinbefore mentioned. (*Third*) In the event of the dissolution of the marriage by the death of the husband the trustees shall thereafter account for and pay over the free income to the wife during all the days of her life after such dissolution. . . . (*Fourth*) With regard to the capital subject as aforesaid the trustees shall hold the same for behoof of the child or children to be procreated of the marriage, and the issue of such of them as may die before acquiring a vested interest leaving issue. . . . (*Fifth*) In the event of the dissolution of the marriage by the death of the husband and of the children and remoter issue, if any, all dying before acquiring a vested interest, the capital shall (subject, however, to the liferent of the wife in the event hereinbefore mentioned) be payable and be dealt with as the husband may direct by deed or will, and failing such, then the same shall be payable to his executors to be dealt with as part of his personal estate according to the law of Scotland. (*Sixth*) In the event of the dissolution of the marriage by the death of the wife and of the children or remoter issue, if any, all dying without acquiring a vested interest, the husband shall be entitled to have the capital made over to himself absolutely:... And further, it is hereby specially provided and declared that the husband shall be entitled, if he so wishes at any time during the subsistence of the marriage, to pay to the trustees the sum of £100,000 sterling, and on his making such payment the trustees shall transfer and make over to him the whole of the right, titles, and interests in and to the said shares conveyed to them by these presents or the said shares if they shall have been transferred to them, and also any accumulations or funds that may have been invested by the trustees in terms of the foregoing provisions, and such sum of £100,000 sterling, if and when it shall be paid over to the trustees, shall take the place of the said rights, titles, and interests in the said shares or the said shares if transferred to the trustees and the accumulations or invested funds as hereinbefore provided, and said sum of £100,000 shall be invested and held by the trustees for the same purposes as it is hereinbefore provided they shall hold the said rights, titles, and interests in the said shares, or the said shares if transferred and the accumulations or invested funds."

The schedule of charges referred to in the antenuptial marriage contract was as follows:—"1. Charge in favour of the Scottish Widows' Fund Life Assurance Society over three-fourths of the shares as additional security for a bond and disposition in security over the estates of Wemyss and Torry. The principal sum in the bond has now been reduced to £230,000. The gross annual rental of the estates of Wemyss and Torry amounts to over £25,000. 2. Charge in favour of Sir Michael B. Nairn's trustees as additional security for bonds over the said estates for £62,000. 3. Charge in favour of Lady Cowley's trustees as additional security for bond over the said estates for £30,000. 4. Charge in favour of the Royal Bank of Scotland for £18,000. 5. Charge reserved to Michael J. Wemyss to be exercised by him to the extent of £8000."

The *questions of law* for the opinion of the Court were—"1. Whether the annual value of Wemyss Castle, offices, policies, and shootings forms part of the income of Captain Wemyss for the purposes of super tax? and 2. Whether the income from the said shares, so far as it exceeds 12½ per cent. per annum, forms part of the income of Captain Wemyss for the purposes of super tax?"

Argued for the appellants—*On the first*

question—Under the fourteenth clause of the trust-disposition and settlement the right of Captain Wemyss was one of liferent, and he was liable in the character of liferenter for Schedule A taxation. The trustees were merely holding for him, and he was not entitled to escape taxation because they were infeft—*Johnstone* v. *Mackenzie's Trustees*, 1912 S.C. (H.L.) 106, 49 S.L.R. 986. Although they alone had the power to let, the power was only to be exercised in case of necessity, and he was to enjoy to the whole annual value either by occupation or by receiving the rents if the property was let. The trust-disposition and settlement had been under consideration by the Court before in *Wemyss* v. *Wemyss' Trustees*, 1921 S.C. 30, 58 S.L.R. 116, and the view of the Court then seemed to be that clause 14 gave Captain Wemyss a liferent. But, in any event, if his right was not a liferent, he had acquired under the settlement a right which amounted to that of an occupier within the meaning of Schedule A, No. vii, Rules 1 and 2 of the Income Tax Act 1918. He had a right to the free use of the property, without any corresponding duties, which flowed from the testator and not from any person with a right of occupation. As exercising such a right he was not a mere resident but a person having the profitable use of the subjects, and was therefore properly assessed as occupier under Schedule A. As he had no right of relief under Schedule A, No. viii, Rule 1, he was to be regarded as a qualified owner enjoying the annual value, and therefore liable to the tax—*Inland Revenue* v. *Fry*, 1895, 22 R. 422, *per* Lord M'Laren at p. 428, 32 S.L.R. 341. The possibility of conversion into money was not a test of whether the right was taxable, and there was no warrant for such a view in *Tennant* v. *Smith*, 1892, 19 R. (H.L.) 1, 29 S.L.R. 492. Further, neither *Tennant* v. *Smith* (*cit.*) nor *Inland Revenue* v. *Sutherland*, 1894, 21 R. 753, 31 S.L.R. 630, relied on by respondents, were in point. In *Tennant* v. *Smith* the house was occupied for the business of the bank which was therefore the legal occupier, *per* Lord Watson at 19 R. (H.L.) 6, referring to Lord Herschell in *Russell* v. *Town and County Bank*, 1888, 15 R. (H.L.) 51, 25 S.L.R. 451; 13 App. Cas. 418 at 426; and in *Inland Revenue* v. *Sutherland* the occupancy was personal to the minister who was, further, entitled to have his taxes paid by the trustees—*Inland Revenue* v. *Fry* (*cit.*), *per* Lord M'Laren at 22 R. 428. The cases where persons in physical possession had been held not liable to tax were cases where the right had flowed from some other person who had a right of occupation, *e.g.*, cases of master and servant. As regards the respondent's liability under Schedule B, it was sufficient that he was in occupation of the Castle and policies throughout the financial year. The conception of income in both schedules was annual value, and the test was whether the person assessed enjoyed the annual value—*Middleton* v. *Lord Advocate*, 1876, 3 R. 599, *per* Lord Deas at p. 602, 13 S.L.R. 378. The respondent did so both as owner and as occupier, and his occupancy was therefore to be treated as income, which brought him within the provisions as to super tax—Income Tax Act 1918, sections 5 (1), 19, and 27. *Inland Revenue* v. *Anderson*, 1922 S.C. 284, 59 S.L.R. 262, and the Finance Act 1920 (10 and 11 Geo. V, cap. 18), section 32, were also referred to. 2. *On the second question*—According to the terms of the marriage contract the surplus revenue from the securities was the respondent's income, although transferred by him to trustees for the purpose of paying off the charges. But, in any case, the marriage-contract provision in regard to the excess was merely an administrative trust for the purpose of paying off debts which had no proper reference to the marriage or its consequences. Such a provision did not divest the respondent of the income and was revocable—*Ramsay* v. *Ramsay's Trustees*, 1871, 10 Macph. 120, 9 S.L.R. 106; *Macdonald* v. *Hall*, 1892, 20 R. (H.L.) 88, *per* Lord Watson at pp. 94 and 95, 29 S.L.R. 465; *Synnot* v. *Simpson*, 1854, 5 Clark's House of Lords Cases, 121, *per* Lord Chancellor Cranworth at p. 133, approved by Lord Dunedin in *Carmichael* v. *Carmichael's Executrix*, 1920 S.C. (H.L.) 195, at p. 201, 57 S.L.R. 547; *Byres' Trustees* v. *Gemmell*, 1895, 23 R. 332, 33 S.L.R. 236; *Eliott* v. *Eliott's Trustee*, 1894, 21 R. 955, 31 S.L.R. 850; M'Laren, Wills and Succession, vol. i, p. 424 *et seq.*

