NO. 744.—COURT OF SESSION, SCOTLAND (FIRST DIVISION).—12TH, 13TH AND 14TH JUNE AND 7TH JULY, 1928.

HOUSE OF LORDS.—25TH AND 26TH NOVEMBER, 1929, AND 6TH FEBRUARY, 1930.

LADY MILLER *v.* THE COMMISSIONERS OF INLAND REVENUE.[1]

Super-tax—Total income—Widow entitled under husband's trust disposition to rent-free occupation of house and lands during her life—Whether the Schedule A and B assessments, and rates paid by the trustees, form part of the widow's total income.

The trustees of a trust disposition and settlement were directed to hold and retain a mansion house and grounds, and to pay out of the income of the testator's estate all feu duties, rates and taxes on the property, and all repairs and upkeep expenses and foresters' wages. They were further directed to allow the settlor's widow, the Appellant, " to occupy and possess " this property " during her " lifetime free of rent or taxes ". She in fact occupied the mansion house and grounds during 1919–20 *and was assessed to Super-tax for* 1920–21 *in a sum which included the amount of the assessments under Schedules A and B for* 1919–20 *on the property, and the amounts (with the addition of Income Tax thereto) of the rates and foresters' wages paid by the trustees.*

Held, *that the amount of the assessments under Schedules A and B and of the payments for rates made by the trustees were the income of the Appellant for Super-tax purposes. (The minor question of the foresters' wages was not pursued in the House of Lords as the facts before the House were found to be insufficient for its determination).*

I.—CASE.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held at Edinburgh on 1st July, 1927, for the purpose of hearing appeals, the Hon. Lady Miller of Manderston, hereinafter called the Appellant, appealed against an additional assessment to Super-tax on the sum of £1,500 made upon her for the year ended 5th April, 1921.

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[1] Reported (C. of S.) 1928 S.C. 820; and (H.L.) [1930] A.C. 222; 1930 S.L.T. 219, 46 T.L.R. 207.

I. The following facts were admitted or proved :—

(1) The Appellant is the widow of Sir James Miller of Manderston, Bart., who died without issue on 22nd January, 1906.

(2) Sir James Miller by a trust disposition and settlement, dated 4th December, 1901, which, together with a codicil, dated 26th December, 1901, was recorded in the Books of Council and Session on 26th January, 1906, gave (*inter alia*) the following directions :—

(i) He directed his trustees in the event of his being survived by his wife and a son, to hold and retain his lands and estate of Manderston and other lands and heritages in the County of Berwick belonging to him at the time of his death, and out of the income of his estate generally (including the said lands and estate of Manderston and others) to make payment, and that preferably to an annuity or jointure bequeathed by him to his said wife, of (*first*) all feu, blench and teind duties, and all public parochial and local burdens of every kind exigible furth of his heritable estate; (*second*) all sums that should appear to them to be proper and necessary to be expended from time to time for putting or keeping in repair the said mansion house of Manderston, and offices, gardens, policies and pleasure grounds thereof, and for adding to the furniture and other effects in the said mansion house, and for keeping up the game on his said lands and estate, all which it was his desire that his trustees should keep up and maintain at their discretion during the subsistence of the trust; (*third*) In the absolute and uncontrolled discretion of his trustees, all sums which should appear to them to be necessary or proper to be expended in keeping up and maintaining the buildings, fences, drains, roads and plantations on the said lands of Manderston and others, and his other heritable estate in good condition and repair, and for erecting any additional buildings, or making any additional fences, drains, roads or plantations, or executing any other works of any kind on the said lands and others which they might consider necessary for the improvement, management, cultivation or letting of the same, or for the working or letting of the stone quarries or minerals therein; and until a son attained the age of twenty-five years to allow his said wife to occupy and possess, free of rent or taxes (both landlord's and tenant's), the said mansion house of Manderston, and furniture and other effects therein, and stables, coach-houses and other offices, policies (including grass parks within the same), gardens and pleasure grounds pertaining thereto, as also the dairy and other buildings at

Buxley and the pertinents thereof and whole fittings therein, whether fixed or moveable, and the dairy utensils, with the free use and enjoyment of the game on his said lands and estate of Manderston and others, and during the liferent of his said wife to pay the wages of the gamekeepers, gardeners and foresters employed in connection with the said establishment.

(ii) He gave very similar directions for the case of his being survived by his wife and a daughter, together with the liferent use of certain silver plate, of which in the former case she was only given the liferent use for a limited period.

(iii) In the case, which in fact happened, of his dying without issue and being survived by his wife alone, he directed his trustees to hold and retain his said lands and estate of Manderston and others, and out of the income of his estate generally (including the said lands and estate of Manderston and others) to make the various payments before provided for in the event of his death leaving a son; (*Seventh*) To allow his said wife to occupy and possess during her lifetime, free of rent or taxes (both landlord's and tenant's), the said mansion house of Manderston and offices and furniture and other effects therein, and the game on his said lands of Manderston and others, and the other subjects of which he had directed his said wife to have the liferent in the event of his death survived by a daughter: And he directed his trustees during the liferent of his said wife to pay the wages of the foresters employed in connection with the said establishment, the wages of the gamekeepers and gardeners to be paid by his said wife.

A copy of the trust disposition and settlement and codicil is annexed hereto and forms part of this Case.

(3) The Appellant did in fact, as contemplated in the said trust disposition and settlement, occupy and possess the mansion house and lands at Manderston during the year ended 5th April, 1920, and for the said year the assessments under Schedules A and B of the Income Tax Act on the house and lands so occupied by her were :—

	£	s.	d.
Policy Parks, Schedule A	165	10	0
,, ,, ,, B	452	0	0
Part farm, Briery Hill, Schedule B	89	5	0
Mansion House, Schedule A	319	10	0

No question arises as to the Appellant's liability in respect of the Briery Hill subjects, which were rented by the Appellant from the trustees.

(4) The trustees under the authority, above set out, of the trust disposition and settlement paid the following sums during the said year out of income received by them under deduction of Income Tax :—

	£	s.	d.
Forester's Wages	60	0	0
Rates on Mansion House	65	0	0
,, Policy Parks	32	0	0

(5) The Appellant had been assessed to Super-tax for the year ended 5th April, 1921, without the inclusion of any amount to represent either the above assessments under Schedules A and B, or the above sums paid by the trustees. The additional assessment appealed against was made in an estimated amount to make good this omission, and it is admitted that (with the addition of Income Tax to the sums paid by the trustees), the correct amount in figures of such additional assessment should have been £1,250.

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

(1) That under the terms of the trust disposition and settlement the Appellant's occupation of the Mansion House and lands did not amount to a liferent use;

(2) That the sums expended by the trustees should not be regarded as money expended on her behalf; and

(3) That there was no ground for making an additional assessment.

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

(1) That the Appellant had a liferent use of the Mansion House and lands;

(2) That the sums paid by the trustees were paid for her benefit; and

(3) That the additional assessment should be fixed at £1,250.

IV. We held that the Appellant had a liferent use of the property, and that the sums paid by the trustees were paid for her benefit, and we accordingly amended the additional assessment to £1,250, and determined the appeal accordingly.

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 :—

(1) Whether the Appellant has a liferent use of the said Mansion House and lands, and is bound to include in calculating her liability

to Super-tax the assessments made thereon under Schedules A and B of the Income Tax Act; and

(2) Whether she is also bound so to include the sums mentioned as paid by the trustees, together with the Income Tax applicable thereto.

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

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

20th February, 1928.

II.—APPENDIX.

1.—TRUST DISPOSITION AND SETTLEMENT by Sir JAMES MILLER of Manderston, Baronet, dated 4th December, 1901.

I, SIR JAMES MILLER of MANDERSTON, in the County of Berwick, Baronet, being desirous of regulating the succession to my means and estate after my death DO hereby GIVE, GRANT, ASSIGN, DISPONE, DEVISE, LEGATE and BEQUEATH to and in favour of Sir GEORGE LAUDERDALE HOUSTON BOSWALL of Blackadder, in the County of Berwick, Baronet; General THOMAS MAUBOURG BAILIE, Caldecott House, Abingdon, Berks; ALFRED DOUGLAS MILLER, Captain Second Dragoons (Royal Scots Greys); The Honourable FRANCIS NATHANIEL CURZON, son of the Right Honourable and Reverend Alfred Nathaniel Holden Lord Scarsdale, Baron of Scarsdale, in the County of Derby; and WILLIAM HUGH MURRAY, W.S., Edinburgh; and such other person or persons as I may hereafter name or as shall be assumed to act in the Trust hereby constituted, and to the acceptors and acceptor and survivors and last survivor of the persons hereby named or to be named or assumed as aforesaid as Trustees for executing the Trust hereby constituted (the major number accepting and surviving and resident in Great Britain for the time, while more than two so accept, survive and reside, being a quorum, and the said Trustees named and to be named and assumed as aforesaid being throughout these presents denominated 'my Trustees'), ALL and SUNDRY lands and heritages and whole other means, estate and effects, heritable and moveable, real and personal, of every description or wherever situated, now belonging or which shall belong to me at the time of my death, with the whole writs, titles, vouchers and instructions of and concerning my said means and estate, and all that has followed or may be competent to follow thereon: BUT these presents are granted only in trust for the uses, ends and purposes, and with

Trustees.

Estate conveyed.

Purposes of Trust—

and under the conditions, provisions and others after mentioned, viz. : IN THE FIRST PLACE, For payment of all my just and lawful debts, death-bed and funeral expenses, and the expenses of executing this Trust : IN THE SECOND PLACE, For payment to my Trustees acting for the time, equally among them of an annuity of £150, and that during the continuance of the Trust hereby created, and subject to the declaration hereinafter contained, beginning the first payment at the first term of Whitsunday or Martinmas that shall happen one year after my death : IN THE THIRD PLACE, For payment and delivery of the following legacies and bequests, and implement of the following directions namely : (*First*) To my wife, the Honourable Eveline Mary Curzon or Miller, the sum of £25,000, subject to this provision, that the sum of £15,000 contained in a personal Bond granted by the Right Honourable George Nathaniel Curzon Baron Curzon of Kedleston, and the said Honourable Francis Nathaniel Curzon in my favour, and the sum of £7,000 contained in another personal Bond granted by the Honourable Assheton Nathaniel Curzon and James Albert Salton of 31 Lombard Street, in the city of London, carrying on business as Bill Discounters under the firm name of J. A. Salton and Company, in my favour shall, so far as unpaid at my death, but without including any interest which may then be due thereon be imputed *pro tanto* towards payment of the said legacy of £25,000, and shall be accepted by my said wife accordingly : (*Second*) To lease to my said wife during her life, should she desire it, Hamilton House, Newmarket, should the same belong to me at my decease, or any other house at Newmarket that may then belong to me, at a rental of £150 per annum, but in the event of my said wife not being desirous of occupying said house the same shall form part of my general estate : (*Third*) To deliver to my said wife as her own absolute property out of the furniture and plenishing of said Hamilton House, Newmarket, or any other house at Newmarket which may belong to me at my decease, such furniture, pictures, books, linen and others that she may select for her own personal use : (*Fourth*) To deliver to my said wife as her own absolute property three carriages and six carriage horses, to be selected by herself from the horses and carriages belonging to me wherever the same may be at the time of my death : (*Fifth*) To my sister Mrs. Amy Elizabeth Miller or Bailie, wife of the said General Thomas Maubourg Bailie, and in the event of her predeceasing me, to her children, equally among them, the sum of £25,000 : (*Sixth*) To my sister Mrs. Evelyn Mary Miller or Hunter, wife of Richard Hunter, Esquire, of Thurston, and in the event of her predeceasing me, to her children, equally among them, the sum of £25,000 : (*Seventh*) To my overseer at Manderston, to my secretary and to each of my servants, including house servants, gardeners, gamekeepers, foresters, servants employed on any farm or farms which may be in my own possession, or of which I may be lessee, those connected with the Northumberland and Berwickshire Hunt

Payment of Debts.

Annuity of £150 among Trustees.

Legacies—

1. Lady Miller, £25,000.

Sums due under certain Loans to be imputed towards Legacy.

2. Lease of Newmarket house to Lady Miller at rent of £150.

3. Legacy to her of such furniture, &c., in Newmarket house as she may select.

4. Legacy of certain carriages and horses.

5. Mrs. Bailie, £25,000.

6. Mrs. Hunter, £25,000.

7. Overseer, secretary and servants who have been three years in his service, one year's salary or wages.

whose wages are paid by me, if I shall be master of said hunt at the time of my death, and who shall have been three years in my service at the date of my death, one year's salary or wages, and that in addition to the salary or wages that may at my death be due to them or any of them, all which legacies shall be payable at the first term of Whitsunday or Martinmas that shall happen after my death: IN THE FOURTH PLACE, In the event of my death survived by a son, I direct my Trustees (*First*) To make payment to my said wife, in the event of her surviving me, of an annuity or jointure of £10,000 sterling per annum, during all the days of her life, payable half-yearly in advance by equal portions, beginning the first payment thereof at the first term of Whitsunday or Martinmas after my death for the half-year succeeding, and so forth half-yearly thereafter during her life, and also to make payment to her as soon as they can conveniently do so after my death of the proportion of said annuity or jointure corresponding to the period between the date of my decease and the first term of Whitsunday or Martinmas thereafter: (*Second*) To allow my said wife the liferent use and enjoyment of the house No. 45 Grosvenor Square, London, with the stables and appurtenances thereof, belonging to and presently occupied by me, if the same shall belong to me at my death, and in the event of the same not belonging to me at the time of my death, the liferent use and enjoyment of any other house in London, with the stables and appurtenances thereof, excepting the mansion-house No. 1 Park Lane, which may then belong to and be occupied by me, together with the whole household furniture and furnishings of every description therein, including pictures, books, linen and others: (*Third*) To deliver to my said wife the whole silver plate belonging to me at the time of my death, for her liferent use and enjoyment, until a son reaches the age of twenty-five years; and on that event happening I direct my Trustees to pay her the sum of £1,000 to enable her to purchase silver plate in lieu thereof: (*Fourth*) To deliver to my said wife in liferent, for her liferent use only, (1) the turquoise and diamond set, (2) the pearl and diamond set, and (3) the emerald and diamond set: (*Fifth*) To hold and retain my lands and estate of Manderston and other lands and heritages in the County of Berwick belonging to me at the time of my death, and out of the income of my estate generally (including the said lands and estate of Manderston and others) to make payment, and that preferably, to the said annuity or jointure bequeathed by me to my said wife, of (*first*) all feu, blench and teind duties, and all public parochial and local burdens of every kind exigible furth of my heritable estate; (*second*) all sums that shall appear to them to be proper and necessary to be expended from time to time for putting or keeping in repair the mansion-house of Manderston, and offices, gardens, policies and pleasure grounds thereof, and for adding to the furniture and other effects in said mansion-house, and for keeping up the game on my said lands and estate, all which it is my desire that my Trustees

Provisions in event of Truster being survived by a son—Annuity to Lady Miller of £10,000.

