

VOL. XIII.—PART V.

No. 654.—COURT OF SESSION, SCOTLAND (FIRST DIVISION).—
16TH DECEMBER, 1926.

HOUSE OF LORDS.—12TH AND 13TH DECEMBER, 1927, AND
14TH FEBRUARY, 1928.

LADY DE ROBECK *v.* THE COMMISSIONERS OF INLAND REVENUE.⁽¹⁾

Super-tax—Total income—Income from will trust—Income Tax Act, 1918 (8 & 9 Geo. V, c. 40), Section 5.

The Appellant's first husband, by his trust disposition and settlement, gave the whole of his property, real and personal, to trustees for payment of his debts (except those heritably secured on his real estate), his funeral expenses, and the management expenses of the trust, any legacies he might leave, and an annuity to a niece, and subject thereto, in the events which happened, the trustees were to hold the whole of his property on trust to pay out of the free income thereof an annuity to his sister, and subject to the implement of all prior purposes of the trust, the trustees were, as soon as convenient after his death, to convey all his lands and estates to the Appellant in liferent during her life, with remainders over to a series of heirs, and to hold the whole of the residue of his property in trust for her in liferent during her life and on her death to the person then entitled to the landed estates in fee.

⁽¹⁾ Reported C. of S., 1927 S.C. 235; and H.L., 1928 S.L.T. 222.

In addition to all powers competent to them by statute or common law, the testator conferred on his trustees all powers of administration competent to a fee simple proprietor, and, in particular, power to sell any part of his property and to grant leases of any part of the heritable property.

On the death of the testator in 1919, heavy death duties became payable on the heritable estates, which were already heavily mortgaged. The trustees elected to pay the duties by sixteen half-yearly instalments, of which the earliest were met out of the proceeds of sale of the testator's stocks and shares. Pending the realisation of such part of the heritable estates as, after necessary reductions of the charges thereon, would be sufficient to meet the remaining instalments, the trustees retained the estates and the management thereof in their own hands, and paid the Appellant only the free annual income.

On the footing that she was entitled to the liferent of the estates from the date of her husband's death, the Appellant was assessed to Super-tax for the year 1923-24 on the whole annual value of the estates as assessed to Income Tax, Schedule A, for the previous year, and this assessment was upheld by the Special Commissioners on appeal.

Held, that the Appellant was assessable to Super-tax for the year 1923-24 only on the amount of the free income actually receivable by her from the trustees for the preceding year, the trustees and not the Appellant being owners of the estates for the purposes of Schedule A for that year.

STATED CASE.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held at Edinburgh on 25th February, 1926, for the purpose of hearing appeals, Lady Lockhart de Robeck, wife of Vice-Admiral Sir John de Robeck, Baronet, and hereinafter called the Appellant, appealed against an assessment to Super-tax on the sum of £4,782 made upon her for the year ended 5th April, 1924, in respect of the proportion of her income for the previous year effeiring to the period from 3rd July, 1922 (the date of her marriage), to 5th April, 1923, under the provisions of the Income Tax Acts relating to Super-tax.

I. The following facts were admitted or proved :—

(1) The Appellant is the widow of Sir Simon Macdonald Lockhart, of Lee and Carnwath, Baronet, hereinafter called Sir Simon, who died on 25th March, 1919.

(2) By his trust disposition and settlement, dated 2nd March, 1916, Sir Simon conveyed the whole of his property, heritable and moveable, real and personal, to trustees for payment of his debts, any legacies he might leave and an annuity to a niece, and under Clause (Fourth) in the event of his leaving issue of his body (which did not occur) the trustees were directed, as soon as convenient after his death, to convey his whole heritable estates in Scotland to his eldest son, whom failing, as therein set forth, provided the institute being less than twenty-one years of age, the trustees were directed to keep up the mansion-house of Lee as a family residence for Sir Simon's widow and children until they should be in a position to execute the disposition in favour of an institute of full age. The said institute was entitled to a conveyance of the residue of the trust estate along with the said disposition.

Clause Fifth contained the following directions :—

“ In the event of my leaving no issue of my body or of such
 “ issue all dying without attaining majority and without lawful
 “ issue, I direct my trustees (subject to implement of the first,
 “ second, and third purposes hereof) to hold my whole lands
 “ and heritages in Scotland, and my whole other residuary
 “ means and estate, heritable and moveable, real and personal,
 “ wherever situated, in trust for the purposes following, viz :—
 “ (*Primo*) . . . : (*Secundo*) Subject to implement or due pro-
 “ vision being made for implement of the foregoing purposes
 “ of the trust, I direct my trustees as soon as convenient after
 “ my death to dispo, convey, and make over (subject always
 “ to the conditions after-mentioned) my said lands and estates
 “ of Lee, Cartland, Carnwath and others in the county of
 “ Lanark, my said lands and estate of Dryden (or Roslin) and
 “ others in the county of Midlothian, and generally all my
 “ lands and heritages in Scotland to and in favour of my said
 “ wife (if she survive me) in liferent during all the days of her
 “ lifetime and to and in favour of the heirs-male of her body,
 “ whom failing, the second son of the said John Ronald More-
 “ ton Macdonald (if the said John Ronald Moreton Macdonald
 “ shall then have an elder son or an heir of the body of an
 “ elder son in life) and the heirs-male of the body of such second
 “ son, whom failing . . . in fee . . . and I direct my trustees to
 “ execute a valid disposition of my said whole lands and
 “ heritages in Scotland in terms of the foregoing directions,
 “ containing all such special clauses and conditions as my
 “ trustees deem reasonable and appropriate in the circum-
 “ stances . . . and I direct my trustees to record the said