Argued for the respondent—*On the first question*—The interest of Captain Wemyss in the Castle and grounds was not income taxable under Schedule A. The right to which the schedule applied was a proprietary right, which would include a full liferent—Ersk. Inst., ii, 9, 41—as having all the elements of a proprietor's right in regard to occupation—*Inland Revenue* v. *Fry* (*cit.*). But the right here fell far short of such a liferent. It was limited, the feudal title and the right to let being with the trustees. The right of occupation was restricted by conditions and could be withdrawn. Further, if the trustees let the property, which they could only do in case of necessity, *e.g.*, to meet debts, Captain Wemyss would be deprived of the rents. In *Johnstone* v. *Mackenzie* (*cit.*) the words were very different. The real position here was that there was no liferent but merely a number of trust purposes, and there was nothing which could be assessed as income under Schedule A—*Tennant* v. *Smith* (*cit.*), *per* Lord Watson. There was therefore no income subject to super tax. There was no authority for the view that in the absence of a right of relief under Schedule A, No. viii, Rule 1, a mere right to occupy was to be regarded as qualified ownership taxable under the schedule. On the contrary, the schedules contrasted owners and occupiers, and if the occupier was assessed he had a right of relief at common law against the owner. But the right of relief had no proper bearing on the question of liability for super tax. This liability depended on section 19, and as regards Schedule A depended on ownership. The Commissioners were therefore right, and could not have come to any other decision in the light of *Tennant* v. *Smith* (*cit.*) and

Inland Revenue v. *Sutherland* (*cit.*). *Agnew* v. *Ferguson*, 1903, 5 F. 879, *per* Lord Trayner at p. 883, 40 S.L.R. at 636, was also in point. As regards Schedule B, the true occupation was with the trustees. They had the feudal title, the right to collect the rents, and the control of the property. The appellant's contention involved a misuse of the meaning of "use" and "occupation" in the schedule, which was intended to apply, not to annual value but to income from the use or employment of land which the occupation inferred. 2. *On the second question*—The effect of the marriage-contract provisions was that the excess income from the shares could never reach Captain Wemyss in the form of income. These provisions were to improve the estate for the other beneficiaries and were onerous and irrevocable. The fact that he might ultimately benefit if his wife did not survive and there were no children did not affect the question—*Inland Revenue* v. *Blott*, [1921] 2 A.C. 171. *Eliott* v. *Eliott's Trustee* (*cit.*) was in sharp contrast to the present case, in respect that the wife was in that case merely the husband's agent.

At advising—

LORD PRESIDENT (CLYDE)—The questions in this case relate to the assessment of the respondent's income to super tax.

By section 5 (1) of the Income Tax Act 1918 the total income of any individual is to be estimated for purposes of super tax in the same manner as the total income from all sources is estimated for purposes of exemption or abatement of income tax. By section 27 (1) a claimant for exemption or abatement must declare, *inter alia*, "all the particular sources from which his income arises." And by section 19 it is provided that for purposes of exemption or abatement—and therefore for purposes of super tax—"*income arising from the ownership of lands* . . . shall . . . be deemed to be the annual value thereof estimated in accordance with the rules applicable to Schedule A," and in like manner "*income arising from the occupation of lands* . . . shall . . . be deemed the assessable value thereof estimated in accordance with the rules applicable to Schedule B."

It is maintained on behalf of the Inland Revenue that one of the sources of the respondent's income is the *ownership of lands*. The lands referred to in this contention consist of the mansion-house and policies of Wemyss Castle and the shootings.

It is a circumstance apparently unfavourable at the outset to the contention of the Inland Revenue that these lands are not in fact owned by the respondent but by his father's trustees, to whom they were conveyed under and in terms of his father's trust-disposition and settlement, and in whose administration they still remain (along with other estate belonging to the respondent's father) for the manifold purposes therein contained. But the Act of 1918 does not define "ownership," and it is clear from the rules applicable to Schedule A that "ownership" may consist in something far short of a vested feudal fee. If regard be had to the provisions of the rules which fix who is the person assessable or chargeable under Schedule A—either without relief (1918 Act, Schedule A, No. ii, 4, 5, 6, and 7, No. iii, 4, and 7 (1)), or with relief or right of recoupment (1918 Act, Schedule A, No. vii, 8, 9 (1), and 13 (1), No. viii, 1, 4 (1), and 5—it appears that the Act regards that person as having the *ownership of lands* whose right thereto or therein *immediately* entitles him to the receipt of any annual value the lands may possess—the "landlord" or "immediate lessor" to whom the civil fruits of the lands themselves are or would be *immediately* payable. This is confirmed by the terms in which the rules for estimating annual value (1918 Act, Schedule A, No. iv, 1 and 2) and those which regulate deductions and allowances (1918 Act, Schedule A, No. v, 1 (*g*) and 8 (1)) are conceived, and it accords with the opinions expressed by Lord Macnaghten and Lord Davey in *London County Council* v. *Attorney-General* ([1901] A.C. 26, at pp. 35-36 and 45) to the effect that the duties under each and all of the schedules—including what is often called "property" tax (Schedule A)—are equally duties on *income* or profits and gains. Thus, for example, a person occupying the position of a "proper" liferenter in the law of Scotland appears to stand in a relation of "ownership" to the lands liferented by him within the meaning of the Act. He has no trust interposed between him and those lands; he is "*interim dominus* or proprietor for life"—Ersk. Inst., ii, 9, 41—and he is immediately entitled to the civil fruits of the lands, which lands he may let to tenants for the duration of his life. Like any other "owner" he may be "occupier" also and uplift the natural fruits of the lands, since he is entitled if he pleases to possess the lands personally or by his own servants—Ersk. Inst., ii, 9, 56.