Liferent of London house to Lady Miller, with furniture, &c.

Except 1 Park Lane.

Liferent of silver plate to Lady Miller till son attains twenty-five.

On that event Trustees to pay her £1,000.

Liferent of three sets of jewellery to Lady Miller.

Trustees to hold Manderston and other lands in Berwickshire; And out of income of Truster's estate generally make payment, preferably to annuity, of (1) Public burdens.

(2) Sums necessary to keep up Manderston House and furniture and game.

shall keep up and maintain at their discretion during the subsistence of this Trust; (*third*) In the absolute and uncontrolled discretion of my Trustees, all sums which shall appear to them to be necessary or proper to be expended in keeping up and maintaining the buildings, fences, drains, roads and plantations on the said lands of Manderston and others, and my other heritable estate in good condition and repair, and for erecting any additional buildings, or making any additional fences, drains, roads or plantations, or executing any other works of any kind on the said lands and others which they may consider necessary for the improvement, management, cultivation or letting of the same, or for the working or letting of the stone quarries or minerals therein; and until a son attains the age of twenty-five years to allow my said wife to occupy and possess, free of rent or taxes (both landlord's and tenant's), the said mansion-house of Manderston and furniture and other effects therein, and stables, coach-houses and other offices, policies (including grass parks within the same), gardens and pleasure grounds pertaining thereto, as also the dairy and other buildings at Buxley and the pertinents thereof and whole fittings therein, whether fixed or moveable, and the dairy utensils, with the free use and enjoyment of the game on my said lands and estate of Manderston and others; and during the liferent of my said wife to pay the wages of the gamekeepers, gardeners and foresters employed in connection with the said establishment: (*Sixth*) Upon a son attaining the age of twenty-five years to deliver over to such son the said silver plate and the furniture and plenishing in the said mansion-house of Manderston, then liferented by my said wife as his own absolute property, to discharge any debts or incumbrances that may affect the said lands and estate of Manderston and others, and to convey and make over the said lands and estate of Manderston and others to such son and his heirs and assignees whomsoever: (*Seventh*) To apply the free income, or such part thereof as my Trustees in their absolute and uncontrolled discretion may think expedient, of the residue of my means and estate to or for behoof of my said son until said son attains the age of twenty-five years, and thereafter during the lifetime of my said wife to pay to him the whole of said free income, and upon the death of my said wife and upon my said son attaining the age of twenty-five years, whichever event shall last happen, I direct and appoint my Trustees to make over to my said son the whole of the said residue of my said means and estate, and I provide and declare that during the minority of my said son, and so long as he shall live in family with his mother, my Trustees may pay to her such a sum as they may think necessary for his education and upbringing: AND I further direct and appoint that in the event of my said son dying before he attains the age of twenty-five years, leaving lawful issue, my Trustees shall pay and make over said residue of my means and estate to and among my said son's lawful issue, in such shares and proportions, and subject to such Trusts, conditions and provisions as my said

(3) Sums necessary to keep up buildings, fences, roads, &c., on Manderston estate and other lands.

Lady Miller to occupy Manderston House, gardens, policies, &c., till son attains twenty-five.

Trustees to pay gamekeepers, gardeners and foresters during Lady Miller's liferent.

On son attaining twenty-five Trustees to deliver to him absolutely silver plate and furniture, discharge debts affecting Manderston, and make over estate to him.

Apply income of residue for behoof of son till he attains twenty-five;

after Lady Miller's death, the whole of said income.

On his attaining twenty-five, after Lady Miller's death, residue to be made over to him absolutely.

During his minority Trustees may pay Lady Miller a sum for his education.

Provisions for son dying leaving issue.

son shall appoint by any testamentary writing, and failing such appointment, then equally to and among said issue, and until the eldest of my said son's said issue shall attain the age of twenty-five years complete, the rights and interests of my said wife hereunder shall remain and continue the same as I have hereby directed and appointed they shall be until my said son shall have attained twenty-five years of age: IN THE FIFTH PLACE, In the event of my death survived by a daughter, I direct my Trustees—(*First*) To pay to my said wife an annuity or jointure of £15,000 per annum during all the days of her life, payable half-yearly in advance by equal portions beginning the first payment thereof at the first term of Whitsunday or Martinmas after my death for the half-year succeeding and so forth half-yearly thereafter during her life, and also to make payment to her as soon as they can conveniently do so after my death of the proportion of said annuity corresponding to the period between the date of my decease and the first term of Whitsunday or Martinmas thereafter: (*Second*) To convey and make over to my said wife as her own absolute property the said house No. 45 Grosvenor Square, London, with the stables and appurtenances thereof, presently belonging to and occupied by me, if the same shall belong to me at the time of my death: AND in the event of the same not belonging to me at the time of my death to convey and make over to her as her own absolute property any other house in London, with the stables and appurtenances thereof, which may then belong to and be occupied by me (excepting said mansion-house No. 1 Park Lane) together with the whole household furniture and furnishings of every description therein, including pictures, books, linen and others: (*Third*) To deliver to my said wife in liferent for her liferent use only during her life the whole silver plate belonging to me: (*Fourth*) To deliver to my said wife in liferent for her liferent use only during her life (*first*) the turquoise and diamond set, (*second*) the pearl and diamond set, and (*third*) the emerald and diamond set: AND on the death of my said wife to deliver to such daughter, in the event of her surviving her mother, the said turquoise and diamond set, pearl and diamond set, and emerald and diamond set, as her own absolute property: (*Fifth*) To hold and retain my said lands and estate of Manderston and others, and out of the income of my estate generally (including the said lands and estate of Manderston and others) to make the payments before specified in the event of my death survived by a son, and that preferably to the said annuity or jointure of £15,000, and to allow my said wife during her life to occupy and possess, free of rent and taxes (both landlord's and tenant's), the said mansion-house of Manderston and furniture and other effects therein, and stables, coach-houses and other offices, policies (including grass parks within the same), gardens and pleasure grounds pertaining thereto; as also the dairy and other buildings at Buxley and the pertinents thereof, and whole fittings therein, whether fixed or moveable, with the free use and enjoyment of the game on my

Provisions in event of Truster being survived by daughter—Annuity to Lady Miller of £15,000.

London house and furniture to be made over absolutely to Lady Miller.

Liferent of silver plate.

Liferent of three sets of jewellery to Lady Miller.

On her death to be made over absolutely to daughter.

Manderston to be held by Trustees.

Out of income of estate generally make payments before referred to, preferably to annuity.

Lady Miller to occupy Manderston House and furniture, policies, gardens, &c., free of rent.

Trustees to pay foresters' wages.

said lands and estate of Manderston and others; and I direct my Trustees during the liferent of my said wife to pay the wages of the foresters employed in connection with the said establishment, the wages of the gamekeepers and gardeners to be paid by my said wife, which I think it reasonable she should do, as she will be in receipt of an annuity or jointure of £15,000 per annum: (*Sixth*) Subject always to the provisions hereinbefore contained in favour of my said wife, to apply the balance of free income or such part thereof as my Trustees in their absolute and uncontrolled discretion may think expedient, of the residue of my means and estate to or for behoof of my said daughter until she attains the age of twenty-five years or is married, which while my said daughter resides with her mother may include a suitable payment to her for her education and upbringing, and on my said daughter attaining the age of twenty-five years or being married with the consent of my Trustees, whichever event shall first happen, to make payment to her of the whole income of my means and estate, heritable and moveable, and after her death to convey and make over the residue and remainder of my means and estate to and amongst my said daughter's lawful issue in such shares and proportions, and subject to such trusts, conditions and provisions as my said daughter shall appoint by any testamentary writing, and failing such direction, then equally to and amongst the said issue: BUT during the lifetime of my said wife, my Trustees shall retain in their own hands so much of my estate as in their absolute discretion they shall think necessary or expedient for meeting the foresaid annuity or jointure to my said wife: IN THE SIXTH PLACE, In the event of my death without leaving issue, or in the event of such issue, if a son, dying before attaining the age of twenty-five years without leaving lawful issue, or if a daughter in the event of her death without leaving lawful issue, I direct my Trustees:—(*First*) In the event of my death without leaving a son, or upon the death of such son before attaining the age of twenty-five years and without leaving lawful issue, to make payment to my said wife of an annuity or jointure of £15,000 per annum, that is the annuity or jointure of £10,000 which I have directed my Trustees to pay to my said wife in the event of a son surviving me shall immediately on the death of such son without lawful issue, and if leaving lawful issue, upon the failure of such issue, be increased to £15,000: (*Second*) To deliver to my said wife as her own absolute property the said turquoise and diamond set, the said pearl and diamond set, and the said emerald and diamond set: (*Third*) To convey and make over to my said wife as her own absolute property the house No. 45 Grosvenor Square, London, presently belonging to and occupied by me, if the same shall belong to me at my death, and any other house or houses in London (excepting always the said mansion-house No. 1 Park Lane) which may pertain and belong to me at the time of my death, together with the whole household furniture and plenishing of every description, including pictures, books, linen and others (but

Balance of income of residue to be applied for behoof of daughter till twenty-five or marriage.

Payment to Lady Miller for daughter's education.

On daughter attaining twenty-five or being married income of estate to be paid to her.

On her death fee to be made over to her issue.

During Lady Miller's life part of estate to be retained to meet annuity.

Provisions in event of truster's death without issue, or of son's death before twenty-five without issue, or daughter's death without issue.

Annuity to Lady Miller of £15,000

Legacy to Lady Miller of three sets of jewellery.

Trustees to convey to Lady Miller absolutely London house (except 1 Park Lane), stables and furniture, &c., except silver plate.

excepting silver plate) in said house 45 Grosvenor Square, and said other house or houses, and also to convey and make over to my said wife as her absolute property, any stable or stables, coach-house or coach-houses in London (other than the stable and coach-house, if any appertaining, to the said mansion-house No. 1 Park Lane aforesaid) and the pertinents thereof, and the whole fittings therein, whether fixed or moveable, as the same may belong to me at my death: (*Fourth*) To deliver to my said wife for her liferent use allenarly, the silver plate belonging to me wherever the same may be at the time of my death: (*Fifth*) Upon the death of my said wife to deliver to my brother, John Alexander Miller, Esquire, of Barneyhill, for his liferent use allenarly, the said silver plate of which I have by the preceding purpose given the liferent to my said wife: (*Sixth*) To hold and retain my said lands and estate of Manderston and others, and out of the income of my estate generally (including the said lands and estate of Manderston and others) to make the various payments before provided for in the event of my death leaving a son: (*Seventh*) To allow my said wife to occupy and possess during her lifetime, free of rent or taxes (both landlord's and tenant's), the said mansion-house of Manderston and offices and furniture and other effects therein, and the game on my said lands of Manderston and others, and the other subjects of which I have directed my said wife to have the liferent in the event of my death survived by a daughter: AND I direct my Trustees during the liferent of my said wife to pay the wages of the foresters employed in connection with the said establishment, the wages of the gamekeepers and gardeners to be paid by my said wife: (*Eighth*) On the death of my said wife, or on my death, whichever shall last happen, to allow my brother, the said John Alexander Miller, to occupy and possess during his lifetime, free of rent, said mansion-house of Manderston and furniture and others therein, and the other subjects including the game on my said lands and estate of Manderston, of which I have directed my said wife to have the liferent: BUT it is a condition of the liferent thereof hereby directed to be granted to the said John Alexander Miller that he shall be bound at his own charges and expenses to pay the wages of the servants, including gardeners, foresters, gamekeepers and others employed by him, and generally the whole establishment expenses: (*Ninth*) On the death of my said wife or on my death without leaving issue, whichever event shall happen last, to make payment to the said John Alexander Miller of an annuity of £10,000 sterling during all the days of his life, payable half-yearly in advance by equal portions, beginning the first payment thereof at the first term of Whitsunday or Martinmas that shall occur after the death of the survivor of me and my said wife for the half-year succeeding, and so forth half-yearly thereafter during his life, and also to make payment to him as soon as they can conveniently do so after the death of the survivor of me and my said wife of the proportion of said annuity corresponding

Liferent of silver plate to Lady Miller.

On Lady Miller's death, liferent of silver plate to Sir John A. Miller.

Trustees to hold Manderston, and out of income of estate generally to make payments before provided for in the event of truster leaving a son.

Lady Miller to occupy, free of rent or taxes, Manderston House, furniture and others.

Trustees to pay wages of foresters.

Gamekeepers and gardeners to be paid by Lady Miller.

On Lady Miller's death Sir John A. Miller to have liferent of Manderston House and others.

Sir John to pay all servants and establishment expenses.

On Lady Miller's death, annuity to Sir John A. Miller of £10,000

to the period between the date of the decease of such survivor and the first term of Whitsunday or Martinmas thereafter: (*Tenth*) I authorise and empower my Trustees, in the event of my said wife predeceasing the said John Alexander Miller, if in their absolute and uncontrolled discretion they shall think it expedient, and if there shall then be free income from my estate available for the purpose, to pay to the heir for the time presumptively entitled to succeed to the said lands and estate of Manderston and others under the deed of entail after mentioned, an annual sum of £5,000, or such part thereof as they think fit, during the lifetime of the said John Alexander Miller, or while and so long as they shall think proper: (*Eleventh*) To accumulate the whole surplus income of my estate, heritable and moveable, for the period of twenty-one years after my death, or until the death of the survivor of my said wife and the said John Alexander Miller should they predecease the said period, and in the event of the said John Alexander Miller being alive at the expiry of said period of twenty-one years I direct my Trustees to pay over the whole income of the residue of my means and estate accruing after the expiry of the said period of twenty-one years to him during his life, whom failing, to the heir for the time prospectively entitled to succeed to the said lands and estate of Manderston and others under the said deed of entail: (*Twelfth*) On the death of the survivor of my said wife and the said John Alexander Miller to pay off and discharge all debts, if any, that may then affect my said lands and estate of Manderston and other lands in the County of Berwick belonging to me at the time of my death, and to dispose, convey and make over my said lands and estate of Manderston, and whole other lands situated in the County of Berwick which shall at the date of my decease belong to me by a formal and valid disposition and deed of entail to and in favour of the heirs-male of the body of my brother, the said John Alexander Miller, whom failing, to the heirs-female of his body; whom failing, to my sister, the said Mrs. Amy Elizabeth Miller or Bailie, and the heirs-male of her body, and the heirs-male of the body of such heirs-male; whom failing, to my sister the said Mrs. Evelyn Mary Miller or Hunter, and the heirs-male of her body, and the heirs-male of the body of such heirs-male; whom failing, to the heirs-female of the body of the said Mrs. Amy Elizabeth Miller or Bailie; whom failing, the heirs-female of the body of the said Mrs. Evelyn Mary Miller or Hunter; whom all failing, to my own nearest heirs or assignees whomsoever, it being expressly declared that in all cases the eldest heir-female shall succeed without division, excluding heirs-portioners: AND it is hereby provided that the entail or entails to be executed by my Trustees shall be so framed as to bind the institute as well as the substitute heirs of entail, and shall contain all clauses, conditions and provisions proper and necessary for

In event of Lady Miller predeceasing Sir John, Trustees may pay to heir of Manderston annual sum of £5,000, or such part thereof as they think fit.