“ disposition in the appropriate Division of the General Register
“ of Sasines with a warrant of registration thereon on behalf of
“ my said wife in liferent and the institute thereunder in fee,
“ and that before delivery of the said disposition; and without
“ prejudice to the general and particular directions before
“ written, but in supplement thereof, I declare that my
“ trustees’ discretion in settling the terms of the said disposition
“ shall be absolute, and their decision shall be final and binding
“ on all points and on all concerned: (*Tertio*) I direct my
“ trustees to hold the whole residue and remainder of my means
“ and estate, heritable and moveable, real and personal,
“ wherever situated, excepting only the lands and estates
“ directed to be disposed in terms of the immediately preceding
“ clause hereof, in trust for my said wife in liferent during her
“ lifetime and at her death to pay, convey and make over the
“ same to the institute or the heir substitute then entitled to
“ my said landed estates in fee.”

(3) The trust disposition and settlement also contained paragraphs giving the trustees all powers of administration competent to a fee-simple proprietor, and without prejudice to said generality the trustees were expressly authorised and empowered to sell any part of the estate and to grant leases and feus of any part of the heritable estate.

(4) Sir Simon executed two codicils to the said trust disposition and settlement, both dated 20th March, 1919, under the former of which his trustees were given power to reduce or discontinue contributions which he had been in use to make to the Lanark Hospital, if and when the continuance of such contributions would in their opinion involve a heavier burden than his landed estates could reasonably bear. A copy of the said trust disposition and settlement and of the two codicils is annexed hereto, and forms part of this Case.⁽¹⁾

(5) Upon the death of Sir Simon the heritable estates were found to be heavily mortgaged; the rents thereon were to a large extent back-handed; and the death duties on the heritable estates amounted to £34,615 9s. 6d. The trustees arranged to pay the said death duties by sixteen half-yearly instalments, and they sold the bulk of the stocks and shares left by Sir Simon to meet the first four instalments on the lands and the first six instalments on the minerals.

(6) For the purpose of meeting the remaining instalments it was necessary for the trustees to sell part of the lands. This they proceeded to do, but owing to bonds of over £110,000 affecting the heritage, it was necessary in the first instance to repay bonds amounting to £18,000, and it was not till 1925 that sufficient heritage had been realised to meet the duties.

(1) Not included in the present print.

(7) The following statements showing the income of the trust estate for the financial years 1919-20 to 1923-24 inclusive were submitted on behalf of the Appellant :—

1919-20.

1. Lee Castle, offices, gardens and grounds (including dairy and lodge) in the county of Lanark, owned by the trustees of the late Sir S. M. Lockhart, Bart., and occupied by Lady Lockhart de Robeck—				
Annual rental	...	...	...	£431 0 0
2. Rents and produce of lands of Lee, Carnwath, and Dryden, owned by said trustees and occupied by various tenants, and interests, dividends, &c., belonging to the said trustees, for year to 25th March, 1920		...	£29,031 19 5	
<i>Less</i> —Proportion of rents received accrued prior to 25th March, 1919, the date of Sir S. M. Lockhart's death, when estates acquired by trustees...		...	17,101 4 7	
			<u>£11,930 14 10</u>	
<i>Deduct</i> —Rates, taxes, repairs, upkeep, management expenses, &c., and other outgoings for said year		...	£26,350 1 0	
<i>Less</i> —Proportion accrued prior to 25th March, 1919		4,854 1 8		
			<u>21,495 19 4</u>	
			Deficit	9,565 4 6
Debit balance carried forward to succeeding year		...	£9,134 4 6	

1920-21.

1. Lee Castle, offices, gardens and grounds (including dairy and lodge) in the county of Lanark, owned by the trustees of the late Sir S. M. Lockhart, Bart., and occupied by Lady Lockhart de Robeck—				
Annual rental	...	...	...	£431 0 0
2. Rents and produce of lands of Lee, Carnwath and Dryden, owned by said trustees and occupied by various tenants, and interests, dividends, &c., on stocks, shares, &c., belonging to the said trustees, for year to 25th March, 1921		£36,749 10 10		
<i>Deduct</i> —Rates, taxes, repairs, upkeep, interests, management expenses, and other outgoings for said year		...	33,937 7 10	
			<u>2,812 3 0</u>	
			£3,243 3 0	
Debit balance brought forward from previous year		...	9,134 4 6	
Debit balance carried forward to succeeding year		...	£5,891 1 6	

1921-22.

1. Lee Castle, offices, gardens and grounds (including dairy and lodge) in the county of Lanark, owned by the trustees of the late Sir S. M. Lockhart, Bart., and occupied by Lady Lockhart de Robeck—

Annual rental £431 0 0

2. Rents and produce of lands of Lee, Carnwath and Dryden, owned by said trustees and occupied by various tenants, and interests, dividends, &c., on stocks, shares, &c., belonging to the said trustees, for year to 25th March, 1922 £42,342 10 9

Deduct—Rates, taxes, repairs, upkeep, interests, management expenses, and other outgoings for said year 33,159 2 2

9,183 8 7

£9,614 8 7

Deduct—Debit balance brought forward from previous year 5,891 1 6

£3,723 7 1

To which falls to be added for the purpose of assessment to Super-tax Income Tax effecting thereto paid by the trustees 1,411 0 0

£5,134 7 1

1922-23.