The Inland Revenue founds on the 14th purpose of the trust-disposition and settlement, whereby the testator directs the trustees to whom he has conveyed, *inter alia*, the Castle, policies, and shootings to hold the same "in trust for the liferent use of my said son [the respondent] so long as his mother [the testator's first wife] shall remain alive." This lady still survives. The respondent is thus not a "proper" but only a "beneficiary" liferenter. But this carries one but a very short way, for in the first place the facilities of modern conveyancing make it as easy to restrict as to enlarge the rights conferred on a beneficiary (to whatever general category he belongs). It is therefore necessary to examine the trust-disposition and settlement as a whole before arriving at any conclusion with regard to the respondent's true relation to the subjects for the purposes of super tax. In the second place the subjects of the beneficiary liferent provided in the 14th purpose consist of a house or residence and its appurtenances, and it is necessary to attend to the specialties which have always attached in the law of Scotland to liferent rights of residential occupation—see Ersk. Inst., ii, 9, 60; M'Laren on Wills and Succession (3rd ed.), vol. i,

p. 2618, sec. 1122; *Johnstone* v. *Mackenzie's Trustees*, 1912 S.C. (H.L.) 106, [1912] A.C. 743.

The liferent provided in the 14th purpose is conditional either on the death of the testator's second wife or on her relinquishment of "her occupation of Wemyss Castle policies and others mentioned in the 4th purpose." The second wife survives but has relinquished said occupation. It is, moreover, conditional upon the respondent conforming himself to the testator's prohibition against allowing the testator's first wife (mother of the respondent) or any member of her family to reside at the Castle or on any part of the testator's estates. If the respondent at any time contravenes this prohibition, "my trustees shall forthwith cease to allow him the liferent use of said Castle, policies, and others." But in order to appreciate the true relation of the respondent to the subjects it is necessary to collate the 14th with the 4th purpose. By the 4th purpose the trustees are specially directed to maintain and keep in good repair, *inter alia*, the mansion-house and the offices, policies, and grounds connected therewith, and the testator declares his desire that said mansion-house and policies and the shootings "*shall not be let unless in the opinion of my trustees this course should become necessary or expedient; and so long as my trustees consider it expedient to retain the said Castle, offices, policies, and shootings in their own hands* it is my desire that the same shall be occupied by [the testator's second wife] while she survives as her residence in Scotland, unless and until she shall consider it desirable to relinquish the occupancy thereof. . . . While thus expressing my wish that the [testator's second wife] shall have the liferent use and enjoyment of the said Castle, offices, policies, and shootings, I leave it to her, having full confidence in her discretion and judgment, to decide whether at any time she shall relinquish the occupancy of the said Castle, offices, and grounds in favour of [the respondent]. . . . Should this discretion be exercised" (as it has been) . . . *the said [respondent] shall during the subsistence of this trust only be entitled to occupy the said Castle, offices, policies, and shootings so long as my said trustees shall find it expedient to retain the same in their own hands unlet.*" Wemyss Castle is a fully furnished residence, and, as appears from the last purpose, the intention of the testator was that the furniture, fixtures, plate, and plenishing should remain in the house and be ultimately disposed of along with it. It is of importance to observe that (as also appears from the last purpose) the trust is to continue until the trustees "have been able to reduce the debts other than family provisions affecting the estates of Wemyss, Little Raith, and Torry to the sum of £100,000 sterling." This object of the trust has not yet been achieved.

It is clear from the provisions just narrated that the benefit conferred by the testator on the respondent with respect to residence in the mansion-house and its appurtenances is of a highly and unusually restricted character. The trust contemplates the uninterrupted profitable management of the subjects as part of the testator's whole estates by the trustees for the purpose of paying off debts, and as regards the Castle and its appurtenances it gives the trustees a discretionary alternative—they may preferably "*retain them in their own hands*," or they may *let them* if they think that course necessary or expedient. If and so long as they "retain them in their own hands" the testator's second wife is to reside in them if she wishes, and if she does not the respondent is to have the same personal privilege, subject, however, to a condition as painful as it is unusual—see *Wemyss* v. *Wemyss' Trustees*, 1921 S.C. 30—and a consequent forfeiture. So far as the civil fruits of the subjects are concerned it is plain that the respondent is completely cut off from them and from all opportunity of making any. The trustees alone can let them. The benefit conferred on the respondent, such as it is, I have described as a personal privilege, because I can think of no other apt description for his relation to a mansion-house and its appurtenances in which he is indeed allowed for the time being to reside, but which nevertheless remain in the hands of trustees and never leave their true possession and control. The fact that a beneficiary liferenter of an estate under trust administration is entitled in the absence of provisions qualifying his rights as such to the occupation of the mansion-house and grounds, and to the enjoyment of all the personal rights and privileges of a proprietor—M'Laren on Wills and Succession, vol. ii, p. 837, sec. 1538—though not entitled to let any part of the liferented estate to a tenant, is of no account in relation to the special position of the respondent under his father's trust-disposition and settlement. Again, by the custom of Scotland a person entitled to the liferent occupation of a *residence* has, in the absence of specialties, a right to occupy it either personally or by a tenant of his own—M'Laren on Wills and Succession (3rd. ed.), vol. i, p. 2618, section 1122, and such a person might quite possibly stand to the residence in a relation of "ownership" under the Income Tax Act. But the character and conditions of the benefit conferred on the respondent place him in a very different relation to Wemyss Castle and its appurtenances. As Lord Halsbury, L.C., speaking of a house provided free by a banking company to one of its agents, said in *Tennant* v. *Smith*, 1892, 19 R. (H.L.) 1, at p. 3, [1892] A.C. 150, at p. 154—"It is certainly true that the occupation of a house rent free is not income." Neither, in my opinion, is such a personal privilege as that enjoyed by the respondent, devoid as it is of any assured permanence and dependent at any time on the exercise of a discretion by the trustees. The trustees, and not the respondent, are in these circumstances the true "owners," possessors and (in my opinion) "occupiers" also, of the subjects. At any rate they and they alone stand in a relation of "ownership" to them. I am therefore of opinion that the Commissioners rightly decided that the respondent had no income arising from

"ownership of lands" in respect of Wemyss Castle, its policies, and shootings.

The Inland Revenue further argued that another source of the respondent's income was the "occupation" of the Castle, policies, and shootings. The trust-disposition and settlement no doubt speaks of "occupation" and "occupancy," but that does not carry one very far. As appears from the contentions stated in the case the argument for the Inland Revenue really turned on the view (which I have already negatived) that the position of the respondent is truly that of a liferenter entitled to make a profitable use of the subjects, and not of a mere resident destitute of any such right. It was said that "occupation" within the meaning of the Income Tax Act is satisfied by any form of "use" of the subjects, and the general words of Rule 2 of Schedule A, No. vii were much founded on. But "use" in that rule like "occupation" in Schedule B means, in my opinion, use which is capable of producing income. The typical instance, of course, is the profitable use of land by a farmer for the purpose of growing natural fruits and disposing of them by sale. No use of the subjects here in question competent to the respondent under the settlement was pointed to by the Inland Revenue as being a use of this kind. To give any other meaning to the statutory words "use" and "occupation" would be to run counter to the whole scheme of the Act, which is to tax income and nothing else. It is in accordance with this scheme that Rule 1 of Schedule B excludes from chargeability dwelling-houses and offices (other than farmhouses). I have already given my reasons for thinking that the whole powers of profitable use of the Castle, policies, and shootings are with the trustees, in whose hands they are "retained," except and unless the trustees choose to let them. It was expressly stated to us that no point was made of the fact that, while Schedule A tax on the mansion-house, offices, and grounds, and also Schedule B tax on the small sum which we were informed represents the annual value of the shootings, are paid by the trustees, the assessment was actually made on, or at least in the name of, the respondent.