Trustees to accumulate surplus income for twenty-one years after Truster's death, or until death of survivor of Lady Miller and Sir John, should they predecease said period.

If Sir John alive at expiry of twenty-one years, Trustees to pay to him whole income of residue accruing thereafter, and failing him to heir of Manderston.

On death of Lady Miller and Sir John A. Miller Trustees to pay off debt affecting Manderston and other lands in Berwickshire.

And dispone same by deed of entail to:
1. heirs-male of body of Sir John, whom failing, heirs-female of his body.
2. Mrs. Bailie, whom failing, heirs-male of her body and the heirs-male of the body of such heirs-male.
3. Mrs. Hunter and heirs-male as above.
4. Heirs-female of body of Mrs. Bailie.
5. Heirs-female of body of Mrs. Hunter.
6. Trusters own heirs or assignees whomsoever.

Eldest heir-female to succeed without division.

Provisions as to entail.

constituting a valid and strict entail according to the law of Scotland, effectual against creditors as well as *inter hæredes*, and shall also contain a provision binding the institute and all the heirs of entail in their order successively respectively to pay and keep down the interest on all debts and sums of money affecting or that may be made to affect the fee of the lands and others thereby disponed or any part thereof, and also all annuities which may affect the said lands and others, and also all public and parochial burdens and other charges properly payable out of the rents of the said lands and others, and never to allow the said interest, annuities, burdens and charges, or any part thereof, to fall into arrear: AND also prohibiting the institute and heirs of entail from allowing any adjudication to pass against the said lands and others or any part thereof, and obliging the institute and heirs of entail so often as any creditor or other person holding any debt or incumbrance affecting or that may be made to affect the said lands and others, or any part thereof, shall call for payment of such debt or incumbrance, or take any step in order to obtain payment thereof, or to bring the said lands and others, or any part thereof, to sale, to pay up such debt or incumbrance or obtain the same transferred to another creditor, all at the expense of the institute or heir of entail in possession for the time: AND the said entail or entails shall also contain an obligation binding the institute and all the heirs of entail to assume, bear and constantly retain in all time after their acquiring or succeeding to the said lands and others the surname of Miller and the arms and designation of Miller of Manderston, and the husband of each of the female heirs of entail who shall succeed to the said entailed lands and others shall be bound and obliged to assume, use, bear and constantly retain said surname and arms in all time after his marriage, if his wife shall then be in possession of the said entailed lands and others, or after the succession thereto shall open to her if his marriage with her shall have previously taken place; and also a provision and declaration that the said lands and others shall not be affectable by or subject to any terce or courtesy to the wife or husband of the institute or of any of the heirs of entail, and an express exclusion of all terces and courtesies: AND the said deed or deeds of entail shall, so far as the terms and conditions thereof are not hereby expressly prescribed, be framed in such terms and under such conditions as my Trustees shall direct and appoint, and shall contain an express clause authorising registration in the register of tailzies, and my trustees shall cause the same to be recorded accordingly in said register, and the title of the institute or heir under the same to be feudalised by registration thereof in the Register of Sasines or otherwise, and till such entail or entails shall have been executed by my Trustees and completed as aforesaid they shall pay over to the person who, if the entail or entails had been executed, would have been for the time entitled to the possession of the lands to be entailed, the free rents and other annual income accruing therefrom, after deduction of all charges and burdens affecting the same, and of all expenses of

Heirs to take surname and arms of Miller of Manderston.

Heir to have liferent use and enjoyment of silver plate and furniture in Manderston House.

management: (*Thirteenth*) I direct and appoint my Trustees upon the death of the survivor of my said wife and the said John Alexander Miller to deliver to the heir in possession for the time of the said lands and estate of Manderston and others, under the foresaid disposition and deed of entail to be executed by my Trustees for his or her liferent use and enjoyment allenarly, the said silver plate and the whole household furniture and others in the said mansion-house of Manderston: AND I hereby provide and declare that no right of property in the said silver plate, household furniture and others shall vest in my said wife or the said John Alexander Miller or the said heirs of entail, but such shall remain in my Trustees, my wish and intention being that the said silver plate and the said household furniture and others in the said mansion-house of Manderston shall, after the death of the survivor of my said wife and the said John Alexander Miller, always be enjoyed by the successive heirs who shall from time to time succeed to my said lands and estate of Manderston and others under the said deed of entail: (*Fourteenth*) In the event of the heir entitled to succeed to my said lands and estate of Manderston and others on the death of the survivor of my said wife and the said John Alexander Miller not having attained the age of twenty-five years, I direct and appoint my Trustees after the death of such survivor to manage and preserve the residue and remainder of my estate and effects, heritable and moveable, real and personal, for the use and behoof of such heir, till an heir of entail in possession of said lands and estate attains the said age of twenty-five years, and to pay over to him or her the income and annual produce thereof, and upon an heir of entail in possession attaining said age, I direct my Trustees to pay, assign and dispone the whole of said residue to him or her absolutely, and on this being done the annuity of £150 which I have directed to be paid to my Trustees during the continuance of the Trust shall cease: AND I provide and declare that the annuity or jointure before provided to my said wife, under whatever purpose of the Trust it may become payable, and the annuity of £10,000 which I have directed to be paid to the said John Alexander Miller shall be paid out of income only, and in the event of the income from my means and estate not being sufficient, after providing for the payments hereinbefore directed by me to be made out of income, to meet the full amount of the said annuity or jointure to my said wife or the said annuity to the said John Alexander Miller, then the same shall be restricted to the amount of the free income of my estate for the time after providing for said payments, my wish and intention being that no part of the said annuity or jointure to my said wife or the said annuity to the said John Alexander Miller shall be paid out of capital: AND I provide and declare that the annuities directed to be paid to my Trustees in the second purpose hereof, the whole legacies directed to be paid and delivered in the third purpose hereof, and the whole provisions herein contained in favour of my said wife, shall be paid

Property in silver plate and furniture to remain in Trustees;

and to be enjoyed by successive heirs.

If heir, on death of Lady Miller and Sir John A. Miller, has not attained twenty-five, residue to be managed and preserved for behoof of such heir until twenty-five.

Thereafter capital to be made over to such heir.

Annuity to Trustees then to cease.

Jointures to Lady Miller and Sir John A. Miller to be paid out of income only.

If income not sufficient to meet annuity in full, latter is to be restricted to income for the time.

Truster's wish being, that capital should not be touched.

Annuities to Trustees and legacies under purpose third, and whole provision in favour of wife to be paid and delivered free of duties.

and delivered free of estate, legacy or other government duties, which estate, legacy or other government duties I direct my Trustees to pay out of the residue of my estate: AND I further provide and declare that the provisions herein contained in favour of my said wife shall be in full satisfaction to her of terce *jus relictæ* and every other claim competent to her against my means and estate in the event of her survivance, and also in full of all she can claim or demand under and in virtue of the Antenuptial Contract of Marriage entered into between us, dated 14th January 1893: AND I further provide and declare that the whole provisions of this settlement, whether capital or interest, so far as they devolve upon females, shall be exclusive of the *jus mariti* and right of administration of any husband whom they have married or may hereafter marry, and that the same shall not be affectable by the debts or deeds of such husbands, or the diligence of their creditors: AND I further provide and declare that the whole of the annuities or annual payments which my Trustees are directed or authorised to pay (with the exception of the said annuity to my Trustees) shall be alimentary, and shall not be liable for the debts or deeds of the said annuitants or the person who may receive the said annual payments, or attachable by the diligence of their creditors, nor shall the same be assignable or capable of anticipation by them: AND I hereby give to my Trustees the fullest powers of administration and management of the whole estate, property and effects falling under this Trust, for the purposes before mentioned: AND I provide and declare that notwithstanding the annuities hereinbefore bequeathed by me to my Trustees, they shall have all the powers, privileges and immunities conferred upon gratuitous Trustees by law, and without prejudice thereto they shall have power to enter upon the possession and management of my said means and estate, and to call, sue for, realise, uplift and discharge the same: Power of sale by public roup or private bargain of the whole or any part of the means and estate, heritable and moveable, hereby conveyed, excepting always the said lands and estate of Manderston and other lands in the County of Berwick directed to be entailed as aforesaid,—so far as such sales may not be contrary to, or in their opinion rendered unnecessary by any instructions given or to be hereafter given by me: Power to my Trustees, if they shall deem it expedient, to retain in their own hands and manage any farms and lands (including Hamilton Stud Farm) which may be in my own occupation at the time of my decease, and to do everything requisite and necessary for so doing, and if they shall deem it desirable either to take advantage of the break in the lease of Hamilton Stud Farm or continue in possession until the expiry thereof: As also power to output and input tenants, and to grant leases of my said lands and estate, and of the mines, minerals and substances therein, or any part or parts thereof upon such terms and conditions, and for payment of such rents or lordships, and for such endurance as they shall think proper, and to grant

Provisions to wife to be in full of legal rights and rights under contract of marriage.

Provisions to females to be exclusive of husband's rights.

Annuities (other than Trustees) to be alimentary.

Trustees powers and privileges—

Notwithstanding annuities Trustees to be gratuitous Trustees.

Enter into possession.

Uplift estate.

Power of sale of estate except Manderston.

Retain farms and lands.

Grant Leases.

Abatements of rents. such temporary abatements of rents as the circumstances of the times or of the tenants shall appear to them to render necessary,

Allowances to tenants. or such allowance to tenants as they shall think fit, in respect of expenditure made or undertaken by such tenants for improvements or repairs on their farms or farm buildings or other possessions:

Grant feus and long leases. As also power to grant feu-charters or to let on long building leases any part of my heritable estate, including the estate of Manderston, for such feu-duties and rents and on such conditions as they may

Thin and cut down woods. think expedient: As also to thin and cut down the woods and plantations growing upon my said lands and estate in such manner as they may think most advisable, and to sell and dispose thereof at

Retain the Truster's investments. pleasure: Power to retain the investments or any of them which may be held by me at the time of my death, whether such investments be of the nature authorised to Trustees by law or not, and as part of my means and estate may be invested in the ordinary stocks or shares of trading companies or in private companies, some of which may be in Russia or elsewhere out of Great Britain,

Including ordinary stocks or shares of trading companies in Russia or elsewhere. I hereby provide and declare that the provisions herein contained shall apply to such ordinary stocks and shares of trading companies and to my interest in trading companies, and it shall be in the power of my Trustees to retain the same until in their absolute discretion they think it expedient to realise the same, any law or

No responsibility for loss. practice to the contrary notwithstanding, and they shall incur no

Powers of investment— responsibility for loss if such may arise thereby: As also power to realise the said investments and invest the trust monies in the purchase of land or the public funds, or upon the securities of any municipal or other corporate or public body in the United Kingdom, or mortgage of landed estate in Great Britain or of the rents thereof, or in the stock of the Bank of England, The British Linen Company Bank and The Royal Bank of Scotland, or on the debentures, debenture or preference stocks of any railway or other company or incorporation in Great Britain paying dividends on its ordinary stock at the time of investing, or in the stock or debentures or other debt of the Government of India, or of any British Colony or Dependency, or in the stock of any railway company in India guaranteed by the Indian Government, or on deposit with any Bank carrying on business in India, or in any of the British Colonies, but having its headquarters in Great Britain, or on the debentures of any such Bank, or of any trading or other Company carrying on business in Great Britain or in any of the British Colonies, or on any other securities or investments, heritable or moveable, real or personal, which in the opinion of my Trustees may be safe and sufficient, although not within their powers as defined by law (but for the safety and sufficiency of which they

Take transfers, &c. shall be in no way responsible), and to take transfers, titles and securities in their own names for the Trust-funds, and to change

Change investments. such investments as often and in such manner as the objects and interests of the Trust may, in the opinion of my Trustees, suggest

Power to appoint factors, law-agents, &c. or require: FURTHER my Trustees shall have power to appoint factors, cashiers, law-agents and attorneys either of their own

number or other fit person or persons for managing the affairs of the Trust, and to allow such factors, cashiers, law-agents and attorneys, whether of their own number or not, reasonable remuneration and the usual professional fees, and generally to do or cause to be done everything necessary for the execution of the Trust hereby created, and for these purposes to grant, subscribe and deliver all deeds requisite and necessary: AND I hereby declare that my Trustees shall nowise be answerable for any neglects, errors or omissions in the management of the Trust, nor for the omissions, errors or neglect of their factors, cashiers, law-agents or attorneys, nor for any investment made by them either as to title or value, nor for the responsibility of the debtors, purchasers or others, with whom my Trustees may transact, but they shall only be bound to act honourably, and shall nowise be liable *singuli in solidum* nor for one another, but each for himself only and for his own personal and actual intromissions or for his own wilful default and no further: AND I declare that the receipts of any of my Trustees for any money payable to them by virtue of these presents shall be good and sufficient discharge for the same, and that the persons to whom such receipts shall be respectively given and all other persons dealing with my Trustees shall not be answerable or accountable for the loss, misapplication or non-application of the money which they may pay to my Trustees, or be in any way bound or concerned to see to the application of such money or to inquire into the necessity or propriety of any act or thing to be done in virtue hereof, or be bound or entitled to see to the execution of any of the Trusts hereof: AND I nominate and appoint my Trustees to be my executors and administrators: AND I hereby appoint my Trustees to be tutors and curators or tutor and curator to any person or persons beneficially interested herein who may be pupils or minors when the succession opens to them, and who may not otherwise have guardians legally appointed: AND I hereby revoke all former wills, codicils or other deeds of a testamentary nature made by me at any time heretofore: AND I reserve to myself my own liferent of the premises, with full power and liberty at any time of my life to alter, innovate or revoke these presents at pleasure in whole or in part: AND I dispense with the delivery hereof: And I consent to registration hereof for preservation:—

Trustees not answerable for errors or omissions;

or for factors, &c.