1. Lee Castle, offices, gardens and grounds (including dairy and lodge) in the county of Lanark, owned by the trustees of the late Sir S. M. Lockhart, Bart., and occupied by Lady Lockhart de Robeck—

Annual rental £431 0 0

2. Rents and produce of the lands of Lee, Carnwath and Dryden, owned by the trustees and occupied by various tenants, and interests and dividends, &c., on stocks, shares, &c., belonging to the said trustees, for the year to 25th March, 1923 £31,286 17 7

Deduct—Rates, taxes, repairs, upkeep and outgoings for said lands, income tax, interests, annuity, management expenses, &c., for said year 27,075 6 11

4,211 10 8

£4,642 10 8

To which falls to be added for the purpose of assessment to Super-tax Income Tax effecting thereto paid by the trustees 1,051 17 8

£5,694 8 4

1923-24.

1. Lee Castle, offices, gardens and grounds (including dairy and lodge) in the county of Lanark, owned by the trustees of the late Sir S. M. Lockhart, Bart., and occupied by Lady Lockhart de Robeck—			
Annual rental	...	...	£431 0 0
2. Rents and produce of lands of Lee, Carnwath and Dryden, owned by said trustees and occupied by various tenants, and interests, dividends, &c., on stocks, shares, &c., belonging to the said trustees, for year to 25th March, 1924		...	£29,952 2 11
<i>Deduct</i> —Rates, taxes, repairs, upkeep, interests, management expenses, and other outgoings for said year		...	27,429 15 0
			<hr/> 2,522 7 11
			<hr/> £2,953 7 11
To which falls to be added for the purpose of assessment to Super-tax Income Tax effeiring thereto paid by the trustees		...	732 6 0
			<hr/> £3,685 13 11

In addition to making good the deficiencies shown in these statements for the earlier years, the trustees advanced payments to the Appellant for her maintenance. The advances made have not yet been cleared off.

(8) The trustees have in the circumstances above stated, pending the realisation of a sufficient part of the estates to meet the instalments of duties, retained the estates and the management thereof in their own hands, and paid to the Appellant the free annual income. They propose to continue to do so until such time as the estate can be conveyed to the Appellant.

(9) In a Special Case, dated 18th March, 1921, submitted for the Opinion and Judgment of the Court of Session, the Appellant claimed the fee of the heritable estates left by Sir Simon, but the Court held that she was entitled to a liferent only, together with a fiduciary fee for the heir called under the destination (*Lockhart's Trustees v. Lockhart*, 1921 S.C. 761).

(10) The assessment appealed against, so far as it related to the income from Sir Simon's trust estate, was made upon the basis of the assessments made on the estates left by Sir Simon under Schedule A of the Income Tax Acts. The assessment to Super-tax was made in the Appellant's own name, as she and her husband applied to be separately assessed.

(11) It was agreed that if the Appellant's contention is correct she would fall to be assessed for Super-tax for the period in question on the sum of £4,306.

II. On behalf of the Appellant it was contended :—

- (1) That on a sound construction of Sir Simon's trust disposition and settlement, and in view of the facts proved, the time at which the trustees were directed to convey the estates to the Appellant in liferent had not yet arrived ;
- (2) That the trustees were not entitled to grant, and the Appellant could not have demanded, a conveyance at an earlier date ;
- (3) That subject to fulfilment of the prior trust purposes the trustees had under the will a discretion as to the date at which a conveyance was to be granted, and the discretion had not been unreasonably exercised ; and
- (4) That the Appellant was entitled to be assessed to Super-tax for the year in question by reference to the income actually receivable by her from the trustees for the year ended 5th April, 1923, and not upon the basis of the Schedule A assessments.

III. On behalf of the Commissioners of Inland Revenue it was contended :—

- (1) That on a proper construction of Sir Simon's trust disposition and settlement the Appellant was a full liferentrix ;
- (2) That the settlement had been so construed in *Lockhart's Trustees v. Lockhart*, 1921 S.C. 761, where the Appellant had actually claimed to be a fiar ;
- (3) That the Appellant derived her whole rights from the testator, and the trustees could not increase or diminish her rights ;
- (4) That it was immaterial whether the Appellant was feudally vested in the estates or whether she allowed them to remain in the trustees' names (*Commissioners of Inland Revenue v. Wemyss*, 1924 S.C. 284 ; 8 T.C. 551) ; and
- (5) That the assessment had been correctly made.

IV. We, the Commissioners who heard the appeal, held that the Appellant was entitled to the liferent of the estates from the date of Sir Simon's death, and must therefore be assessed to Super-tax upon the basis upon which the estates were assessed to Income Tax under Schedule A.

We accordingly confirmed the assessment.

V. Immediately upon our so determining the appeal the Appellant expressed to us her dissatisfaction therewith as being erroneous in point of law, and having duly required us to state and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, this Case is stated and signed accordingly.

VI. The questions of law for the opinion of the Court are whether the Appellant is assessable to Super-tax (1) as a life-rentrix on the basis of the assessments made under Schedule A of the Income Tax Acts, or (2) on the amount of the free income actually receivable by her from the trustees for the year ending 5th April, 1923.

W. J. BRAITHWAITE, } Commissioners for the Special
P. WILLIAMSON, } Purposes of the Income Tax Acts.

York House, 23 Kingsway,
London, W.C. 2.

9th September, 1926.

The case came before the First Division of the Court of Session (the Lord President and Lords Sands, Blackburn and Ashmore) on the 16th December, 1926, when judgment was given unanimously against the Crown, with expenses.

Mr. D. Jamieson, K.C., and Mr. J. S. C. Reid appeared as Counsel for the Appellant, and the Solicitor-General (Mr. MacRobert, K.C.) and Mr. Skelton for the Crown.