The Inland Revenue further contends with reference to the respondent's marriage contract that the income thence arising to him includes not merely the income which he is entitled to receive during his life, and actually receives at present, from the trust thereby created, but also certain other income of the trust which he does not receive, but which in terms of the trust is employed by the trustees for the purpose of paying off certain charges on the securities which form the trust assets.

The circumstances (which have to be gathered for the most part from the documents) are briefly these—The securities in question belonged to the respondent's father, who had burdened them with jointure and (collaterally) with other three charges, being the first three out of the five charges a note of which is scheduled to the marriage contract. At the time of his marriage the respondent was vested in the reversion to these securities, and he had himself further charged them to the extent of £18,000. This charge is the fourth of the scheduled charges. By his marriage contract, dated in 1918, the respondent conveyed to trustees his whole right, title, and interest in those securities subject to the jointure and the four charges above referred to, and also subject to a reserved power to charge them to the further extent of £8000. This reserved power is entered in the schedule as a fifth charge. He also assigned to the trustees his whole right, claim, and interest under an indenture between him and his father's second wife, whereby the latter undertook during her life to make up to him out of her own income under her marriage settlement a certain proportional amount of the income arising from the securities above referred to, and of which he was deprived in consequence of their being subject to the first three charges above mentioned (being those imposed by the respondent's father). This latter assignation is, however, of no importance in relation to the present question. The respondent has exercised the reserved power to charge the securities conveyed to the trustees to the further extent of £8000. The income arising to the marriage-contract trustees from these securities is payable under the marriage contract to the respondent during his life, and if he predeceases his wife to her for life, while the capital is held for the children of the marriage. If his wife predeceases him and no child lives to take a vested interest, the securities are to revert to the respondent. Finally, there is a right to the respondent at any time during the subsistence of the marriage to have the securities in question made over to him on payment to the trustees of the sum of £100,000 in place of them, which sum of £100,000 is to be held in the same way for the same purposes and subject to the same provisions as the securities. The income received by the respondent from the trustees is of course part of his own income for the purposes of super tax, and so far no question arises. But the marriage contract contains a clause whereby in the event of certain of the securities above mentioned producing dividends exceeding the rate of 12½ per cent., part of the excess shall be retained by the trustees and used to reduce and discharge the two charges imposed on the securities by the respondent, these being the fourth and fifth charges in the schedule. The securities in question have yielded dividends exceeding the rate of 12½ per cent., and the Inland Revenue contends that inasmuch as the excess is employed in paying off the respondent's debts (represented by the fourth and fifth charges) such excess truly forms part of his income for purposes of super tax.

It has to be added that the clause contains further provisions applicable to the event of the fourth and fifth charges being discharged out of the excess dividends. That event has not occurred, but the provisions are to the effect that the trustees are to pay to the respondent the free income arising from the securities in question unless

the dividends produced by them exceed certain still higher rates, when accumulations up to the limit of £10,000 are to take place. The respondent is to receive the income arising from these accumulations in the same way as the income of the securities themselves, and if the dividends should fall below the rate of 12½ per cent. the trustees are to draw on the accumulations so as to make up the respondent's income to what it would have been if the rate of 12½ per cent. had been maintained. These provisions emphasise the importance of the respondent's personal interest in the employment of part of the trust income in reducing and discharging the debts represented by the fourth and fifth charges in the schedule.

I shall deal in the first place with the fourth charge to which the securities placed in trust were already subject at the date of the marriage contract. The effect of the charge was that the assets acquired by the trustees were just so much less valuable as a marriage provision for the wife and children than they would otherwise have been. There is, of course, no doubt that the liferent of income arising from the securities provided to the respondent is part of his income and must enter his return for super tax. But by the marriage contract he makes over to the trustees that part of the income which represents the excess above dividends at the rate of 12½ per cent., and directs them to use it in extinguishing the said fourth charge and so increasing the value of the marriage provision for the wife and children. He is no doubt as free to revoke the direction for payment of income to himself during his life as his creditors are to attach it—*Ker's Trustees* v. *Justice*, 1866, 5 Macph. 4; *Eliott* v. *Eliott's Trustee*, 21 R. 955. But it appears to me to be clear that the direction to use the *excess* income for the purpose of increasing the value of the provisions made in favour of those who are within the consideration of the marriage is as irrevocable by him as it is unattachable by his creditors, and makes it impossible to regard that excess income as still his own. It is true that one result of the trustees' use of the excess income will be to improve the respondent's income, but this will involve no prejudice to the Revenue, since any improvement in the respondent's income will when it occurs swell his super tax return. It is also true that if the respondent should outlive his wife and no child take a vested right under the contract, the reversion of the trust assets to the respondent may be more valuable in consequence of the use made by the trustees of the excess income. But any benefit which the respondent might thus obtain would be in the form of capital, not of income, and would be no more liable to super tax than would the amount of an appreciation in the market value of the securities when they came to be made over to him.

I turn next to the fifth charge, which at the date of the marriage contract was in the form of a reserved power, since exercised. The reserved power may be represented as a power to revoke *pro tanto* the conveyance of the securities to the trustees, but if (as happened) the revocation was actually made, the respondent covenanted that the excess income which he made over to the trustees, should be used for the purpose of making good the effects of his exercise of the reserved power, and so compensating the interests of the wife and children who are within the consideration of the marriage. There does not therefore appear to me to be any substantial difference between the fourth charge and the fifth so far as the *excess* income is concerned with regard to the respondent's super-tax return.

Before disposing of the case it is necessary to consider the effect of the right given the respondent at any time during the subsistence of the marriage to redeem from the trustees the securities conveyed to them, along with any accumulations that may have been made in virtue of the provision quoted above by substituting in their place a sum in cash of £100,000. This is certainly a remarkable provision, and no facts or circumstances are submitted to us which throw any light upon the intention of it. It is true that the respondent is little likely to exercise the option thus given him unless the securities and accumulations (if any) come to be value for more than £100,000. But we have no information as to the present capital values or future prospects of the securities, and it is idle to speculate on the possibility that the option might be exercised at such a moment and under such circumstances as to enable the respondent ultimately to secure to himself the advantages which his sacrifice in the meantime of the *excess* income had procured. It seems to me that as the case is presented we are bound to assume that the £100,000 was fixed between the contracting parties as the fair and full equivalent of anything that the securities (even if disencumbered of the fourth and fifth charges and including contemplated accumulations, if any) could reasonably be expected to be worth in the hands of the trustees. A contract of marriage is a bargain like any other contract, and unusual as this provision is, there is no ground for attributing to it any oblique purpose.