Not to be liable *singuli in solidum*.

Receipts of any of Trustees to be sufficient.

Persons dealing with Trustees to have no concern with application of money, &c.

Trustees to be executors;

and tutors and curators of minor beneficiaries.

Revocation of former wills.

Reservation of liferent and power to alter.

Registration Clause.

Testing Clause.

IN WITNESS WHEREOF these presents written on this and the seven preceding pages by Hugh Forbes, clerk to the firm of John and Francis Anderson, W.S., Edinburgh, are subscribed by me at London on the 4th day of December 1901, before these witnesses, Henry Adolphus Roberts, secretary of the Cardiff Railway Company, and William John Coysh, clerk to the said Cardiff Railway Company, both at 22A Queen Anne's Gate, Westminster, London, S.W.

HENRY A. ROBERTS, *Witness.* JAMES MILLER.

WILLIAM J. COYSH, *Witness.*

2.—CODICIL by Sir JAMES MILLER, dated 26th December 1901.

I, SIR JAMES MILLER of Manderston, in the County of Berwick, Baronet, with reference to the Trust Disposition and Settlement executed by me, dated 4th December 1901, and particularly to the fifth purpose thereof, in the event of my death survived by a daughter, Do hereby direct my Trustees acting under said Trust Disposition and Settlement, so soon as the liferent right created in favour of my wife of the silver plate and the furniture, and other effects in the mansion-house of Manderston and others shall have lapsed by the death of my said wife, to deliver over to such daughter in liferent for her liferent use only, the whole silver plate belonging to me, and to allow her during her life the possession and enjoyment of the furniture and other effects in and about the mansion-house of Manderston liferented by my said wife, and in all other respects I confirm my said Trust Disposition and Settlement.—IN WITNESS WHEREOF, these presents, written by Robert Christie Dewar, clerk to the firm of John and Francis Anderson, Writers to the Signet, Edinburgh, are subscribed by me at Edinburgh, on the 26th day of December 1901, before these witnesses, John Jordan, residing at 17 Charlotte Square, Edinburgh, and James Wishart Thomson, residing at 5 Rothesay Terrace, Edinburgh.

If survived by daughter, Trustees after death of wife to give daughter liferent of silver plate and of furniture, &c., in Manderston House.

Confirm settlement in other respects.

Testing Clause.

JOHN JORDAN, *Witness.* JAMES MILLER.

JAS. W. THOMSON, *Witness.*

The foregoing Trust Disposition and Settlement and Codicil are both recorded in the Books of Council and Session on 26th January, 1906.

Sir James Miller died at Manderston House on 22nd January, 1906.

The case came before the First Division of the Court of Session (the Lord President and Lords Sands, Blackburn and Morison) on the 12th, 13th and 14th June, 1928, when judgment was reserved. On the 7th July, 1928, judgment was given against the Crown, with expenses (Lord Morison dissenting).

Mr. D. Jamieson, K.C., and Mr. N. A. MacLean appeared as Counsel for the Appellant, and the Solicitor-General (Mr. A. M. MacRobert, K.C.) and Mr. A. N. Skelton for the Crown.

I.—INTERLOCUTOR.

EDINBURGH, 7th July, 1928. The Lords having considered the Stated Case and heard Counsel for the parties, Answer the Questions of Law in the Case both in the Negative: Reverse the determination of the Commissioners: Sustain the appeal and Decern; Find the Appellant entitled to 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).—Under the trust disposition and settlement of the late Sir James Miller of Manderston, his widow (the Appellant) was entitled (*a*) to receive a legacy of £25,000, (*b*) to have leased to her for life a house in Newmarket at a rental of £150 per annum, (*c*) to have delivery made to her of the furniture in the said house and of certain carriages and horses " as her own " absolute property ", (*d*) in the event of there being no issue of her marriage with Sir James—which event happened—to receive a jointure of £15,000 per annum, (*e*) to have conveyed to her Sir James's London residence with the plenishing therein, and the stables, " as her own absolute property ", and (*f*) to have delivery made to her " in liferent for her liferent use only during her life " Sir James's silver plate and certain articles of jewellery. Then, with regard to the lands and estate of Manderston and others, Sir James directed his trustees to " hold and retain " the same, and to make payment out of the income of his whole estate (including said lands and estate) of (1) all feu and teind duties and all public, parochial and local burdens exigible furth of his heritable estate, (2) all repairs and upkeep of the mansion house, offices, gardens, policies, and pleasure grounds of Manderston—including additions to the furniture—and all expenses connected with keeping up the game on the estate, and also with upholding and adding to buildings, fences, roads, plantations and so forth on any of the lands belonging to him, the trustees being given a special discretion with regard to the amount of the expenditure required under these heads. The settlement then proceeds to direct the trustees as follows :— " To allow my said wife to occupy and possess during her lifetime, " free of rent and taxes (both landlord's and tenant's) the said " mansion-house of Manderston and offices and furniture and other " effects therein, and the game on my said lands of Manderston " and others, and the other subjects of which I have directed my " said wife to have the liferent in the event of my death survived " by a daughter " (the reference here is either to the articles of jewellery referred to under (*f*) above, or to the dairy buildings at Buxley, or to both of them—the point is not, however, material to the question in the present case) : " and I direct my trustees " during the liferent of my said wife to pay the wages of the " foresters employed in connection with the said establishment, " the wages of the gamekeepers and gardeners to be paid by my " said wife ".

During the year ended 5th April, 1920, the Appellant resided in the mansion-house of Manderston and enjoyed the advantages connected therewith which are secured to her by the clause just quoted. The question is whether the Appellant is bound, in respect of such residence and enjoyment, to include in the return of her total income from all sources for purposes of Super-tax (1) the

(The Lord President (Clyde).)

annual value of the property of the mansion-house and policy parks estimated in accordance with the Rules applicable to Schedule A of the Income Tax Act, 1918, (2) the annual value of the occupation of the policy parks estimated in accordance with the Rules applicable to Schedule B of the said Act, and (3) the rates on the mansion-house and policy parks paid by the trustees, and the foresters' wages likewise paid by the trustees, *plus* Income Tax on the amounts so paid. The case bears a considerable resemblance to that of *Inland Revenue* v. *Wemyss*(1), 1924 S.C. 284: but some at least of the arguments now presented for the Inland Revenue are new.

The provisions of the Statute on which the question turns are as follows:—By Sections 4 and 5 (1) in Part II of the Income Tax Act, 1918, Super-tax is payable on the total income of any individual from all sources, estimated as his total income from all sources would be estimated for purposes of exemption or abatement from Income Tax. The reference is particularly to Sections 27 and 19 in Part III of the Act. By Section 27 a claimant for exemption and abatement must set forth "all the particular sources from "which his income arises, and the particular amount arising from "each source"; and by Section 19 it is provided that "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 further that "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".

The Special Commissioners have found that the Appellant had what they called a "liferent use" of the mansion-house and policy parks, and they regard that finding as a conclusive ground for treating the annual value (as per Schedule A) of the mansion-house and policy parks as being income of the Appellant. It appears from the arguments presented to us for the Inland Revenue that the soundness of the reasoning, on which this conclusion turns, depends, in the first instance, on the meaning and effect of the judgment of the House of Lords in *Johnstone* v. *Mackenzie's Trustees*, 1912 S.C. (H.L.) 106; [1912] A.C. 743.

I do not think it could be disputed that, if the Appellant's "liferent use" of the mansion-house and policy parks had amounted to what is known in the Law of Scotland as a "proper" liferent of those heritages, their annual value (as per Schedule A) would be

(1) 8 T.C. 551.

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properly reckoned as income of hers. I did not understand either party to question the correctness of what was said in *Inland Revenue* v. *Wemyss*(1) to the effect that the Income Tax Act, 1918, " regards that person as having 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 "; and that therefore " 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 "

But the word " liferent " and such expressions as " liferent " use " are applied by Scottish lawyers and laymen alike to a wide variety of rights limited (as regards their duration) by life. Dealing with heritable subjects, those rights fall broadly under two classes :—(1) liferents of the heritages themselves, (2) liferents of a beneficiary interest of some kind in or out of heritages. The former of these classes of rights for life—i.e., liferents of the heritages themselves—are created directly by deed of constitution (including conveyances in conjunct fee or in conjunct fee and liferent), or by way of regrant (or reservation as it is called) in a deed granted primarily for other purposes, or they are legal rights conferred directly by the Law of Scotland on certain persons, such as terce and courtesy. The latter of these classes of rights, i.e., liferents of a beneficiary interest in heritages—are conferred indirectly through the medium of a continuing trust set up by the grantor for the purpose of limiting and securing the beneficiary interest on the one hand, and of protecting and preserving the property for the fiar or other person having the ultimate right on the other hand. The beneficiary interest thus conferred on the liferenter may be limited to a right merely to receive from the trustees the annual proceeds arising from the heritages, or it may include right to be given the natural possession of them, and one of the most familiar instances of such a beneficiary interest is provided by the case in which—as in the present case—the interest consists in a right of personal residence in a dwelling-house and its pertinents.

But the vital distinction between the two classes of rights for the purposes of the present case is this. The " proper " liferenter is the " *interim dominus* or proprietor for life " of the lands (Erskine, Inst. II, IX, 41), and (as such) is immediately entitled to receive the rents from the tenants therein (whose " landlord " he truly is), and he is also entitled to let the lands for the duration of his own life. If he wishes to let for a fixed term which may outlast his own life, he must obtain the concurrence of the fiar. But, in the case

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

(The Lord President (Clyde).)

of the creation of a beneficiary interest in the lands under a continuing trust, the liferenter of such interest is not *dominus* of the lands at all. He may, as I have said, be given the right to reside in a mansion-house and to enjoy the privileges appertinent thereto, or he may even be given the right to the natural possession of unlet lands; but the tenants in the lands (if they are let) are not his tenants, but tenants of the trustees who are the sole *domini* of the lands and who, accordingly, have the sole right and title to let them, and are exclusively entitled to the immediate receipt of the rents, whatever obligation they may be under to pay or account for them to the liferenter of the beneficiary interest. In short, such a liferenter has, at best, no competency to exercise the functions of a person having the ownership of land, unless indeed he may be said to do so through the intervention of the trustee (see McLaren on Wills and Succession, 3rd Ed., Vol. I, p. 615, sect. 1118).

Now it is just at this point that the argument founded on *Johnstone* v. *Mackenzie's Trustees* comes in.

All that was actually decided in that case was that a widow to whom her husband's testamentary trustees were directed to give, during all the days of her life, the " liferent use and enjoyment " of his dwelling-house (together with the plenishing therein) was liable for feu-duty, proprietor's taxes, and landlord's repairs without relief against the trustees. But the grounds on which that decision was reached were (1) that the relation of the widow to a dwelling-house to the " liferent use and enjoyment " of which she was entitled at the hands of her husband's trustees was—or at least was indistinguishable from—the relation of a proper liferenter to the heritages liferented by him; and (2) that it was immaterial that the use and enjoyment of the dwelling-house were provided to her only indirectly through the medium of the husband's trust. Now, the Inland Revenue argues that there can be no substantial difference between the rights conferred by a direction to " give my widow the " liferent use and enjoyment " of a dwelling-house and pertinents (as in *Johnstone's* case) and those conferred by a direction to " allow " my widow to occupy and possess " a mansion-house and pertinents (as in the present case). I shall have a word to say about that shortly. But the next stage of the argument is that if the position of a widow for whom a place of residence is provided in these terms is indistinguishable from that of a proper liferenter *quoad* the obligations of ownership, it must be held to be equally indistinguishable *quoad* the right to the immediate receipt of any annual value the heritages may possess, and to in-put and out-put tenants therein. The Appellant is thus—according to the argument —shewn to be the person pointed out in *Inland Revenue* v. *Wemyss* as having the " ownership " of the mansion-house and policy parks, the annual value of which is accordingly part of her income. Counsel for the Inland Revenue did not shrink from maintaining

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that the Appellant was entitled to let the mansion-house and policy parks, if she did not choose to reside there herself, and to receive for her own use any rent paid for them by a tenant.

This argument was perhaps adumbrated, but was not developed in *Inland Revenue* v. *Wemyss*. It loses none of its force, however, when the authorities on which the judgment in *Johnstone* v. *Mackenzie's Trustees* is based are examined. They are wholly drawn from chapters of the Law of Scotland dealing with proper liferents, and none other. The chapters in question are Erskine's Institutes, II, ix, 56–58; Bell's Principles (10th Ed.), Sections 1037–1070; More's Notes on Stair's Institutes, Note V, pp. ccxii–ccxx; and Broun's Supplement, III, 33. In every one of these chapters the liability of a proper liferenter for the burdens of ownership is correlated with the proprietary character of the proper liferenter's right to the lands themselves—to receive the rents from tenants—to in-put and out-put tenants in the lands. Moreover, it is relevant to observe that, prior to the decision in *Johnstone* v. *Mackenzie's Trustees*, the question of the liability—for the burdens of ownership—of the liferenter of a beneficiary interest in a residence, as such, had always been regarded in this Court from the angle of considering the nature and extent of the interest conferred. I refer to the cases of *Clark & Others*, 1871, 9 M. 435; *Bayne's Trs.* v. *Bayne* 1894, 22 R. 26—in which last mentioned case Lord Young's doubts were founded on the view that the testator's will implied a direction to convey the dwelling-house to the widow in liferent, thus constituting her (had it been granted) a proper liferenter, and entitling her to let the house in that capacity; *Cathcart's Trustees* v. *Allardice*, 1899, 2 F. 326; and *Smart's Trustee* v. *Smart's Trustees*, 1912 S.C. 87. But these cases were unfavourably criticised in the House of Lords in *Johnstone* v. *Mackenzie's Trustees*, if not actually over-ruled.