I. INTERLOCUTOR.

Edinburgh, 16th December, 1926. The Lords having considered the Stated Case and heard Counsel for the parties, Answer the first Question of Law in the Case in the Negative and the second Question in the Affirmative; Reverse the determination of the Commissioners, and Decern: Find the Respondents liable to the Appellant in the expenses of the Stated Case, and remit the account thereof to the Auditor to tax and to report.

(Signed) J. A. CLYDE, I.P.D.

II. OPINIONS.

The Lord President (Clyde).—This case has reference to an assessment to Super-tax made upon Lady Lockhart de Robeck for the year ending April, 1924, in respect of the amount of her income assessable to Income Tax for the previous year.

In 1919 Lady Lockhart de Robeck's first husband died, leaving a trust disposition and settlement whereby he made over to trustees all his estate, heritable and moveable, and

(The Lord President (Clyde).)

directed them to pay all his debts and funeral expenses, but excepted from that direction all debts and other charges that were heritably secured upon his real estate. The heritable burdens were large, but he apparently did not anticipate that it would be necessary to clear the estate of them before the estate itself was disposed of in accordance with the directions in his will. He went on to provide an annuity in favour of his niece; and then, in Clauses 4 and 5, he provided for the disposal of the estates themselves, both heritable and moveable, in the respective events of his leaving, or not leaving, issue of his body. He left no issue; and, in that event, his directions were that (subject to the implement of the prior purposes of the settlement) his trustees were "to hold" his whole lands and whole moveable estate for certain purposes which he went on to define. The first of these was to pay out of the free income of the lands and the residuary estate, to his sister, a strictly alimentary annuity of £450 sterling. Secondly, subject to implement of that provision and of all the foregoing purposes of the trust, he directed his trustees "as soon as convenient after" my death to dispoise, convey, and make over "his lands and estates to and in favour of his wife (Lady Lockhart de Robeck) if she survived him in liferent during all the days of her lifetime, and to and in favour of a series of heirs whom he defined in fee. With regard to the residue of his moveable estate he directed the trustees to hold that residue in trust and to pay his wife the liferent of the proceeds thereof, the fee going to that member of the series of heirs upon whom the lands were entailed, who might at her death be found entitled to the possession of them. He gave his trustees the widest powers competent to them by statute or at common law, and used the expression that they were to have "all powers of administration competent to a fee simple proprietor." He specially authorised them to sell any part or parts of his estate or property, heritable or moveable.

The real estate was heavily mortgaged at the time of the testator's death, and the death duties which were exigible by the Revenue upon the occurrence of his decease amounted to no less than £34,500. Under Sub-section (4) of Section 8 of the Finance Act, 1894, the deceased's trustees were accountable for this duty, and they accordingly considered whether it would be best to attempt payment of the whole duty at once (which would have involved immediate and extensive realisation), or to avail themselves of the option of paying it by instalments. So far as one can judge, they very properly elected the latter course. Even so, however, parts of the estate had to be realised between 1919 and 1925, the proceeds being used (after reducing the bonds on the estate) in meeting the instalments.

(The Lord President (Clyde).)

Meantime—and particularly in the year ending 5th April, 1923,—the trustees paid the free income of the estate to Lady Lockhart de Robeck. They did so because, had it been “convenient” (or indeed possible) to carry out immediately the directions of the settlement, Lady Lockhart de Robeck would have been in possession of the estate, as a proper *liferentrix* in her own right, and entitled to draw the rents. But it was neither “convenient”, nor practically possible, to convey it to her while the process of realising parts of it in order to liquidate the death duties was going on; and it was not in fact conveyed to her in the year ending 5th April, 1923, but remained under the administration of the trustees.

Now, the contention of the Inland Revenue, which the Special Commissioners have upheld, is that for the purpose of assessing Lady Lockhart de Robeck's income to Super-tax for the year ending 5th April, 1924, she must be deemed—during the year ending 5th April, 1923,—to have been the “owner” (*qua* proper *liferentrix*) of the estate and therefore liable to Income Tax on the annual value thereof under Schedule A of the Income Tax Act, 1918. In short, the argument is that Lady Lockhart de Robeck's total income from all sources for such last-mentioned year must be taken to include, not merely what she actually received as income from the trustees in the then circumstances of her husband's estate, but the whole annual value of the said estate in the hands of the trustees as assessed to Income Tax under Schedule A. No doubt, if the estate had been conveyed to her prior to the year ending 5th April, 1923, it would have been assessable in her hands (*qua* proper *liferentrix*) to Income Tax under Schedule A in that year, and its annual value (for Schedule A purposes) in that year would have formed a part of her income assessable to Super-tax in the following year.

This contention was rested on the proposition that the direction in the settlement to convey to Lady Lockhart de Robeck was intended to be immediately effectual, and that accordingly her true relation to the estate was the same as if the conveyance had been granted immediately after the death of her first husband. If all that had happened was that the trustees had been dilatory in executing the conveyance, this contention might possibly have been sound. But it takes no account of the solid reasons which made it practically necessary that the trustees should remain actual owners of the estate for such time as was required to effect (1) the realisation of parts of it, and (2) the reduction of the bonds affecting the whole of it, so as to acquit themselves of their accountability for Estate Duty. During that time, the trustees were not acting merely as agents for Lady

(The Lord President (Clyde).)