I therefore propose that the questions put to us should both be answered in the negative.

LORD SKERRINGTON—For the purposes of super tax the taxpayer's income is taken to be his total income from all sources for the previous year "estimated in the same manner as the total income from all sources is required to be estimated in a return made in connection with any claim for a deduction from assessable income," and without any deduction in respect of earned income (see sections 4 and 5 of the Income Tax Act 1918, as amended by sections 15 (4), 32, and Schedule III of the Finance Act 1920. By section 19 of the Income Tax Act 1918, as verbally amended by the Act of 1920, it is enacted that for the purpose of any claim for an allowance or deduction "the income arising from the ownership of lands," &c., shall, subject to any statutory allowances, "be deemed to be the annual value thereof

estimated in accordance with the rules applicable to Schedule A; and the income arising from the occupation of lands," &c., shall, subject as aforesaid, "be deemed the assessable value thereof estimated in accordance with the rules applicable to Schedule B, and where a claimant is both owner and occupier, the amount of the annual value under Schedule A, added to the amount of the assessable value under Schedule B, shall be deemed to be the income arising from those lands, tenements, hereditaments, or heritages."

In this appeal, which is taken at the instance of the Commissioners of Inland Revenue, the first question of law is whether the Special Commissioners were wrong in holding that Captain Wemyss (the respondent in the present appeal and the successful appellant to the Special Commissioners) was not bound to include in his super-tax return the annual value of Wemyss Castle, offices, policies, and shootings. It is stated in the case that the assessments under Schedules A and B for the year previous to that in respect of which super tax was claimed "had been made out in the name of Captain Wemyss," but that the tax under both schedules had been paid by the trustees. Though the testator did not expressly direct his trustees to make these payments, such a direction is in my opinion implied, and the contrary was not argued. Moreover, it was not argued on behalf of the Inland Revenue, either before the Special Commissioners or in the present appeal, that section 5 (2) of the Income Tax Act 1918 precluded Captain Wemyss from maintaining that the testamentary trustees of his father, the late Randolph Wemyss, were, for the purposes of the Income Tax Acts, both the owners and the occupiers of the subjects during the year in question. It is, however, stated in the case that Captain Wemyss was in occupation of Wemyss Castle, &c., throughout the year in question. It is further stated that the Castle is "furnished for occupation," and we were informed that the furniture belongs to the trustees.

It may be conceded that a person who is really the owner of heritable property cannot avoid payment of super tax by conveying it to, or by allowing it to remain feudally vested in, trustees who hold it under a simple trust for his behoof. In the present case, however, there exists a combination of circumstances which, in my judgment, makes the contention of the Inland Revenue untenable and even unarguable so far as regards the tax under Schedule A—a tax which is stated in the opening words of Schedule A to be "charged in respect of the property in all lands," &c., according to the annual value thereof. In the present case (1) the trust is not terminable at the pleasure of Captain Wemyss; (2) the trustees are, on my construction of the trust-disposition and settlement, intended by the testator to have all the rights and duties of owners and occupiers as regards maintenance and upkeep and payment of public burdens, so long as they elect to keep the subjects unlet and in their own hands; (3) it is admitted in the case that Captain Wemyss has no power himself to let the Castle, &c., whereas the trustees have express power conferred upon them by the testator to grant such a lease if, in their opinion, "this course should become necessary or expedient;" (4) although by the 14th purpose of his will the testator directed his trustees in the events which have happened to hold the Castle, &c., in trust for the liferent use of Captain Wemyss so long as his mother, Lady Lilian Wemyss, shall remain alive, this right (which the testator had previously described as a right of occupancy) is clogged by two conditions, viz., that it is to be enjoyed only so long as the trustees shall find it expedient to retain the Castle, &c., in their own hands unlet, and that it is to be forfeited if Captain Wemyss should allow his mother or any member of her family to reside at Wemyss Castle or on any part of the testator's estates. It would be impossible to describe a right of so limited and precarious a character as one of ownership. Different considerations would of course apply if and so long as the trustees elected to let the subjects and paid the rent to Captain Wemyss. As regards the Schedule A assessment, the appeal ought, in my opinion, to be refused.

As regards the assessment under Schedule B we heard no separate argument which would entitle us to reverse the determination of the Special Commissioners.

There remains the second question of law raised by the appeal, viz., Whether the income so far as exceeding 12½ per cent. arising from 10,000 shares in the Wemyss Colliery Trust, said to be of the face value of £100,000, to which shares Captain Wemyss had a vested but reversionary right immediately before his marriage in the year 1918, formed part of his income in the income-tax year 1919-20 for the purpose of super tax in the following year. The answer to this question must, in my opinion, depend upon whether the settlement of this reversionary right by Captain Wemyss in his antenuptial contract of marriage ought to be regarded as a merely administrative and revocable trust in so far as the income in excess of 12½ per cent. was directed to be applied, and was during the year in question applied by the trustees of the marriage contract in reducing a charge in favour of the Royal Bank of Scotland for £18,000. It is stated in the marriage contract that Captain Wemyss had either granted or joined in granting this charge by way of additional security for various loans and advances, and counsel asked us to dispose of the case on the assumption that Captain Wemyss was personally liable for repayment of the amount of the charge in favour of the bank. On the other hand, it was not suggested that this direction to the trustees of the marriage contract conferred any *jus quæsitum* upon the bank. It seems to me clear that the marriage contract conferred upon Captain Wemyss's future wife and children an interest to demand that this direction should be enforced according to its terms, and that the direction was therefore not revocable. While it is true that

Captain Wemyss derived a direct and immediate advantage from the income in question being applied in paying a debt for which he was personally liable, it is equally true that the income so applied was not his income but that of his marriage-contract trustees.

In my opinion both questions of law should be answered in the negative.

LORD CULLEN—The assessment for super tax here under consideration, so far as regards Schedules A and B, is admittedly regulated by section 19 of the Act of 1918.

As regards Schedule A, the annual value of the heritable subjects in question does not, under section 19, enter into the assessment unless it can be predicated of it that it is "income arising from the ownership" of the subjects to the respondent. Accordingly it is incumbent on the appellants if they are to succeed to show that the respondent is, within the meaning of the statute, owner of the subjects, and that income to the amount of the annual value arises to him from such ownership. I am of opinion that they have failed to make good this proposition.