The recent case of *Donaldson's Executors* v. *Inland Revenue*[1] in this Division raised the same point—although under very different circumstances—as that which is raised by the Inland Revenue's argument in the present appeal. The case was decided upon certain marked specialities in the trust settlement and, while I did not dissent from the judgment, I expressed doubt both with regard to the supposed scope of the decision in *Johnstone* v. *Mackenzie's Trustees*, and with regard to the effect which should be given to the specialities in question. I do not think my doubtful concurrence in the judgment arrived at in *Donaldson's Executors* v. *Inland Revenue* debars me from now stating my own opinion upon the former point.

It will be observed, in the first place, that the judgment in *Johnstone* v. *Mackenzie's Trustees* nowhere affirms in so many

[1] 13 T.C. 461.

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words that the widow in that case was a proper liferentrix *quoad omnia*. The question whether she, and not the trustees, had the right or title to let the dwelling-house, in the event of the widow preferring to reside elsewhere, did not arise, and I respectfully doubt if it was present to the minds of the noble Lords who took part in the judgment. Anyhow—and whatever be the force of the logical inference we are now asked to draw from the grounds of the judgment—no decision was pronounced on that question. In the second place, I confess myself unable to obliterate from my mind the radical distinction in this matter between a proper liferent of the heritages themselves and the liferent of a beneficiary interest in or out of them—such as a right of personal residence in a dwelling-house. I refer to the earlier part of this opinion in which I have already explained that difference. The trustees, and not the Appellant, have the right and title to let the mansion-house and policy parks, should the Appellant prefer to take up her residence elsewhere; and it is thus in my opinion impossible to regard the annual value of those heritages as forming income of the Appellant, " arising from the ownership of lands ".

If I am mistaken in my interpretation of the judgment in *Johnstone* v. *Mackenzie's Trustees*, I should still think it inapposite to the present case. Much stress was laid in *Johnstone* on the employment of the words " liferent use and enjoyment ". Those words (which were also used in *Donaldson's Executors* v. *Inland Revenue*) are absent from Sir James Miller's direction with regard to the mansion-house and policy parks. The settlor makes ample provision for the upkeep and improvement of the mansion-house and the pertinents usually associated with a country gentleman's family residence, and he directs his trustees (who are to hold and retain them) to " allow my said wife to occupy and possess " them rent free and tax free. The intention of this seems to be as clear as it is simple; through the medium of his trustees, the settlor gave his wife leave to live at Manderston as long as she pleased so to do. I can see in this no higher beneficiary interest than a right or privilege of personal residence. In a later part of the settlement, the trustees are specially empowered to " out-put and in-put " tenants and to grant leases of (the settlor's) lands and estate ". The Appellant is neither directly nor indirectly given any competing right to let either the family residence or any of its pertinents. In *Johnstone* v. *Mackenzie's Trustees* there was also the peculiarity that, in the event of the trustees selling the house, the widow was to be entitled to the annual proceeds of the price for life. Reading Sir James's settlement as a whole, I am unable to construe it as conferring on the Appellant anything more than the right or privilege of personal residence at Manderston. If this is sound, then the argument of the Inland Revenue on the effect of *Johnstone's* case fails, whatever may be its merits otherwise.

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Dealing still with " income arising from the ownership of " lands ", the Inland Revenue presented to us a supplementary argument which was evidently not put before the Special Commissioners, for there is no trace of it in the Case. As the Appellant did not object, and as the Inland Revenue made no secret of their desire to submit the whole question for decision by the House of Lords, we heard parties on this supplementary argument, which was to the following effect :—(*First*) In respect to her residence in. and enjoyment of, the mansion-house and policy parks under and in terms of her deceased husband's settlement, the Appellant was " occupier " of the said mansion-house and policy parks within the meaning of the Rules of Nos. VII and VIII of Schedule A of the Income Tax Act, 1918, and was therefore liable (in accordance with Rule 1 of No. VII) to be charged with, and to pay, Income Tax on the annual value of the mansion-house and policy parks under Schedule A. (*Second*) Inasmuch as the Appellant was not a " tenant-occupier " of the said mansion-house and policy parks within the meaning of Rule 1 of No. VIII, the statutory machinery therein provided, whereby a tenant occupier throws the incidence of the tax on the owner, is not available to her; and she herself is thus shown to be the only, and the proper, person to bear Income Tax on the annual value of the property of the mansion-house and policy parks. (*Third*) Therefore the Income Tax Act, 1918, must be held to deem the annual value of the said property to be " income " (of the Appellant) " arising from the " ownership of lands ", and such annual value must accordingly be included as an item of her total income from all sources for purposes of Super-tax.

It is a fundamental and, I think, a fatal objection to this argument that it seeks to add, for the purposes of the Income Tax Act, 1918, to the actual income which the tax-payer puts, or could (if he pleases) put, into his pocket a fictional or supposititious income, which does not reach, and could not possibly reach, that destination. The Income Tax Act nowhere defines " income ", and it follows that this word—which limits and controls the scope of the entire Income Tax system—must be interpreted in its plain and ordinary meaning. If that be done, fictional or supposititious contributions to the taxpayer's income must be ruled out of consideration. For it is not to be inferred, without clear words for the purpose, that a taxing Act which selects the taxpayer's income as the measure of his liability includes in that measure anything more, or other, than the income actually received or receivable by him—least of all income which is only attributed to him by a fiction. The Courts, including particularly the Court of last resort, have so far uniformly endeavoured to construe the word " income " consistently with those principles. One of the most recent examples is to be found

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in the case of *Brown* v. *National Provident Institution*(1), [1921] 2 A.C. 222. It is nothing to the point that the Act provides in most of the Schedules more or less artificial modes of estimating the amount of the taxpayer's income, once it is ascertained that he did receive such income. Nor is it anything to the point under which of the Schedules the taxpayer may be liable to be assessed. For the tax under Schedule A is just as much a tax on income as the tax under any other Schedule (*London County Council* v. *Attorney-General*(2), [1901] A.C. see especially pp. 35–36 and 45). It is perhaps not irrelevant to bear in mind that claims for exemption and abatement, based on a disclosure of the taxpayer's total income from all sources, have been a feature of the Income Tax system for three quarters of a century at least; and, if the argument of the Inland Revenue is well founded, the Income Tax Acts must be credited with having all along contained the design of artificially loading the income of a claimant (entitled similarly with the Appellant to the right or privilege of personal residence in a dwelling-house) with the same fictional or supposititious contribution as is alleged by the Inland Revenue in the present case to arise to the Appellant's income. The disclosure of the taxpayer's total income from all sources is the same whether the object of the disclosure be to ascertain whether it falls within the limits of exemption from Income Tax or within the limits of liability to Super-tax.

Apart from these general considerations the argument seems to me to be vulnerable at almost every stage.

The problem in the case is to ascertain whether the " property in " the mansion-house and policy parks (in respect whereof Income Tax under Schedule A is charged by the Act) is one of the " particular sources " from which the Appellant's income arises (Section 27). If the views expressed in the earlier part of this opinion are correct, it seems clear that the " property in " those heritages is not within the " ownership " of the Appellant; and again, if plain words are to be given their natural meaning, it would appear necessarily to follow that the " property in " the mansion-house and policy parks is not among the " particular sources " contributory to her total income.

But the argument ignores this difficulty, and turns on the alleged chargeability and liability of the Appellant—*qua* " occupier " of the mansion-house and policy parks within the meaning of Rules 1 and 2 of No. VII of Schedule A—for Income Tax under that Schedule on the annual value of those heritages. I shall assume meantime that the Appellant is " occupier " in the sense contended for.

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(1) 8 T.C. 57. (2) 4 T.C. 265, at pp. 293–4 and 301.

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The determination of the person chargeable under Schedule A depends partly on the nature of the heritages on the annual value of which the tax is payable, and partly on circumstances. Thus, in the case of manors and royalties and all dues and casual profits (not being rents or other annual payments reserved) both chargeability and liability rest on the lord of the manor or the person renting the same (No. II, Rule 5). So, in the case of fines in consideration of the demise of lands, chargeability and liability rest on the receiver of the fines (No. II, Rule 6). In the case of all houses and lands let to tenants, of less than £10 annual value, chargeability and liability rest on the owner or immediate lessor (No. VII, Rule 8). Further, in the case of any lands, houses or buildings whatsoever, the landlord or immediate lessor is the person chargeable and liable, if (on a written request by him) the Commissioners think fit to deal with him as the "occupier" (No. VII, Rule 9). In other cases, the general rule is that the tax is to be charged on the occupier (whether owner or not), and that the occupier is to throw the incidence of the tax on the proper shoulders —those namely of the person who has the "ownership" of the heritage, and who (as such) is entitled to receive the annual value thereof as income—by deducting the amount of the tax from the rent or other annual return (No. VIII, Rule 1 and proviso and Rules 2, 3, 8, 9 and 10). As I understand, the object of all these Rules is to promote convenience in the collection of the tax.

Now, the broad proposition maintained on behalf of the Inland Revenue is that when the tax happens to be chargeable on and payable by the owner (whether or not he is in occupation), the annual value of the heritages is part of the owner's income; but, when the tax happens to be chargeable on and payable by the occupier (not being also the owner) it becomes part of the occupier's income. I have called this the broad proposition; because it was admitted, in the course of the discussion, that if an occupier successfully used his right to transfer the incidence of the tax on to the shoulders of the owner by deduction from the rent or other annual payment then the annual value of the heritages ceased to be part of the occupier's income and reverted to the position of being part of the owner's income. If this is so, the question whether the annual value is part of the owner's income on the one hand, or of the occupier's income on the other hand, depends, not merely on which of them is potentially or primarily chargeable, but rather on which of them actually turns out to bear the burden of the tax. Suppose an agricultural tenant, in the last year of his lease, omits to deduct the Schedule A tax from his rent, he has to submit to bear his landlord's burden on the footing that he has inadvertently, but irrevocably, made a gift to the landlord of the amount of the tax (see *Denby* v. *Moore*, 1817, 1 B. & Ald. 123); and the result appears to be—according to the argument—that the tenant's

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income in that year (for purposes of abatement, exemption, and Super-tax alike) is actually increased by the amount of the annual value of his farm which he paid in the form of rent to his landlord. Again, suppose the written request (under No. VII, Rule 9) of a landlord or immediate lessor to be assessed and charged as if he were " occupier " is granted by the Commissioners in one year and refused in the next, the annual value of the heritages concerned would—according to the argument—be income of the landlord or immediate lessor in the first year, but would be converted into income of the actual occupier in the next. The Case does not disclose whether in the year ending 5th April, 1920, the tax was charged on the Appellant or on her husband's trustees; but we were informed from the Bar that the tax had in some years been charged on the trustees and in others on the Appellant. I understand that it was charged in the year in question on the trustees. In these circumstances, the annual value of the mansion-house and policy parks is shown—according to the argument—to have been, in some years, income of the trustees, and in others income of the Appellant.

I think the fallacy which lurks behind all these anomalies consists in the assumption that the question of *whose the income is*, depends either (1) on the primary chargeability of the owner on the one hand or of the occupier on the other, or (2) on the fact that the statutory provisions for effectuating relief against the owner do not apply in the particular circumstances of a given occupier, or (3) on the accident that the person primarily chargeable has not effectually used the right of relief provided to him. In my opinion the question can only be answered by ascertaining the person who receives or is entitled to receive any annual value the heritages may possess; and that person in the present case is obviously not the Appellant but the body of trustees under Sir James Miller's settlement. The counter proposition, that the circumstance of primary chargeability, or of chargeability without effectual relief, makes the annual value " income arising (to the " person so chargeable or charged) from the ownership of land " appears to me to involve a *non sequitur*. It is in vain, on this matter, to recur to the idea which found favour with the majority of this Court in the case of *Tennant* v. *Smith*(1), 1891, 18 R. 428 —I mean the idea that the occupation of a house rent-free is income. That idea was repudiated by all the noble Lords who took part in the judgment upon that case in the House of Lords, 1892, 19 R. (H.L.) 1; [1892] A.C. 150; and, as was there pointed out, it is nothing to the purpose that a person may derive a material advantage from the right to reside in a house rent-free and tax-free, so long as his possession is not such as might be used for purposes

(1) 3 T.C. 158.

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of profit (*per* Lord Halsbury), or to bring in something which could be reckoned up as a receipt or properly described as income (*per* Lord Macnaghten), or such as might in some way be converted by the possessor into money or money's worth (*per* Lord Field).

If the considerations above discussed are relevant and well founded, they are enough to dispose of the supplementary argument presented on behalf of the Inland Revenue.

But it is only right that I should add that, in my opinion, the body of Sir James Miller's trustees—and not the Appellant—is the "occupier" of the mansion-house and policy parks within the meaning of No. VII of Schedule A, Rules 1 and 2. The trustees, and not the Appellant, are occupiers of those heritages, and have the right to "occupy" and "use" them for every possible purpose including that of allowing to the Appellant the privilege of personal residence therein. The trustees are indeed admittedly entitled to the occupation and use of the mansion-house and policy parks for the purposes (1) of putting and keeping them in such repair as they think proper and necessary, (2) of making such additions to the furniture and other effects in the mansion-house as they in their discretion are pleased to make, (3) of taking such measures as they in their discretion think advisable to keep up the game on the estate generally, (4) of keeping up and adding to any buildings, fences, drains, roads, or plantations, or of "executing any other works "of any kind on the said lands and others", including the mansion-house and policy parks, as well as the dairy and other buildings at Buxley, "which they may consider necessary for the improve-"ment, management, or cultivation, or letting of the same, or for "the working or letting of the stone quarries or minerals therein". The Appellant has, no doubt, to maintain her own domestic establishment so long as she lives at Manderston, and she has to pay the wages of any gardeners and gamekeepers she employs. But that is all. She has no power of restraint on the exercise by the trustees of the "absolute and uncontrolled "discretion" in all other matters affecting the occupation and use of the mansion-house, policy parks, and dairy which the settlor conferred upon his trustees. The identification of the person whom the Act designates as the "occupier" for the purposes of Schedule A, is not in my opinion much aided by the provision of Rule 2 of No. VII which requires every person who has the "use" of the heritages to be deemed the "occupier" thereof. It is I think settled that an occupation or use which is merely derivative and subordinate is the occupation and use not of the physical occupier, but of the owner, in the sense of the Rule. Thus in *Bent* v. *Roberts*[1], 1877, 3 Ex. Div. 66, a police superintendent who occupied and used a police station as his dwelling-place was held not to be an occupier or user within the meaning of

[1] 1 T.C. 199.