Lockhart de Robeck. The ownership of the estate was truly in them, and they were the persons immediately entitled to the receipt of any annual value the estate possessed, and they were therefore the persons to whom the "ownership" of the estate belonged for the purposes of Schedule A (*Inland Revenue v. Wemyss*⁽¹⁾, 1924 S.C. 284 see esp. at p. 293). Moreover (as appears from the recital of the provisions of the testator's settlement in the earlier part of this opinion), although the difficulty presented by the aggravation of the burdens, already incumbent on the estate, by the incidence of Estate Duty may not have been in the purview of the testator, the conveyance of the estate to Lady Lockhart de Robeck was subject to the primary direction to "hold" it ("subject to implement of the first, second, and "third purposes" of the settlement) for payment of the sister's annuity. It was only after implement of all these provisions that the trustees were directed "as soon as convenient after my "death" to convey the estate to Lady Lockhart de Robeck. I think it would be unreasonable to disregard a prolongation of the period of the trustees' administration, due to the necessity of meeting the Estate Duties, in determining when the "convenient" time for conveying the estate to Lady Lockhart de Robeck had arrived; and it seems to me impossible in these circumstances to say that the delay in making over the "ownership" of the estate to her was in any degree contrary to the intention of the settlement. If so, there is no reason to impute to her (for tax purposes) an "ownership" which she did not, and could not, in the circumstances, have. I think therefore her income (for Super-tax purposes in the year ending 5th April, 1924) must be taken as including only the free income of the estate which she received from the trustees in the year ending 5th April, 1923.

I am for answering the first alternative branch of the question put to us in the negative, and the second in the affirmative.

Lord Sands.—This case has reference to a question of liability to Super-tax. Now, Super-tax and Income Tax are prima facie imposed, and are intended to be imposed, upon the income which the person to be taxed enjoys in the course of the year. But it is one of the anomalies of the Income Tax that duty under Schedule A may so operate as to impose a burden which is disproportionate to the amount of the income received, so that a person pays Income Tax upon a higher sum than the amount of free income which is at his disposal for his own expenditure. In the present case, there is no question as to what income the lady received, but it is contended by the Crown that

(1) 8 T.C. 551, at p. 573.

(Lord Sands.)

she is liable to duty upon a larger sum in respect of the operation of this peculiarity of Schedule A. It is said that she is in the position of one who was in possession of an estate as owner, and accordingly that she must pay the full amount which an owner would have had to pay under Schedule A if he had been in possession of the estate. Now, I understood it to be conceded by the Crown that where trustees in the bona fide fulfilment of testamentary directions retain an estate in their own hands, and remain, so far as title and management go, the proprietors for the time being, the person who receives the net income from the estate is not liable for the duty under Schedule A, but only for what he or she receives. Accordingly, I understood it to be conceded that liability under Schedule A on the part of a person who is to receive a disposition in liferent of a certain estate, does not emerge upon the moment of the death of the testator. Even in a simple case, some time—say a year or so—must be allowed for settlement of debts or duties before the trustees dispoise the estate to the liferenter, and it is only on that disposition that his liability as owner under Schedule A emerges. Now, if this be conceded, it appears to me that a very considerable latitude and a very wide discretion must be allowed where the situation is so complicated and difficult as it was in the present case. I am unable to affirm that the position in 1922-23, the year in question, was one which could not have arisen in the course of prudent and proper administration. That being so, I think we must take things in 1922-23 just as we find them, and we find that in the year in question Lady Lockhart de Robeck was not in possession of the estate as liferentrix and as such liable to the duty imposed upon ownership. Accordingly, I concur in the conclusion at which your Lordship in the Chair has arrived.

Lord Blackburn.—I concur. I think it is quite clear, from the passages in the trust disposition and settlement that your Lordship has read, that the testator did not intend that immediately upon his death the conveyance of his heritable estates should be made to the Appellant in liferent, but that the time when she should be entitled to get the estates in liferent might be postponed for a considerable period after his death. That he considered that the period might be considerable is, I think, quite clear from the terms of the codicil which he executed three years afterwards. In that codicil he gave his trustees power to cease making contributions which he had made in his lifetime to a hospital which he had erected in memory of his brother, “ if
 “ and when the continuance of such contributions on the present
 “ scale would, in their opinion, involve a heavier burden than
 “ my landed estates can reasonably bear, having regard to
 “ diminution of rents and income, and increase of taxes, rates,

(Lord Blackburn.)

“ interest, death duties, wages, and other necessary outgoings connected with ownership; and having regard also to the uses and purposes to which the net income of my landed estates falls from the time to be applied under the terms of my trust disposition and settlement.” That plainly indicates the testator’s recognition that in the circumstances to which he refers, the date upon which the Appellant would be entitled to demand a conveyance of the estate might be very much postponed. It is evident that the time at which she was entitled to make such a demand had not arrived in the year 1923, and that being so it is, I think, impossible to hold either that she was owner of the estates or that she was entitled to demand to be put in the position of owner of the estates, using the word “ owner ” as it is used in the Income Tax Acts. Accordingly, I cannot hold that she is liable to be assessed in respect of the income from the profits arising from the estate, and I think the first question should be answered in the negative and the second in the affirmative.

Lord Ashmore.—In this case, the Appellant is appealing against an assessment to Super-tax made upon her for the year ending 5th April, 1924, and the Special Commissioners held that the Appellant was entitled to the liferent in respect of the taxable income on heritable estates left to her in liferent under the will of her husband, and that from 25th March, 1919, which was the date of the death of her husband. Now, in point of fact, the trustees under the will have not yet granted a conveyance in liferent of the lands and heritages in favour of the Appellant. The delay in granting such a conveyance seems to me to be fully explained and justified in the circumstances set forth in the Case. In view of the directions contained in the will, and of the state of the truster’s affairs at the date of his death, the estates in question were not legally vested in the Appellant in liferent during the year in question, and she was neither entitled herself to demand or uplift payment of the rents of the estates, nor to confer upon the trustees any right to collect the rents on her behalf. In the circumstances, therefore, I think the finding of the Commissioners was unfounded in law and erroneous, and I am accordingly of opinion that the question of law should be answered as your Lordships have stated.