Apart from the statute it is clear that in the proper legal sense the owners of the subjects are the trustees under the testamentary settlement of the respondent's father. Accordingly the appellants' contention must be that along with this proper legal ownership in these trustees there co-exists an ownership in the respondent within the meaning of the statute, from which secondary or statutory ownership there arises to the respondent an income measureable by the annual value. This might have been so if under the settlement the respondent had enjoyed such a fulness of beneficial right in the subjects as made them yield, or made them capable of yielding to him, the annual value in the form of income, while the legal title continued to reside in the trustees. But the right enjoyed by the respondent is of a different quality, which falls to be ascertained from the various provisions of the settlement in their application to the actual conditions obtaining during the year of assessment. Under these the administrative powers over the subjects remain in the hands of the trustees uncontrolled by the respondent. He has no power to let the subjects, and no right to insist on their being let. The power of letting is with the trustees, and is exerciseable according to their sole discretion. All that the respondent enjoys comes from the provision which says that so long as the trustees retain the subjects in their own hands unlet they are to allow the respondent to have the occupancy thereof. This occupancy is of no fixed duration, but is always terminable if and when the trustees decide to let the subjects. It is not even a full and unfettered right of occupancy while it endures, for it is restricted by the severe and penal condition relating to the respondent's mother residing at Wemyss Castle or on the property. Such being the nature and quality of the occupancy enjoyed by the respondent, I am unable to see any grounds in the Act for holding that for the purposes of the Act it falls to be regarded as amounting to an ownership in the respondent from which there arises an income to him. The trustees are, in my opinion, the only owners in the statutory sense as they are in the true legal sense.

The question under Schedule B is of small importance pecuniarily, and received but scant notice in the argument. The Commissioners' determination was in favour of the respondent. As we are asked by the appellants to reverse that determination, it is proper that we should see from the Stated Case what the point raised before the Commissioners was. The Stated Case was obtained by the present appellants for the purposes of this appeal, and must be taken as satisfactorily exhibiting from their point of view the questions raised. Now when one turns to the Case (article 3 (1)) the only contention for the Crown which can be said to touch the matter under Schedule B, although not explicitly, is the contention regarding Wemyss Castle and grounds, which is as follows:—"That the right conferred on Captain Wemyss by the 14th purpose of the said trust-disposition and settlement was a right of liferent and not a mere right of occupancy; . . . and that he was therefore bound to include the annual value of Wemyss Castle and grounds as part of his income." There is no other contention set forth capable of applying to Schedule B. I gather, therefore, that the Crown's contention before the Commissioners was, alike for Schedules A and B, that the respondent was a liferenter to the effect of enabling him to be figured as an owner under Schedule A, and an occupying owner under Schedule B; and, for the reasons already stated, I agree with the Commissioners in thinking that contention unsound. I am unable to find from the Case that any separate contention, based on the view that the respondent if not owner *qua* liferenter yet derived an income from being in the occupation of the subjects falling under Schedule B within the meaning of the statute, was raised before the Commissioners, and we cannot, I think, entertain on appeal a question which for anything shown in the Case the Commissioners did not consider and determine. In these circumstances I think that the determination made by the Commissioners should stand.

The remaining question in the Case relates to the respondent's antenuptial contract of marriage. I need not resume the provisions of that deed. The respondent's capital interest in the shares of the Wemyss Collieries' Trust was alienated by him in trust to the trustees under the contract, onerously for the purpose of making provisions in favour of his wife and the children of the marriage. The trusts regarding the free income are various. The question in the Case is concerned only with that portion of the free income receivable by the trustees which by the contract they are directed to apply in reducing or discharging certain charges on the capital of the settled fund. The object as well as the effect of

this trust purpose occurring in the marriage contract clearly is to better the provisions conceived in favour of the wife and children by enhancing the value of the settled fund to the extent to which the foresaid capital charges thereon are reduced. For effectuating this object—a proper matrimonial one within the consideration of the marriage—the respondent has onerously alienated to the trustees the portion of the income in question, so that it is no longer his income but is income belonging to the trustees of the contract outwith the respondent's control. It appears to me to be irrelevant that the charges for the reduction whereof the income is so dedicated are charges for repayment of which the respondent is personally liable to the creditors therein. The alienation in trust of the portion of the income in question is not one made merely for the purpose, revocable by him, of providing for the respondent's personal liabilities. Its true function as a part of the marriage contract is a proper matrimonial one, as before mentioned, and as such it is not revocable by the respondent.

It does not seem to me that any separate question under this head is raised by the reserved power in the respondent to create a certain additional charge. The creation of this charge only has the effect of expanding the scope of the trust purpose to the effectuating of which the portion of the income in question has *ex contractu* been onerously alienated and dedicated by the respondent.

Nor do I think that the view above expressed is affected by the provision in the contract enabling the respondent to re-purchase or redeem his interest in the shares from the trustees by making payment to them of £100,000 as a surrogatum. This power of re-purchase has not been exercised, and it may never be. We do not know how the sum of £100,000 may compare with the value of the assigned interest in the shares if and when the power comes to be exercised. During the year of assessment in question the onerous alienation in trust made by the respondent of the portion of the income in question stood unaltered by the power of re-purchase.

As regards the argument for the appellants that the directed application of the portion of the income in question will or may have a subsidiary effect in increasing the income from the shares available to the respondent in the future, I agree with what has been said by your Lordship in the chair.

I am of opinion that both the questions in the case should be answered in the negative.

LORD SANDS—The first question which arises in this case is whether the limited right of occupation which the respondent enjoys of the Castle or mansion-house of Wemyss is to be taken into account as equivalent to income in his assessment for super tax under the Income Tax Act of 1918, sections 4-8. The measure of the taxpayer's liability for super tax is his total income from all sources. This income is not limited to what he receives in the course of the year as recurrent money payments. It includes also anything which the statute for the purposes of the tax may have stamped as a benefit to be taken into account as the equivalent of income or money. On the other hand, it does not include any benefit, real or supposed, and whether in money or in some other form, which the statute has not stamped as within the category of annual income. The total income is to be estimated in the same way as the total income is estimated for the purpose of a claim for exemption of abatement of income tax.

Under the statute (Schedule A) duty is charged upon "all property in land," and by section 19 it is provided that for the purposes of exemption or abatement the income "arising from the ownership of lands," estimated in accordance with rules applicable to Schedule A, is to be taken into account in the assessment of super tax. This income need not take the form of money received as rent, but it includes also the benefit derived from personal occupation as owner, the measure of which is the assessed rent, *i.e.*, the rent which the property would presumably have yielded if it had in fact been let. This seems exhaustive of liability in respect of lands, save as provided under Schedule B in regard to occupation as a source of profit. In order therefore to bring into charge for super tax the respondent's rights in the heritable property here in question (otherwise than is provided in Schedule B) it must be shown that within the meaning of the statute he has income arising from the ownership of lands. Now I do not think that it is legitimate to read "ownership" here in any strict or technical sense. Feudal title, or even an unqualified right of fee, is not necessary. It is enough that the taxpayer stands in such a relation to the property that he is entitled to the enjoyment of the rights which ordinarily attach to ownership.