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Schedule A. In *Tennant* v. *Smith* the Bank, and not the Bank agent who occupied and used the house provided to him by the Bank for residential purposes, was regarded as the true occupier. In that case Lord Watson expressed " very serious doubt whether, accord- " ing to the scheme of the Income Tax Acts, it was intended to " assess in any shape mere residence, either in performance of duty " to the actual occupant, or by licence from him " (1), 19 R. (H.L.) p. 6; [1892] A.C. at p. 159. If the owner of an estate gave leave to a relative or other person to reside in a house on his estate, either at will, or for a fixed term, or until the expiry of a notice of termination of the leave, it appears to me that the owner and not the person to whom the leave was given would be the true occupier and user of the premises, just as much as in the case in which the owner gives the physical occupation and use of a house to a factor or estate servant. In both cases, the occupation and use is truly for the owner's purposes, whether the motive is merely beneficent or not. In the present case, Sir James gave—through the medium of his trust—leave to the Appellant to live at Manderston so long as she chose. In *Corke* v. *Fry*(2), 1895, 22 R. 422, a minister of the Church of Scotland was held to be the occupier of his manse within the meaning of Schedule A, but this was on the ground that he was entitled to turn the house to a profitable use by letting it. The Appellant is not in a position to let either the mansion-house or the policy parks, or the dairy. I think the right or privilege conferred on her to reside at Manderston on the terms prescribed by her late husband is a right or privilege derivative from and subordinate to the occupancy and use of the mansion-house and pertinents by the trustees for the purposes of Sir James Miller's settlement.

It remains to deal with the income said to arise to the Appellant " from the occupation of lands " (namely the policy parks), in respect of which the Inland Revenue contends she is chargeable to Income Tax under Schedule B, and the assessable value of which (estimated in accordance with the Rules of that Schedule) is therefore said to constitute part of her total income from all sources. The Appellant enjoyed these subjects as a pertinent of her right or privilege to reside at Manderston. She was not in a position to let them, or turn them to any profitable account so as to produce receipts or income, any more than the mansion-house itself. They may probably be useful to her in connection with the dairy. But the class of occupation taxable under Schedule B is occupation of a profitable kind, and none other; and it follows that the Appellant cannot be held to have been in receipt of income " arising from the " occupation of lands " in respect of the policy parks.

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(1) 3 T.C. at p. 167. (2) 3 T.C. 335.

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With regard to the payments of rates and taxes by the trustees, I apprehend that these payments must follow the fate of the main questions discussed above. They were attached to the beneficiary liferent interest conferred on the Appellant. If that interest is held to be a source of income to her, then the payments in question enhanced its assessable value; but if not, not. If I am right on the main questions they are no more part of the Appellant's total income than was her right to reside in the mansion-house and enjoy it along with the policy parks.

I am for answering the questions put to us as follows:—(1) in the negative, (2) also in the negative.

Lord Sands.—This case is concerned with a claim to Super-tax in respect of the life interest of the Appellant in the mansion-house of Manderston. I use the expression "life interest" advisedly. Interests limited to life are familiar to our jurisprudence as I daresay to most systems. These may be of many varieties and subject to many limitations. So long as we use the generic term "life "interest" no difficulty arises. But a certain confusion has been occasioned because we have fallen into the custom of using in a generic sense as including all forms of life interest, a term, viz:—"liferent", originally used to designate a particular kind of life interest. This confusion is of old standing. Erskine seems to have been conscious of it for he uses the expression a "proper liferent". The characteristics of a liferent—or what lawyers have been driven to call a "proper liferent"—were clearly defined. Subject to limitation to the period of his own life and also subject to the condition *salva rerum substantia*, the liferenter was virtually in the position of an ordinary proprietor. He had an active title to the lands, he could output and input tenants, granting leases enduring to the end of his own life in his own name. Subject to the condition *salva rerum substantia* he had complete freedom as to the management of the property liferented. On the other hand, the liferenter of houses was bound to keep them in repair; liferenters were subject to all the parochial and public burdens, including the land tax and—a quaint rule—the liferenter was bound to aliment the fiar if he had no other means of subsistence. Such were some of the incidents of a liferent—a "proper liferent". Under the modern conditions of a generally prevalent system of trust administration in the case of estates which are not to be immediately conveyed to fiars, proper liferents are now comparatively rare. The property subject to the life interest is generally held or both held and administered by trustees. It is obvious that a direction to trustees to hold and to give to somebody the liferent and enjoyment of some property does not create a proper liferent in the old sense. To effect this it would be necessary to direct the trustees to convey the property to the life beneficiary in liferent. The question accordingly has from time to

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time arisen, viz :—In the absence of express directions of the truster which of the characteristics and incidents of the proper liferent adhere to a life interest under a trust created by some such language as I have indicated? In view of the history of the matter it is understandable how the law applicable to proper liferents has sometimes been invoked. *Esto* that there is no positive rule of law as to whether a beneficiary in the enjoyment of a certain life interest under a trust is or is not to be held liable as in a question with the trust estate in such an obligation as payment of the rates upon the property in which he has the life interest, it has not been deemed illegitimate to invoke the analogy of the rule of law applicable in the case of the technically different but, *quoad* enjoyment, very similar right of proper liferent.

We are concerned, not with that question generally in this case, but solely with the question whether the life beneficiary has the right to make the subject of the life interest a source of benefit by letting it. It is conceded that if this be the situation, the beneficiary must include the annual value of the subjects of the life interest in the income assessable to Super-tax. I do not think that the solution is to be found by attempting to answer the question —Is this a liferent? As I have already attempted to shew, it is not a proper liferent in the sense of the old law. Once we get away from this the expression "liferent" is ambulatory and may, as popularly used, include many different kinds of life interests. The question here is whether the interest created is a life interest to which, in view of the provisions of the settlement, the law necessarily attaches the incident that the person who enjoys that interest may let the subjects for gain.

In the case of *Johnstone* v. *Mackenzie's Trustees*, 1911 S.C. 321; 1912 S.C. (H.L.) 106, it was found that when trustees were directed to give to the widow "during all the days of her life the "liferent use and enjoyment of my dwelling-house", in default of any qualifying provision the widow was in a position analogous to that of a proper liferenter, in so far that she was liable for the rates and taxes. In the case of *Donaldson's Executors* v. *Inland Revenue*(1), where there was a like direction and no clearly inconsistent directions, we came with some hesitation to the conclusion that the case was indistinguishable from that of *Johnstone*. In this case instead of "give during all the days of her life the liferent use "and enjoyment of my dwelling-house", we find "to allow my "said wife to occupy and possess during her lifetime free of rent "and taxes (both landlord's and tenant's) the said mansion-house "of Manderston". Moreover, the scope of the testament and the ancillary provisions are different and much more complicated

(1) 13 T.C. 461.

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than in *Johnstone's* case. Accordingly I conceive we are at liberty to examine the settlement and form our own conclusion whether, as a matter of testamentary intention, as indicated by the whole terms of the settlement, the testator must be held to have directed that his widow shall enjoy the right of turning the mansion-house into a source of profit or gain by letting it. Now when I read this settlement at the outset of the hearing before my mind was bemused by an examination of the many authorities which were cited to us, I confess that I had no doubt as to the intention the testator had indicated, viz :—that during the minority of a son or, in default of a son, during her survivance, the widow, as the person recognised for the time being as the head of the family, should, if she desired to reside at Manderston, be allowed to do so and that the mansion and appurtenances should be maintained for her and that no other or higher right as regards these subjects was conferred upon her. Reperusal in the light of the authorities has not shaken in any way my conviction that this was the intention of the testator. I confess, however, that it has induced some difficulty in my mind upon the question whether the testator has effectually indicated this intention. But these doubts do not constrain me to depart from my original impression. I do not think it necessary to enlarge this opinion by any analysis of the provisions of the testament as that has been made in the opinion which Lord Blackburn is about to read. It seems difficult to hold that it is within the scope of the directions in favour of Lady Miller in regard to Manderston, that on the death of her husband she might have said to the trustees : " I have no intention of residing at " Manderston, but I am going to let it. You must hand it over to " me for that purpose and carry out all the particular directions " in regard to maintenance, etc., contained in the settlement ". There are two considerations which I think it right to notice as much stress was laid upon them. The testator more than once refers incidentally to the right conferred upon his wife as a " liferent ". But I do not attach much importance to this. The word does not occur in the grant of the right, a consideration to which Lord Shaw in *Johnstone* attaches importance. But further, as I have already pointed out, the word " liferent " is ambulatory both in popular and legal usage and is used generally of all manner and degrees of life interest. Another special consideration upon which the Revenue rely is that certain policy parks and the shootings are included in the general life interest. The life interest is a *unum quid*, and it is argued that it could hardly have been contemplated that if the lady, although resident at Manderston, did not desire to keep cows she might not let the grass or might not let the shootings if not herself a follower of the chase. This may perhaps be so. But in my view these subjects are ancillary and subordinate and are in a like position to the rent which the

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Free Church Minister in the case of *Sutherland*(1), 21 R. 753, might have earned had he let the manse during the holiday months. No doubt if Lady Miller was entitled to and did let the shootings or the parks, the profits and gains would be assessable against her as income and would fall to be included for purposes of Super-tax.

Accordingly I do not differ from the conclusion at which your Lordship in the Chair has arrived, that the case for the Revenue fails in so far as it depends upon the argument that the Appellant's right of enjoyment of Manderston included a right to let it for gain rather than to occupy it personally.

The Revenue present a second and alternative argument, which may, I think, be summarised as follows :—*Esto* that the Appellant had no right to sublet, she was none the less the occupier of Manderston and as such was chargeable with tax under Schedule A in respect of the annual value of the property, and that not vicariously or merely as a collector. Accordingly, in view of the provisions in regard to Super-tax, she is bound to bring that annual value into account.

Super-tax is payable upon an amount equal to the total income of the previous year estimated in the same manner as for the purposes of Income Tax, and there is a provision as to the finality of the Income Tax assessment. It must be taken that the provision both in regard to mode of estimate and finality refer not to Income Tax which was assessed upon the payer vicariously or for the purposes of collection only—but to Income Tax which was estimated and assessed as being tax for which the payer was liable without any right of relief under the Statute.

The first question which arises under this branch of the argument is whether the Appellant was immediately chargeable to Income Tax in the year in question " as the occupier for the time " being " of Manderston in terms of Schedule A, Rule 1 of No. VII. I considered a similar question in the case of *Wemyss*(2). I need not recapitulate all I there said. I shall only briefly indicate my view. In my view the occupier within the meaning of the Rule is the person whom the tax-collector finds in the beneficial enjoyment of the property according to its nature on his own account and not as an employee or caretaker. In the case of a country mansion, it is the country gentleman residing there in the ordinary way with his household. In the case of a farmer it is the farmer who cultivates the ground and sells the corn and cattle on his own behalf. Prohibitions as to the manner of use do not, in my view, make any difference unless these prohibitions involve

(1) M'Dougall *v.* Sutherland, 3 T.C. 261.

(2) Commissioners of Inland Revenue *v.* Wemyss, 8 T.C. 551.

(Lord Sands.)

reservations entitling the owner or other person imposing them to exercise certain rights. Occupation infers some positive attributes, and mere prohibitions without reservations confer no positive attributes. The tenant of a grass park is not less the occupier because he is not at liberty to plough it up, or the tenant of a house because he is prohibited from taking in lodgers. If a proprietor in letting a park for grazing were to reserve the right to use the field himself as a sports field, a question might arise as to who was the occupier. But no question could possibly arise if the proprietor, without reserving any right to himself, prohibited the use of the field by the tenant for sports purposes.

Accordingly, in the case of *Wemyss*, I was of opinion that Captain Wemyss was immediately chargeable as occupier. That view, however, did not commend itself to the other members of the Court, and I was content to state my doubts and not to follow out the argument to a dissent, partly out of deference to the opinion of my colleagues and partly because I thought that the line of reasoning had not been fully developed in the discussion.

The present case differs in some of its details from that of *Wemyss*, for the restrictions are less onerous. But I do not think that this affects the argument. Rule 2 of No. VII of Schedule A provides : " Every person having the use of any lands or tenements " shall be deemed to be the occupier thereof ". Referring to that Rule your Lordship in the Chair, with whom Lord Skerrington and Lord Cullen concurred, said(1): " ' Use ' in that Rule . . . . " means . . . . use which is capable of producing income ". That, as I understand it, is the basis of the theory on which such stress is laid upon a right to let. But if a house were disponed in liferent to A under a prohibition, fortified it may be by an irritancy, against letting it, and in fee to B, Property Tax would be payable in respect of that house. That tax would be assessable on the occupier. Surely it could not be suggested that B, the fiar, was the occupier, and that A was exempt because he could not earn income by letting it.

It might perhaps be open to question in another Court how far these considerations necessarily entered into the judgment in the case of *Wemyss*, but sitting in this Division of the Court and having been myself a party to the judgment, I feel that it is binding upon me. This conclusion is sufficient for the disposal of the case so far as regards the second and alternative argument submitted by the Respondents, but as the Solicitor-General was good enough to fasten on my opinion in the case of *Wemyss* the responsibility for the line of argument adopted, I feel justified in following it out as if it rested upon a substantial basis.

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(1) 8 T.C. at p. 576.

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It is a common fallacy that rates and taxes are imposed upon and paid by property. But, whatever the language employed, rates and taxes are imposed upon and payable by, not property, but persons.

The measure of liability may be determined by the nature and value of property, to which the person stands in a certain relation as owner or occupier, and recourse may be available against property in the event of default in payment, but it is a person upon whom liability for the duty is imposed. Who is this person under Schedule A? Upon whom is the tax chargeable? Rule 1 of No. VII provides that the " tax under this Schedule shall be " charged on and paid by the occupier for the time being ". Rule 2 : " Every person having the use of any lands or tenements shall be " deemed to be the occupier thereof ".