The Crown having appealed against the decision of the Court of Session, the case came before the House of Lords (Viscount Cave, *L.C.*, Viscount Dunedin, and Lords Carson, Shaw of Dunfermline and Warrington of Clyffe) on the 12th and 13th December, 1927, when judgment was reserved.

The Lord Advocate (the Rt. Hon. Wm. Watson, K.C.), Mr. R. P. Hills and Mr. Skelton appeared as Counsel for the Crown, and Mr. D. Jamieson, K.C., and Mr. J. S. C. Reid for Lady de Robeck.

On the 14th February, 1928, judgment was delivered unanimously against the Crown, with costs, confirming the decision of the Court below.

JUDGMENT.

Lord Carson.—My Lords, I have been asked to read the opinion prepared by my noble and learned friend Lord Dunedin.

Viscount Dunedin (read by Lord Carson).—My Lords, this is a case as to Super-tax. The Respondent, Lady Lockhart de Robeck, being dissatisfied with the determination of the Special Commissioners, demanded a Special Case. The Special Case was submitted to the First Division of the Court of Session, who answered the questions put in a sense favourable to the Respondent. Appeal has been taken to your Lordships' House against this decision. The facts out of which the case arises are set forth in the Special Case. The Respondent is the widow of the late Sir Simon Macdonald Lockhart of Lee, who died on 25th March, 1919. He left a trust disposition and settlement dated 2nd March, 1916, by which he conveyed his whole estate, heritable and moveable, real and personal, to trustees for certain purposes. After providing an annuity for his niece, he in the fourth purpose dealt with the case of his leaving a son. As a matter of fact, there was no issue of the marriage, so that provision has no effect. The fifth purpose was, unnecessary portions being omitted, as follows:—“(Fifth) In the event of my leaving no issue of my body or of such issue all dying without attaining majority and without lawful issue, I direct my trustees (subject to implement of the first, second, and third purposes hereof) to hold my whole lands and heritages in Scotland and my whole other residuary means and estate, heritable and moveable, real and personal, wherever situated, in trust for the purposes following, viz.:—(Primo) I direct my trustees to pay out of the free income of my said lands, heritages, and other residuary estate to my sister, Miss Esther Charlotte Macdonald Lockhart an annuity of four hundred and fifty pounds sterling, and that during the lifetime of my said sister; declaring that the said annuity shall be strictly alimentary to my said sister, and shall not be capable of being anticipated, alienated, or assigned by her either gratuitously or for onerous consideration or of being attached by her creditors by diligence for debt; and shall be paid to her on her own sole receipt or the receipt of her bankers respectively; and shall be paid free of legacy duty; and shall commence to run as from the day of my decease, and shall be payable half-yearly at the terms of Whitsunday and Martinmas in each year; (Secundo) Subject to implement or due provision

(Viscount Dunedin.)

" being made for implement of the foregoing purposes of the trust,
 " I direct my trustees as soon as convenient after my death to
 " dispose, convey, and make over (subject always to the conditions
 " aftermentioned) my said lands and estates of Lee, Cartland,
 " Carnwath and others in the county of Lanark, my said lands and
 " estate of Dryden (or Roslin) and others in the county of
 " Midlothian, and generally all my lands and heritages in Scotland
 " to and in favour of my said wife (if she survive me) in liferent
 " during all the days of her lifetime, and to and in favour of the
 " heirs-male of her body, whom failing, the second son of the said
 " John Ronald Moreton Macdonald (if the said John Ronald
 " Moreton Macdonald shall then have an elder son or an heir of the
 " body of an elder son in life), and the heirs-male of the body of
 " such second son, whom failing, the other younger sons of the
 " said John Ronald Moreton Macdonald in order of seniority and
 " the heirs-male of their bodies respectively, and failing younger
 " sons of the said John Ronald Moreton Macdonald, his eldest or
 " only son and the heirs-male of the body of such eldest or only son,
 " whom failing, the heirs-female of the body of my said wife.....
 " ; and I direct my trustees to execute a valid
 " disposition of my said whole lands and heritages in Scotland in
 " terms of the foregoing directions, containing all such special
 " clauses and conditions as my trustees deem reasonable and
 " appropriate to the circumstances : But subject always to all sub-
 " sisting heritable securities and all other real burdens, if any,
 " affecting the said lands and others, and subject also to the said
 " annuities in favour of my said sister and my said niece, Miss
 " Geraldine Tryphena Margaret Fitzgerald respectively, and all
 " which I direct my trustees in the said disposition to make valid
 " real burdens upon my said lands and estates or on some sufficient
 " portion thereof ;..... And I direct my trustees to insert in said
 " disposition a clause making it imperative on the institute and
 " each of the heirs substitute foresaid succeeding to the said lands
 " and heritages under and in virtue of the said disposition, and on
 " the husband of each female substitute so succeeding, and also in
 " the event of my said wife surviving me and marrying again on
 " her husband by such marriage constantly to use and bear the
 " name, arms, and designation of Lockhart of Lee as his or her
 " principal name, arms, and designation : As also a clause reserving
 " to my said wife and the institute and heirs substitute foresaid
 " under the said disposition successively power to grant feus and
 " long leases of any part of my said lands and heritages at such
 " rate of feu-duty or rent and on such conditions as my trustees
 " may specify or indicate in said disposition as being in their opinion
 " reasonable and appropriate in the circumstances : And I direct
 " my trustees to record the said disposition in the appropriate
 " Division of the General Register of Sasines with a warrant of

(Viscount Dunedin.)