The nature of the right enjoyed by the respondent, and its very limited character, have already been explained by your Lordships, and I need not repeat these explanations. The respondent's rights such as they are neither flow from real ownership nor are they at all commensurate with the rights of an owner. Further, as it appears to me, if we consider the question broadly as to whether the respondent's rights are an addition to his income, the matter is entirely speculative. The respondent might have the right to occupy the mansion-house, but might find it inconvenient or impossible to do so. In that event he would not be able to reap the advantage of an owner by letting the property. Or, again, even if he did avail himself of the right of occupancy, this might be no real addition to his income in view of the expense of the establishment rendered necessary. In the case of an owner there would be no shelter under this consideration, for (on the merits, and irrespective of any artificial rules of valuation) the answer would be obvious that the alternative of letting was open to him.

Accordingly, apart from the provisions of Rule 7 to Schedule A, I should come to the conclusion that the respondent was not liable in super tax in respect of his right of occupancy of the mansion-house, as being income arising from the ownership of lands. In making up his return of total income for the purpose of super tax, when he comes to the heading "Income arising from ownership of lands," he will enter "Nil."

I confess, however, that the provisions of the group of Rules No. 7 (1) and (2) to Schedule A have occasioned me difficulty. Under these rules property tax is to be charged on and paid by the occupier for the time being, and "every person having the use of any lands or tenements shall be deemed to be the occupier thereof." These rules are, no doubt, rules of convenience as regards the collection of the tax, and they are in conformity, as I understand, with the practice familiar in England whereby rates, tithes, &c., were levied in the first instance upon the occupier. The collector was not to be troubled with investigations as to title or beneficial interests. He was to take the man he found in actual occupation, and leave it to this man to work out any relief to which he was entitled.

In the case where the occupier is a tenant special provision is made to enable him to obtain recoupment by authorising him to deduct the amount of the tax levied under Schedule A from his rent. In the general case the occupier when not a tenant will himself be the owner. Neither of these cases creates any difficulty. But difficulty does arise in the case where the person in actual occupation is neither a tenant paying rent nor the owner himself. There is no special provision dealing with this case. It would be a simple solution of the difficulty to hold that the Act assumes, and by implication directs, that in all cases where the property is not let to a tenant the owner is to be treated as the occupier, and that accordingly the tax is to be charged upon the owner. Such a reading would, I think, be too bold, and I am not prepared to adopt it. It must, I think, be taken that there may be an "occupier" who is primarily chargeable, in respect that he has the "use" of the property although he is neither owner, as that word is ordinarily understood, nor tenant. Such a person may have by arrangement with the owner a right of relief. But the Act is silent as regards any such right in the absence of stipulation. I confess that I do not see anything necessarily inconsistent with the language of the Act, or anything unreasonable, in the view that there is no such right of relief. Doubtless the tax, in the language of the schedule, is "a tax charged in respect of the property in all lands," &c. None the less, as has been authoritatively explained, it is truly a tax upon income. May not such a tax in the purview of the Legislature be properly recoverable without, in the absence of any stipulation, any right of recourse, from the person who for the time being has the beneficial enjoyment of the property according to the primary purpose such property serves, which in the case of a mansion-house is family residence, in the case of a field the sowing and reaping of the crop?

Be this as it may, however, the first question is as to the chargeability, in the first instance, of the occupier who is not a tenant. As it appears to me, the question for the tax collector as to who is the occupier and as such has the use of the property is a question of fact. I do not mean that it is a question, in the case of a house, of mere residence. The resident may be a caretaker, and other special cases may be suggested. But in the case, as here, of a country mansion, the person whom the tax collector finds residing there with his household, just as a proprietor or a tenant usually resides, is *prima facie* the occupier, as being the person having for the time being the use of the property. I hesitate to accept the view that the tax collector is under any duty to inquire whether the resident has a right to let the premises, or whether under the terms on which he occupies them there is some restriction, such as that he shall not entertain a certain guest or shall retain the services of a certain gardener. As regards the consideration most strongly relied upon in the present case—want of power to let—I have difficulty in appreciating that a person has not the use of premises as occupier because he is prohibited from delegating the right of occupancy to somebody else. It is as the occupier having "the use" of premises that a tenant is charged with property tax in the first instance. The tenant can pass on the liability, but he has to lie out of his money. He might very well desire to avoid this and to avoid being troubled with the matter. But I do not think that a tenant in personal possession could be heard to say—"I am not the statutory occupier. I have not 'the *use*' of the premises because I cannot sub-let them. I cannot collect civil fruits."

In the present case the trustees have it in their discretion to let the mansion-house instead of allowing the respondent to occupy it. If they were to do so, as it appears to me, the tenant resident at Wemyss would under Rule 7 (1), be the person chargeable in the first instance with property tax, even though he had no power to sub-let and was subject to certain minor incidental restrictions. Nor in the case, as here, of an occupier who is not a tenant does it appear to me to be a conclusive consideration in this regard that the tenure of possession is defeasible. If a person other than a tenant is in personal enjoyment of premises for a year without disturbance, is he not in fact the occupier during that year? There may be special cases such as a tenement let on short lets to a number of persons, or an apartment house where when such a building is treated as a whole having "the use" connotes the power of letting out for rent. But apart from such special cases, as it appears to me, the right to let for rent is not (save in the case of vacant property) "the use" primarily contemplated in the rule when it defines the occupier as the person who has "the use." On the contrary,

the reference to the tenant as a typical class of occupier seems to me negative of this construction. It is not, in my view, possible to dissociate the interpretation of having "the use" of property from the fact that this is a description of the occupier. Quite a different result might be reached as regards the meaning of having "the use" if the statute had directed that the tax was to be chargeable on the "owner," and had defined the owner as the person having the use of the property. In that case the right to let for rent might well have been vital, as the right to do so is an incident of ownership.

It must be taken in the present case that the respondent, who is a country gentleman, had his ordinary residence for himself and his household at Wemyss Castle, the family mansion, during the year here in question, and that in the course of the year his posssession thereof was not disturbed. In these circumstances, for the reasons I have stated, I should have great difficulty, if I were sitting alone, in holding that he was not the statutory occupier chargeable under Rule 7 (1).

It appears that the respondent was so charged, and that he was reimbursed the amount of the property tax by the trustees. I understand that the appellants do not desire to found upon the fact that the respondent was so charged, and that the tax was recovered immediately from him. But I understand that on the assumption that he was properly charged they do not forego any argument which may be derived in the construction of the statute from the respondent's statutory liability to be so charged.

In these circumstances, if the respondent was properly charged with property tax, two questions suggest themselves — (1) Whether, apart from any arrangement or any right of relief deducible from trust provisions, a statutory occupier (not being a tenant) properly chargeable as such has under the statute any right of relief against the owners? (2) Whether on the assumption that there is no such statutory right the statute has, so far as liability for property tax is concerned, stamped the statutory occupier, not being the tenant paying rent, as the person in the enjoyment for the time being of the "rights of property" which are the subject of taxation under Schedule A?

I do not find it necessary to answer these questions, which were not perhaps very closely argued in the form stated, though I confess my present impression is that the first falls to be answered in the negative and the second in the affirmative.