Now prima facie these words suggest that the occupier is not merely a collector of the tax by whom it is immediately payable, but that the tax is imposed upon him—that it is his tax. But a difficulty suggests itself. The tax is a duty upon property in land, and this suggests ownership, whereas the occupier may not be the owner, unless indeed one reads " property in land, etc." as equivalent to " property consisting of land, etc.". It is well settled that what was once regarded as Property Tax—as something different from Income Tax—is just a form of Income Tax ; that it is income that is taxed. Now what income is taxed under Schedule A? As it appears to me, upon a collation of the provisions, it is the income corresponding to the annual value of the lands in the hands of the person who enjoys that income. There are three cases. There is first of all the owner occupier. That occasions no difficulty. The charging Rule suits it without any explanation. Secondly, there is the case of lands let to a tenant for their annual value in the form of rent. The Rule does not by itself meet this case. The tax is charged upon the tenant and he is not the person in the enjoyment of the income representing the annual value. The Act, however, meets this case by a provision which enables the tenant on paying his rent to deduct the amount of the duty. Finally, there is the third case, where the occupier—the person having the use of the lands—pays no rent or an inadequate rent, and, while chargeable with the duty, cannot recoup himself. Now I understand the view suggested in relation to this case to be that the tax being a tax upon owners, and the occupier being merely a collector for the Revenue, when it happens that he has to pay the tax without recourse, he is the victim of a fatality. He is made the collector and therefore the immediate payer of somebody else's, —viz., the owner's—tax, and no provision has been made to enable him to recoup himself, by passing it on to the person who is properly liable. This, as it humbly appears to me, is a fallacious

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idea. The occupier, in this case, is charged with the tax as a tax properly payable by himself not only immediately but ultimately. In so far as he has the use of the subjects without rent or at an inadequate rent he is the person who is in the enjoyment of the property upon which the duty is levied. In the case of *Duke of Beaufort* v. *Commissioners of Inland Revenue*, [1913] 3 K.B. 48, Lord Justice Buckley in an opinion adopted by his brethren said (at p. 58) that a tenant paying the property tax " has not paid " a debt of the lessor, he has paid his own Crown debt, and " by virtue of the statute he is entitled to deduct the " amount of that debt from the contractual rent which otherwise " he would have had to pay." The case is treated as entirely differentiated from the ordinary one of collection at the source of a tax which, if not deducted at the source, is a debt of the payee to the Crown. Now similarly, as it appears to me, a rent-free occupier paying the Property Tax has not paid a debt of the owner, he has paid his own Crown debt.

If the occupier is the person liable in the duty not simply as collector but as a duty for which the Statute provides no relief, it cannot, I think, as between the occupier and the Revenue, in relation to Super-tax, make any difference that somebody else relieves the occupier of the duty. I am sensible that it may be objected that under *Tennant* v. *Smith*, 19 R. (H.L.) 1, a right of residence without power to convert that right into money is not income. That was a case, however, in which the question was considered as to whether an occupier was assessable under Schedule E in respect of enjoyment of premises as part of his emoluments. We are here, however, dealing with Schedule A, and as it appears to me, for the reasons I have indicated, Schedule A treats the annual value of property as if it were the income of the occupier in so far as he is not in a position under the Statute to obtain recoupment.

In the case of *The London County Council* v. *Attorney-General*(1), [1901] A.C. 26, it was determined that Property Tax is just a form of Income Tax. Property Tax, however, cannot completely be assimilated to Income Tax. In the case of Property Tax it is recognised that it is levied not merely upon actual but also upon potential income. The man who hides his talent in a napkin instead of lending it to the usurers pays no Income Tax upon the usury he might have earned. But the man who leaves his field empty, untilled and unlet, pays Property Tax. The return which he might have gained is treated as his " statutory income ". The idea of a statutory income is not peculiar to Schedule A. It was illustrated in the three years' average rule. Now I take it that in a case of estimate of total income for purposes of abatement or exemption for a particular year, it would have been vain for anyone

(1) 4 T.C. 265.

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who fell under the three years' average rule to have contended that his " statutory income " was more than his actual income for the year in question.

The argument for the Revenue I take to be this. Property Tax is a tax upon income. The person who has to pay tax under Schedule A without recourse, pays this as Income Tax. In estimating total income from all sources that which has thus been treated and taxed as income must be included.

The answer to this, as I interpret it, is : A right of occupancy without power to sublet is not income (*Tennant* v. *Smith*, 19 R. (H.L.) 1). It may be that, in certain cases of occupancy, there is no escape from Schedule A tax. But this does not make the right of occupancy income. It merely, for the purposes of the Schedule, treats it as if it were income. When we get away from that immediate purpose and estimate total income from all sources it does not fall to be taken into account.

The very question we are here considering was touched upon in the case of *Inland Revenue* v. *Fry*(1), 1895, 22 R. 422. In that case a parish minister had paid tax on £30 upon his manse under Schedule A. It was not disputed that he had been properly assessed and was liable without relief. It happened, however, that the £30 if included in his total income brought that income above £400. He applied for an abatement on the ground that his total income was less than £400. The case turned upon the question whether he was entitled to let the manse. It was held that he was and accordingly that the £30 fell to be taken into account in estimating his total income. But there lay behind this the question whether the fact that Property Tax was assessed upon and payable by him upon the £30 did not stamp this as part of his statutory income. All the judges notice this question. So far as can be gathered from the *dicta* the opinion of the Lord President and Lord Adam incline to a negative answer; of Lord McLaren and Lord Kinnear to a positive. The Lord President said(2) : " He " has been assessed under Schedule A in respect of the manse. " I do not regard this fact as conclusive against him ". Lord Adam said(3) : " the argument was maintained to us, " as I understood that . . . . in the case of a particular " individual who was claiming a deduction from his alleged aggre- " gate income, the mere fact that he was assessed under " Schedule A or Schedule B made it imperative that the sum so " assessed should be taken as part of his income. I do not think " that is the proper interpretation of Section 167 " of the Act of 1842. Lord McLaren said(4); " No one who derives a benefit " from land, such as renders him liable to assessment under " Schedule A, can say that that is other than income which must

(1) 3 T.C. 335. (2) *Ibid.* at p. 337. (3) *Ibid.* at p. 340. (4) *Ibid.* at p. 342.

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" be taken into account in estimating the total amount of his assess-
" able income ". Finally Lord Kinnear said(1) : " We are asked
" to dispose of the case on the hypothesis that he has been rightly
" assessed to Income Tax on £30 as the annual value of the manse
" to him and that he has no relief against that burden. Well, if
" that be so, it appears to me that that annual value . . . . is part
" of his income from all sources to be taken into account in estimat-
" ing his claim for abatement ".

These *dicta* are all obiter and the case is earlier than that of *The London County Council* v. *The Attorney-General*, where the character of Schedule A tax as being Income Tax was authoritatively affirmed. Nevertheless, the *dicta* are of interest as indicative of the difficulty of the question.

It is unnecessary, so far as my opinion in the present case is concerned, to resolve the doubt. But the inclination of my opinion is in favour of the view that the amount assessed under Schedule A falls to be included. Exemptions and abatements were and are given on the principle of tempering the burden according to the back that has to bear it. Now there may be special circumstances in which the occupation of a house may be a burden rather than a benefit. But in the general case, and in such a case as that of a Bank agent, as in *Tennant's* case, a free house is a substantial addition to emoluments. It was found, however, for technical reasons, that the enjoyment of the use of a house was not to be reckoned as income falling under Schedules D or E. On the other hand, if we find that on a technical construction the free enjoyment of the occupation of a house is treated as taxable under Schedule A in treating this as statutory income, we do not do violence to the principle underlying exemptions and abatements. Be it that free occupancy is not income under Schedule D or E, has not Schedule A affirmed that in the hands of a person liable in payment of the duty under that Schedule without recourse, it shall be treated as his income for the purposes of the Income Tax Acts ? Otherwise what becomes of the rule of *The London County Council* v. *The Attorney-General* and the *dictum* of Lord Macnaghten that " Income Tax is a tax on income. It is not meant to be a tax " on anything else "? In the case of *Inland Revenue* v. *Fry* Lord McLaren(2) said : " there are such cases as that of a person who " has a liferent of a house under a trust or settlement, which he " is, by the terms of the deed, precluded from letting. There again " his right is not value in money, because he cannot let it, " and yet he could undoubtedly be subject to assessment under " Schedule A, and without relief from any other party ". If this opinion, which coincides with what I have indicated in an earlier part of my present opinion, be sound, then, as it humbly

(1) 3 T.C. at p. 343. (2) *Ibid.* at p. 341.

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seems to me, the denial of the statutory character of income to the annual value so taxed is reconcilable with Lord Macnaghten's *dictum* only upon the theory that whilst the Legislature did not " mean " to tax anything other than income it has inadvertently succeeded in doing so.

For the reasons I have indicated, I am of opinion that in the present state of authority on the point the questions should be answered in the manner proposed by your Lordship in the Chair.

Lord Blackburn.—All taxes imposed under the Income Tax Acts, in whatever manner the amount of the assessable income falls to be ascertained or the amount of the tax thereon to be collected, are taxes upon the income of ar individual who has right thereto. Where the individual is the owner of lands and heritages, the annual value of the subjects to him are ascertained under the Rules in Schedule A, and the sum so ascertained becomes liable to Income Tax as part of his income. Taxes imposed under Schedule A may be charged directly on the occupier of the lands, his occupation being necessarily at the free will of the owner, but he is entitled to deduct the amount of the tax paid by him from the rent which he himself pays to the owner. If he does so, then the owner pays indirectly the same tax on his assessed income from the lands as he would have paid directly had there been no tenant in occupation. The fact that the tax is charged upon the occupier cannot deprive the annual value of the lands upon which the tax has been assessed of its character as part of the income of the owner of the lands.

The occupation of land may, however, produce income to the occupier, and for this reason its value to the occupier is assessed under Schedule B, and the tax under this Schedule is charged upon the occupier in respect of his occupation of the subjects.

Super-tax is charged as an additional Income Tax upon the total income of any individual above a certain amount. The total income of an individual for Super-tax purposes is to be estimated (Sections 4 and 5 of the Act of 1918 as amended by the Finance Act, 1920) in the same manner as a return made in connection with a claim for a deduction from assessable income. That is provided for in Section 19 of the Act of 1918, which enacts that for that purpose " the 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 the income " arising from occupation of lands . . . . shall . . . . be " deemed the assessable value thereof estimated in accordance with " the rules applicable to Schedule B ". Nothing is here said as to whether the taxes under Schedules A and B have been paid or not, or whether, if paid, it makes any difference by whom they may have been paid. For Super-tax then, the value of the lands as assessed under Schedule A is to be treated as taxable income of

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the owner, and the value assessed under Schedule B as taxable income of the occupier. It appears to me that it would be just as extravagant to maintain that an occupier of lands who has recovered from his landlord the tax charged upon him under Schedule A must, in making a return of his total income for the purposes of Super-tax, return the value of the lands assessed under Schedule A as part of his income, because, as occupier, he has paid the Income Tax levied under Schedule A, as it would be to suggest that the owner of the lands would, in making his return for Super-tax, be entitled to omit the annual value of his lands assessed under Schedule A on the ground that the tax on that part of his income had been charged on and paid by the occupier, and only recovered indirectly from himself.

The question in this case is whether the Appellant in respect of the rights conferred upon her under her husband's trust disposition and settlement is bound to include in her total income for Super-tax purposes not only the annual value of the house and policy parks of Manderston assessed under Schedule A as representing the income to be derived from the subjects by the owner, but also the annual value assessed under Schedule B upon the parks as representing the income to be derived therefrom by the occupier.

With regard to the assessed value in respect of ownership, it appears to me, for the reasons which I have already given, to be quite irrelevant for the purpose of Super-tax that the Appellant should have been charged as occupier with payment of the tax under Schedule A. The assessed value under Schedule A remains, as it was before, the measure of the income of the owner of the lands, and unless the Appellant's rights amount to the rights of an owner, I cannot conceive how the assessed value taxed under Schedule A can be held to form part of her personal income. The question as to whether the income arising from her occupation of the subjects taxed under Schedule B does or does not form part of her total income turns upon a different consideration, namely, whether she or her husband's trustees are the true occupiers of the subjects within the meaning of the Income Tax Acts.

The question whether the Appellant has any right in the subjects equivalent to a right of ownership appears to me to depend upon whether the trust deed conferred upon her the full rights of a "proper" liferenter or merely a right of occupancy. I have reached the conclusion that it gives her the right of occupancy only.

I should have reached this conclusion with much less hesitation than I have done but for the decision in the case of *Johnstone* v. *Mackenzie's Trustees*,(1) 1912 S.C. (H.L.) 106, which suggests some assimilation between the rights of a person who is given a life interest in a heritable estate which has been vested in trustees

(1) [1912] A.C. 743.

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for the protection of the rights of the ultimate fiar, to the rights of a " proper " liferenter to whom the estate has been conveyed in liferent and whose position thereby is that of an owner for life restricted only in so far that he can do nothing adverse to the interests of the ultimate fiar. The only matter actually decided in *Johnstone* v. *Mackenzie's Trustees* was that, on a sound construction of the deed there under consideration, the testator, who had conveyed his whole estate to trustees for certain purposes, intended that his widow, to whom he had given a liferent of his house, should bear the annual burdens exigible from the proprietor of the subject. But the effect of the judgment seems to go somewhat further as Lord Shaw of Dunfermline, who gave the opinion of the House, says in his speech (page 113) that the testator intended that " she as liferenter " should have *the rights* and perform the obligations attaching to " such a position ", i.e., to the position of a proprietor or " proper " liferenter; and the two propositions which he lays down on pages 111 and 112 indicate quite clearly that if the language of the trust deed indicates such an intention on the part of the testator, then it must be given effect to. The difficulties which might arise from giving to a person enjoying a life interest of a heritable property conveyed to trustees such right of a proprietor as the right to let the subjects although they were already vested in the trustees, do not appear to have been discussed. But in a recent case in this Division (*Donaldson's Executors* v. *Inland Revenue*[1]) we gave effect to the above decision in holding that the testator in that case had intended to give his widow such a right. The facts in the case were special in respect that the house referred to was bequeathed by the husband in lieu and place of another house to the liferent of which the widow would have been entitled under their marriage contract. And for my part I reached the conclusion I did as to the testator's intentions more easily than I might otherwise have found possible for the reason that the liferentrix having died before the case was raised, no such difficulty as that to which I have referred could have arisen. There is no speciality in this case and we must depend alone upon the terms of the trust deed and the circumstances under which the rights given to the Appellant were constituted to ascertain what were the intentions of the testator. In the first place, the testator makes very substantial provisions for his widow in money—£25,000 in cash and an income of £15,000 a year in the event which has happened. These provisions alone are so substantial as to make any increment which might accrue to her from the letting of Manderston with its parks a mere bagatelle. Next he gives her an interest in three houses. His London house, 45, Grosvenor Square, with its contents, is to become " her own absolute

(1) 13 T.C. 461.