“ registration thereon on behalf of my said wife in liferent and the
“ institute thereunder in fee, and that before delivery of the said
“ disposition; and without prejudice to the general and particular
“ directions before written, but in supplement thereof, I declare
“ that my trustees’ discretion in settling the terms of the said
“ disposition shall be absolute and their decisions shall be final and
“ binding on all points and on all concerned: (*Tertio*) I direct
“ my trustees to hold the whole residue and remainder of my means
“ and estate, heritable and moveable, real and personal, wherever
“ situated, excepting only the lands and estates directed to be dis-
“ posed in terms of the immediately preceding clause hereof, in
“ trust for my said wife in liferent during her lifetime and at her
“ death to pay, convey, and make over the same to the institute or
“ the heir substitute then entitled to my said landed estates in fee;
“ and I declare that the provisions herein contained, conceived in
“ favour of my said wife during her widowhood in the event of my
“ leaving no issue of my body or of such issue all dying without
“ attaining majority, shall be held to be in substitution for and if
“ accepted by her shall supersede and extinguish the whole
“ provisions made by me for her during her widowhood in the ante-
“ nuptial marriage contract between us, dated the 13th day of
“ December 1898, and I hereby specially confer upon my
“ trustees, in addition to all powers competent to them by statute
“ or at common law, all powers of administration competent to a
“ fee-simple proprietor; and without prejudice to said generality I
“ hereby expressly authorise and empower them to sell any part or
“ parts of my estate and property, heritable or moveable, real or
“ personal, at such times and on such terms and conditions as they
“ deem proper; as also to grant leases of any part of my landed or
“ other heritable or real estate wherever situated for such rents or
“ other prestations and for such periods and on such terms and
“ conditions as they deem proper; as also to grant feus of any parts
“ of my said heritable estates in Scotland on such terms and con-
“ ditions as they deem expedient; and to grant, execute, and
“ deliver all deeds and documents necessary or expedient in the
“ exercise of their powers.” He also executed a codicil, as
“ follows:—“ I, Sir Simon Macdonald Lockhart, of Lee and
“ Carnwath, Baronet, make the following codicil to my trust dis-
“ position and settlement dated the 2nd day of March 1916; that
“ is to say, I hereby name and appoint Charles Joseph Edmonstoune
“ Cranstoun, Esquire, of Corehouse, in the county of Lanark, as
“ one of my trustees and executors under my said trust disposition
“ and settlement along with the persons therein named as such,
“ and the acceptors or acceptor and survivors and last survivor of
“ them and him; and I give my trustees full power in their sole
“ and absolute discretion to reduce in amount or to discontinue
“ entirely the contributions which I have been in use to make for

(Viscount Dunedin.)

“ the maintenance of the Lanark Hospital, which I erected in memory of my brother, if and when the continuance of such contributions on the present scale would, in their opinion, involve a heavier burden than my landed estates can reasonably bear, having regard to diminution of rents and income, and increase of taxes, rates, interest, death duties, wages, and other necessary outgoings connected with ownership; and having regard also to the uses and purposes to which the net income of my landed estates falls for the time to be applied under the terms of my trust disposition and settlement; and, subject to this codicil, I confirm my said trust disposition and settlement; and I consent to registration hereof for preservation.” The Special Case, after quoting these deeds, proceeds as follows:—“(5) Upon the death of Sir Simon the heritable estates were found to be heavily mortgaged; the rents thereon were to a large extent back-handed; and the death duties on the heritable estates amounted to £34,615 9s. 6d. The trustees arranged to pay the said death duties by sixteen half-yearly instalments, and they sold the bulk of the stocks and shares left by Sir Simon to meet the first four instalments on the lands and the first six instalments on the minerals. (6) For the purpose of meeting the remaining instalments it was necessary for the trustees to sell part of the lands. This they proceeded to do, but owing to bonds of over £110,000 affecting the heritage, it was necessary in the first instance to repay bonds amounting to £18,000, and it was not till 1925 that sufficient heritage had been realised to meet the duties.”

The Special Case then quotes at length the trustees' accounts from the year of Sir Simon's death, 1919, up to and including 1923-24. These show that there was a deficiency in the earlier period, but in the year as to which the question is raised a balance of £4,000 odd, which was paid to Lady Lockhart. The Case continued: “ In addition to making good the deficiencies shown in these statements for the earlier years, the trustees advanced payments to the Appellant for her maintenance. The advances made have not yet been cleared off. (8) The trustees have in the circumstances above stated, pending the realisation of a sufficient part of the estates to meet the instalments of duties, retained the estates and the management thereof in their own hands, and paid to the Appellant the free annual income. They propose to continue to do so until such time as the estate can be conveyed to the Appellant.”

Lady Lockhart remarried on 3rd July, 1922, and the question arises as to the Super-tax due by her for the year 1924, that is to say, as to the amount on which she falls to be assessed for nine months of the year 6th April, 1922, to 5th April, 1923. The Special Commissioners held that she fell to be assessed on the basis of the sum on which the landed estates were assessed for ordinary Income

(Viscount Dunedin.)

Tax under Schedule A. The Respondent contended that she should only be assessed on the basis of the income actually paid over to her by the trustees; for that period the amounts in figures being £4,782 on the one hand and £4,306 on the other. There is no dispute as to these figures.

As already stated, the Court of Session reversed the decision of the Special Commissioners and held the latter figure to be the proper figure.

By Section 5 of the Income Tax Act of 1918, as amended by the Finance Act of 1920, it is provided: "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 required to be estimated in a return made in connection with any claim for a deduction from assessable income, but subject to the provisions hereinafter contained"; and by Section 19 of the Income Tax Act of 1918 it is provided: "19. For the purpose of any claim for an allowance or deduction, 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."