As regards the first, I have difficulty in appreciating how a person who is charged by the Legislature with payment of a tax without any provision for an indemnity can, in the absence of any contract or trust directions, recover the amount of that tax from some other person. As regards the second question, its answer in the affirmative strikes me as the corollary of a negative answer to the first.

But even if the questions fall to be so answered, it may not follow, in view of the special terms of section 19 and its relation to the charge of super tax, that this enjoyment, though inferring liability for income tax, falls to be taken into account under a return for the purposes of super tax. As, however, property tax is a form of income tax, I should be indisposed to rely upon any construction of the statute which inferred that a benefit which, for the purpose of assessment, was to be treated as equivalent to income did not fall to be included in a return of total income for exemption or super tax purposes.

Upon the whole matter, however, whilst I have thought it right, in view of the importance and complexity of the case, to indicate my difficulties, I am sensible of the weight of the consideration stated by your Lordship in the chair, and I do not see my way to dissent from the conclusion of your Lordships that in the special circumstances of this case the respondent is not to be deemed to be the statutory occupier.

The final and pecuniarily the most important question in the case is that of the liability of the respondent for super tax in respect of sums paid by his marriage-contract trustees in liquidation of debts which affected the marriage-contract trust estate, and for which it is, I understand, admitted, though not stated in the case, the respondent was himself personally liable. At the outset of the argument I understood that the case for the appellants was based upon the contention that the marriage-contract provisions in this regard were revocable. That contention, however, failed entirely, and the case for the appellants came to rest upon the consideration that the revenue here in question, though not handled by the respondent was really applied for his benefit. There are three ways in which it may be so regarded—(1) The respondent, subject to the marriage-contract provisions, has an interest in the *corpus* of the estate which is benefited by release *pro tanto* from debt charges; (2) the payment of debt increases the future annual revenue of the trust in which the respondent has an interest; (3) the respondent is released *pro tanto* by these payments from his personal liability for debt. In my opinion these incidental advantages accruing to the respondent from the application of the money for the benefit of the marriage-contract estate in terms of the trust deed do not suffice to make the money so applied part of the total annual income of the respondent in respect of which he is liable in super tax. If the case could be figured of the application year by year under a man's irrevocable mandate solely for the purpose of liquidating his own debt of money which would otherwise be enjoyed by him as his ordinary income, it may be that the money so applied would fall to be treated as part of his income applied annually under his mandate for his own purposes. But these are not the circumstances of the present case. The money is applied by the trustees of the marriage settlement under a contract in which third parties are interested. The respondent does not receive it

into his own hands and he has debarred himself, under contract with third parties, from any voice in its disposal. He may take benefit by the manner in which the money is applied, but this benefit does not take the form of the application of income recoverable by him and at his disposal in liquidation of his debt. Upon this branch of the case, accordingly, I am of opinion that the determination of the Special Commissioners ought to be affirmed.

The Court answered both questions of law in the negative.

Counsel for the Appellants—The Lord Advocate (Hon. W. Watson, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Counsel for the Respondent—Moncrieff, K.C.—Kinross. Agents—Dundas & Wilson, C.S.

Saturday, February 2.

SECOND DIVISION.

HAMILTON'S TUTORS, PETITIONERS.

Nobile Officium — Tutor-nominate — Payment Out of Ward's Estate to Destitute Pupil Cousin of Ward—Ex post facto Sanction.

An estate was held in trust for the liferent use allenarly of a lady and the heirs of her body in fee. Her two sons A and B were both killed in action in 1915, A being survived by an infant daughter and B by an infant son. On the death of the liferentrix in the year 1917 A's daughter succeeded to the estate, which had an annual rental of over £3000. By his marriage contract A had bound himself, if and when he succeeded to the estate, to charge upon it annuities in favour of his father and B, not exceeding a total sum of £350 per annum. B's son having been left destitute by his father's death the liferentrix paid out of her own income an allowance of £150 per annum for his support, and on the death of the liferentrix in 1917 the tutors of A's daughter continued to make payment of a similar allowance out of their ward's estate until 1921, when B's son succeeded to certain estate. The ward's tutors having presented a note to the Court for sanction of the payments made by them, the Court *granted* the prayer.

Authorities considered.

Robert Robertson Shersby Harvie of Brownlee, in the county of Lanark, and others, the surviving tutors-nominate and assumed of Miss Elspeth Mary Campbell Hamilton of Dalserf, in the county of Lanark, presented a note to the Court in which they prayed the Court, *inter alia*, "(1) to sanction the payment of the allowances amounting to £612, 10s. made by the petitioners for the maintenance of James Leslie Campbell Henderson Hamilton."

The circumstances in which the application was presented sufficiently appear from the note (*infra*) of the Lord Ordinary (CONSTABLE), who on 13th December 1923 reported the application to the Second Division.

Note.—"The petitioners are tutors-nominate and assumed of Miss Elspeth Campbell Hamilton under a contract of marriage between her parents, who are both dead. The pupil, who is eight years of age, is proprietrix of the estate of Dalserf in the county of Lanark—a property with a gross rental of about £3700. The present application is made to obtain the sanction of the Court (1) to the payment of certain allowances made by the petitioners for the maintenance of the pupil's cousin, who is next heir to the estate, and (2) to the amount of certain estate duties paid by the petitioners being charged on the estate.

"The first of these purposes raises a question which having regard to the authorities I think should be reported to the Inner House. I should not have considered it necessary to report the other purpose if it had stood alone, but in order to avoid the possibility of the petition coming twice before the Inner House I have included both points in my report.

"The circumstances attending the payments for the maintenance of the next heir were very exceptional. The estate of Dalserf was destined to Mrs Mary Henderson Hamilton, the grandmother of the pupil, in liferent and the heirs of her body in fee. She had two sons, Charles and James, who were killed within a month of one another in 1915. The pupil is the only child of Charles, the elder son, and the next heir is a posthumous child of the younger son James. James left no estate, and his widow and child were unprovided for with the exception of the widow's annuity from the Advocates' Widows' Fund. By the marriage contract of Charles the elder son he bound himself in the event of and immediately on his succeeding to the estate to charge the same with annuities in favour of his father and younger brother not exceeding a total sum of £350 per annum, but as he predeceased his mother this obligation never took effect. Mrs Henderson Hamilton, the liferentrix, survived till May 1917, and until that date she contributed a sum of £150 per annum for the maintenance of her son James's child. After her death the petitioners continued this allowance out of the surplus income of the tutory estate until 1921, when James' son succeeded to some estate by the death of his grandfather. The total amount of the allowances is £621, 10s., and that is the payment which the petitioners desire to be sanctioned. It is right to add that the child's mother married again in 1920, but the petitioners were satisfied that the change of circumstances did not affect the necessity for continuing the allowance.

"While the circumstances of the payments were thus exceptional and urgent, the past decisions of the Court present serious difficulties in the way of their being sanctioned. There was no legally enforceable obligation on the pupil to aliment her cousin. In such circumstances the Court