The whole question, therefore, is—Was the income which the Respondent received during the above period an income derived from the ownership of lands? The argument of the Appellants is very simple. They say that under Sir Simon's settlement, there was vesting *a morte testatoris* in the Respondent as a proper liferenter, and that a proper liferenter is an owner in the sense of the Section quoted. Now, though there is no definition in the Statute of what an owner is, it may, I think, be held as certain that the expression is not confined to the owner of the fee feudally vested, and I think a proper liferenter, either feudally vested or in such a position that he might be feudally vested, would be an owner. But what is a proper liferenter? I agree with what the learned Lord President said in the case of *Wemyss*⁽¹⁾, 1924 S.C. at page 293. The case itself is far too peculiar and special to form a precedent for any other, but the remarks of the learned Judges on the general law may be quoted. The Lord President, after saying, as I have said, that a proper liferenter may be an owner of lands in the sense of the Statute, goes on saying of him: "He has no trust interposed between him and those lands; he is '*interim dominus* and '*proprietor for life*' (*Erskine*, Inst. II, ix, 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

(1) *The Commissioners of Inland Revenue v. Wemyss*, 8 T.C. 551 at p. 573.

(Viscount Dunedin.)

“ 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 means of his servants (*Erskine*, Inst. II, “ ix, 56).” Now let these tests be applied to the present case. As regards every one of them the Respondent, during the period in question, fails to correspond to the indicium of the proper liferenter. She is not immediately entitled to the civil fruits of the lands; she cannot grant leases for the duration of her life. Nay, further, the trustees can grant a lease for the ordinary duration of an agricultural lease, *i.e.*, 19 years, which would bind the fiar, whom, at this juncture, they also represent—a thing which she could not do even after the disposition in her favour was executed, unless a clause as to long leases was inserted in the disposition, as to which the trustees are to be the sole judges. She could not be the occupier, except of what the trustees allow her to occupy; and she could not uplift the natural fruits of the lands. Besides this, the trustees had a power of sale, which she never had nor could have. It is, therefore, abundantly clear that she was not during this period a proper liferenter, and as such owner of the lands. During this period the trustees were owners of the lands—in trust, no doubt, but still owners—and in such capacity they would and did settle the ordinary Income Tax under Schedule A, as for the mansion house, which they possessed but allowed her occupation of in terms of the settlement. No doubt they rightly paid her the surplus income when it began to emerge, for in the early years, the rents being mostly backhand, there was only deficiency. They did so rightly, because the beneficial right arising from the estate was hers in virtue of the fact that she was the person to whom the estate was to go in liferent, but what she received was not the direct income of lands, but was the balance of what the estate had brought as a whole.

My Lords, I do not doubt that the Inland Revenue could not be defeated by the trustees simply holding on to the estate without making the disposition as directed, which disposition, when executed, would undoubtedly make her a proper liferenter. Accordingly, the Lord Advocate urged that she was all along in a position to compel the trustees to execute the disposition, and that being so it must be held as if done. *Quod fieri debet infectum valet*. I do not think that she was in such a position. The trustees were executors, and under the provisions of the settlement the whole estate was under their control, and, therefore, under Section 6, Sub-section 2, of the Finance Act, 1894, they were in a position, if they chose, to elect to pay the Estate Duty on the heritable property, and having done so, they became accountable. They chose the alternative of settling the duty by sixteen half-yearly instalments, as is found by the Special Case. Under these circumstances, they were, in my opinion, entitled to keep the estates

(Viscount Dunedin.)

until the duties were paid off and they were free of further liability. That the course of administration was beneficial to all concerned cannot be denied. Any other course would have entailed a forced sale, which in the position of the heritable debt would have led to disastrous results. That, however, is not the question. The question is whether the Respondent could have compelled a disposition at an earlier date. I am of opinion she could not.

On the whole matter, therefore, I think that the view taken by the learned Judges of the First Division was right, and I move that the appeal be dismissed with costs.

Lord Carson.—May I add, my Lords, that I agree with the judgment I have just read.

Viscount Cave, L.C.—My Lords, I have had the pleasure and advantage of reading the opinion of my noble and learned friend, Lord Dunedin, on this appeal, and I concur in the conclusion at which he has arrived. I only desire to add that my opinion is founded on the terms of the trust disposition and settlement executed by the late Sir Simon Lockhart, with the codicil thereto, as applied to all the facts found in the Special Case to have existed in the year 1922-23; and that this decision does not involve the consequence that in every case trustees who have elected to pay death duties by instalments are entitled to retain the estates in their own hands until all the instalments of duty have been paid.

Lord Shaw of Dunfermline (read by Lord Warrington of Clyffe).—My Lords, after further consideration of this case, I still feel much anxiety about it.

I humbly agree with the conclusion reached by my noble and learned friend, Lord Dunedin. My agreement is founded (1) on the very special terms of Sir Simon Lockhart's testamentary deeds, and (2) on the course of the administration legitimately pursued thereunder since his decease by his trustees.

But I fully concur in and respectfully adopt the reservations contained in the opinion just delivered from the Woolsack.

Lord Warrington of Clyffe.—My Lords, for myself I have had the advantage of reading the opinions of my noble and learned friends Lord Dunedin and the Lord Chancellor and I concur therein.

Questions put:—

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and this appeal dismissed with costs.

The Contents have it.

[Agents:—Messrs. Gregory Rowcliffe and Co. for Messrs. John C. Brodie and Sons, W.S.; the Solicitor of Inland Revenue, England, for the Solicitor of Inland Revenue, Scotland.]