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" property ". It is significant that in the event of her being survived by a son she was given " the liferent use and enjoyment " of this house, an expression which is at least apt to create a " proper " liferent, but which is very different from that used in connection with the house in question. His Newmarket house she may lease for life at the rental of £150 per annum, with the right to select from the plenishings of the house any articles she may choose as " her own absolute property ". It is not immaterial to notice that the power to lease this house is coupled with the provision that " in the event of my said wife not being desirous " of occupying said house the same shall form part of my general " estate ", which would appear to negative any intention on the testator's part that his widow should have the right to add to her income by re-letting that house at a higher rent than she was to pay for it. Finally, there is Manderston, which his trustees are directed " to allow my said wife to occupy and possess during her " lifetime, free of rent or taxes (both landlord's and tenant's)", together with the furniture and game on the said lands. Looking alone to the marked distinction between the rights conferred upon her with regard to each of these three houses, I should have drawn the conclusion that so far as Manderston and its parks are concerned, he intended her to have no right other than a right to reside there and that he certainly did not contemplate that she should exercise any rights of property over the subjects. This view is supported by the fact that the trustees are directed to pay all the taxes, a direction which appears to me to exclude the idea of any intention on his part that she should bear the burdens or enjoy the rights of a " proper " liferenter. In this respect the terms of the bequest in this case correspond to those in the case of *Rodger* (2 R. 294) to which Lord Shaw refers in *Johnstone* v. *Mackenzie's Trustees* at p. 110 as having no bearing on that case.

Nor do I think that too much significance should be attached to the reference in the deed to the Appellant's interest in the subjects as " my wife's liferent ". I concur with what has been said by Lord Sands as to the common use of the word " liferent " to indicate what is no more than a life interest. In this deed alone we find, as one would expect to find, that the word " life-" rent " is continually used as synonymous to " life interest " and is indeed applied to subjects which bear no rent and to rights which do not endure for the grantee's lifetime. There is never any doubt as to the meaning, but the general use of the word makes it impossible to conclude with confidence that it is used as meaning a " proper liferent " with reference to the subjects in question. The best illustration of the popular use to which the word " liferent " may be put occurs in the Fourth Place (Third) of the deed, where, in the event of a son surviving, the trustees are directed to deliver

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the silver plate to the Appellant " for her liferent use and enjoy-" ment until a son reaches the age of twenty-five years ". The meaning is obvious, but silver plate yields no rent and the right conferred need not necessarily have endured for a lifetime. I do not think any light can be gained as to the nature of the right which the testator intended to confer upon his wife in the subjects in question by going beyond the dispositive words giving her the right " to occupy and possess during her lifetime ", and in my opinion these words are not apt to constitute a right of " proper " liferent or to assimilate the rights of the Appellant to a right of ownership. It follows accordingly that in my opinion the value arising from the ownership of the subjects as assessed under Schedule A is income not of the Appellant but of the trustees in whom the subjects are vested.

The question whether the value of the lands assessed under Schedule B in respect of occupancy forms part of the Appellant's income appears to me to be one of much greater doubt and difficulty. She undoubtedly has the right to occupy the subjects and to make such use of them as may attach to a right of residence. Being in fact the actual resident I do not well see how she could avoid the liability of being charged with payment of the ordinary Income Tax assessed on the subjects both under Schedule A and under Schedule B unless, as might have been done, an arrangement had been made for the tax to be charged on the trustees. But when you come to Super-tax, the question must always be whether the right of occupation gives the occupier any right to earn income from the subjects. If it does not, then I do not see how the value assessed under Schedule B in respect of occupancy can fairly be described as part of the income of the occupier. In this case the Appellant certainly enjoys the privilege of occupying lands, but in my opinion the testator did not intend that she should have any higher right. I do not think he ever contemplated that she should deal with the subjects as income-bearing subjects. If that is so, then the decision in the case of *Wemyss*(1), 1924 S.C. 284, is binding upon us. But I think the same result as was reached in that case might have been reached on somewhat different grounds. For it seems to me that if an owner of lands allows another to reside in a furnished house and to use the lands connected therewith gratuitously and further binds himself to pay all the taxes exigible in respect of the ownership and of the occupancy, he impliedly continues to occupy the lands himself, and the assessed value of the lands in respect of occupancy would, for purposes of Super-tax, fall to be treated as his income and not the income of his nominee. It seems to me at least certain that if the nominee was a person of straw and unable to pay the tax under Schedule B, then in a question with the

(1) 8 T.C. 551.

(Lord Blackburn.)

Revenue authorities the land owner by his gratuitous action could not avoid payment of the tax on occupancy. For these reasons I do not think that for Super-tax purposes the Appellant possesses any income arising out of her right to reside at and occupy Manderston and its parks which she is bound to include in her Super-tax return. The subjects are, in my opinion, occupied by the trustees through the Appellant.

I concur in thinking that both questions should be answered in the negative.

Lord Morison.—This is a case on appeal which relates to Super-tax. It is admitted that the Appellant is an individual liable to Super-tax but she asserts that for the purposes of this tax, she ought not to be rendered liable in Super-tax on the annual value of the mansion-house and lands of Manderston. The first question which arises is on what income is Super-tax chargeable ? I did not understand from the argument that there was any dispute between the parties as to the principle on which Super-tax falls to be assessed. Super-tax is an additional duty of Income Tax. The broad effect of the statutory provisions on the subject is, I think, this, that Super-tax is charged on an income which is taken to be the previous year's income, and where an assessment to Income Tax has become final for the purposes of Income Tax for any year, the assessment is also final in estimating income for the purposes of Super-tax for the following year. Stated generally, the income chargeable with Super-tax falls under two heads (1) the income chargeable with Income Tax by way of assessment and (2) income chargeable with Income Tax by way of deduction. No question arises in this appeal in regard to head (2). But under head (1) the income chargeable with Super-tax is the income chargeable with Income Tax under Schedules A, B, D or E of the Statute after allowing the appropriate deductions.

In this appeal we are concerned only with heritable subjects and the Appellant's liability for Super-tax on their annual value depends, in my opinion, on whether or not she was chargeable with Income Tax thereon under Schedules A and B and their relative Rules. If she was, then I think it is clear that she was chargeable with Super-tax on the annual value of the subjects as estimated for Income Tax. It is found as a fact in the Case that during the year of assessment the Appellant occupied the subjects in virtue of a clause contained in the settlement of her husband, which directed his trustees to allow the Appellant to occupy the mansion-house of Manderston and others " free of rent or taxes " (both landlord's and tenant's) ".

We had a full argument from Counsel on the question whether the right which was conferred on the Appellant under the terms of the will was a proper liferent right with power to let the subjects

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or whether it was a special right of occupation personal to herself during her lifetime. My impression from the terms of the settlement is, that as regards the liferent of the mansion-house, the right is personal to the Appellant and that she has no power to let it without the consent of her husband's trustees. On the other hand I think she was entitled to let the home farm and the shootings if she desired to do so. I do not examine in detail the clauses in Sir James Miller's settlement on this subject, for the reason that I think their terms have no bearing on the question whether or not the Appellant was liable in Property Tax on the subjects. In my opinion the incidence of this tax depends on the terms of Schedule A and the Rules applicable to it. I think it is necessary to point out that we are dealing here with a subject "capable of actual "occupation" to which General Rule No. I of the Schedule applies. We are not concerned at all with any question relative to the incidence of the duty arising under No. II (which applies to manors, tithes, etc.) and is charged and levied under special rules.

The Statute enacts that: "Tax under Schedule A shall be "charged in respect of the property in all lands, tenements, "hereditaments and heritages in the United Kingdom, for every "twenty shillings of the annual value thereof".

This tax is a tax upon income—that is, upon the annual value of heritable property. The Schedule assumes that lands capable of occupation have an annual value. The tax is not a tax on the value of the interest of the person in possession for the year. The annual value of the subjects here is admitted at about £1,100 and is set forth in detail in Statement 3 of the Case. Upon whom then is the tax chargeable? The answer to this question is, in my opinion, to be found only under No. VII of the Schedule as follows:—

"*Rules as to persons chargeable.*"

"1. Save as in this Act provided in any particular case, tax "under this Schedule shall be charged on and paid by the occupier "for the time being".

The definition of occupier is contained in Rule 2: "Every person "having the use of any lands or tenements shall be deemed to be "the occupier thereof".

It was not contended—and I think it could not be contended—that the present is one of the particular excepted cases referred to in the opening words of Rule 1.

The next question is: Was the Appellant the occupier of Manderston, etc. "for the time being", i.e., was she the person having the use of these lands during the year of assessment?

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Having regard to the third finding of fact in the Case, this question must, in my opinion, be answered in the affirmative. There is no Rule in the Schedule which draws any distinction among the various classes of liferenters known to our law. For the purpose of chargeability to duty, I venture to doubt whether the Legislature contemplated any discrimination among these liferenters or any distinction among persons who occupied lands under deeds with or without irritancy clauses or clauses of forfeiture. Either the liferenter is the occupier or he is not. If he is occupier, he is chargeable in the tax *qua* occupier. If he is not the occupier, no chargeability for tax is imposed upon him.

The final question arising on the Rules is: Upon whom is the tax levied? The answer is supplied by Rule 3 which in imperative terms requires that "the tax on each assessment shall be levied on "the occupier for the time being". There are three classes of cases which fall under these Rules of the Schedule.

Firstly, there are cases in which the owner of the subjects is also the occupier and the tax is charged and levied upon him *qua* occupier.

Secondly, there are cases in which the land owner prefers to enjoy the possession of his lands through a tenant who occupies them and pays rent for the use. In that case also, though the tax is charged and levied on the occupier, the proprietor truly pays it, because the tenant is authorised under No. VIII to deduct the amount of the tax from the rent payable to the owner.

The third case—of which this is an instance—is where the owner of the subjects is under obligation, arising either by contract or testamentary directions, to confer the right of beneficial occupation of the subjects on a liferenter or on some other person, without rent being charged. In that case this occupier enjoys exclusively the use of the subject for the year, and he and he alone, in my view of the Rules, is chargeable and liable for tax. He has no relief from any other person. This is illustrated by the decision in the case of *Drughorn* v. *Moore and others*, [1924] A.C. p. 53. In all three sets of cases the property chargeable to duty is, in my view, accurately described as "the income arising from the ownership "of lands" within the meaning of Section 19 of the Statute.

In practice, the Assessor for Income Tax under Schedule A proceeds, as a general rule, on the entries in the Valuation Roll, made up under the authority of the Lands Valuation (Scotland) Act, 1854 (17 & 18 Vic. Cap. 91) and the Lands Valuation Act, 1857 (20 & 21 Vic. Cap. 58). The word "occupier" as used in these Acts has the same meaning as it has in the Rules appended to Schedule A. Mr. Jamieson admitted that the Appellant's name was entered in the Valuation Roll as occupier of the mansion-house of Manderston, etc., and having regard to

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the terms of Section 1 of the principal Statute, I think the entry was correct. It was partly because the Appellant *qua* occupier of Manderston was liable in the taxes under Schedules A and B that her husband directed that she was to possess the subjects free of all taxes.

It is easy for the notices under the Income Tax Acts to be issued to the proprietors, occupiers or tenants of the lands and heritages in Scotland, on calculations based on the entries in the Valuation Roll. I think the task would be an impossible one, if the notices of assessment had to be issued on an examination of such questions as whether a particular liferenter had or had not power to let the subjects.

The learned Counsel for the Appellant said that the question in the case was whether, under the terms of her husband's settlement, the Appellant was or was not a liferentrix with power to let the subjects. He then argued that, as the Appellant had only a personal right of occupation, her possession was " of no value ", that it therefore produced " no income " and was not property within the meaning of that word as used in Schedule A and that accordingly she was not chargeable with the tax.

In my opinion, this argument proceeds upon a misapprehension of Schedule A and its Rules. I shall assume for the moment that the Appellant had no power to let. But she had the beneficial occupation of the subjects during the year of assessment. When the criterion of chargeability under the Rules is the fact of occupation, it seems to me to be immaterial whether or not she had power to let the subjects to a tenant at some future time. She may have no right to convert her use of the subjects into a money income, nevertheless she has the use of lands of an admitted annual value of £1,100. Further, I think that the Appellant, with the assent of the trustees, might have let the subjects to a tenant, and, in that case, the tax chargeable on him would have been deducted from the rent payable to the Appellant. But, in my view, it is inaccurate to say that the occupation by a liferentrix, without power to let, is " property without value ". The property subjected to tax is the use of the heritable subjects for the year, and it is the annual value of the subjects so used and occupied which is to be charged.

The Appellant's Counsel did not support his contention that the value of her mere right of personal occupation of the subjects was " nil ", by any argument based on the language contained in the Rules of Schedule A. He said that we were compelled to adopt this construction by reason of the judgment of the House of Lords in *Tennant* v. *Smith*(1),[1892] A.C. 150. I think this contention proceeds upon a misconception of the judgment in that case. It raised no question in regard to Schedule A, and indeed no question

(1) 3 T.C. 158.

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under that Schedule could arise in the case. The Bank were owners and occupiers of premises consisting of a Bank and a house in which their manager lived. Their manager's emoluments consisted of a salary of £300 with the house free. The Bank were admittedly the occupiers of the whole subjects within the meaning of Schedule A and they had already paid the tax under that Schedule in respect of their occupation of the whole premises. It was argued for the taxpayer that the case of *Bent* v. *Roberts*(1), (1877) 3 Ex. D. 66 must be taken to have decided that a person in the position of Mr. Tennant is not liable to Income Tax under Schedule A or B.

In point of fact Mr. Tennant had not been assessed under Schedules A or B at all. As appears from the report of the case in the Court of Session, 18 R. 428, he had been assessed only under Schedules D and E. The House of Lords held that Mr. Tennant's occupation of the Bank house—an advantage which he could not turn into money—was neither "an emolument" under Schedule D nor a "perquisite" under Schedule E. In the course of his opinion Lord Macnaghten said(2): "Has not "the Crown got all that it is entitled to in respect of this house "when it has received the duty on its full annual value? Is not "the notion of finding some subject for taxation in lands . . . . "over and above the full annual value chargeable under Schedules "A and B a fanciful notion and foreign altogether to the scope "and intent of the Income Tax code? The learned Counsel for "the Crown say no. Their case is that the benefit derived by "the Appellant from his occupation of the bank house is chargeable "under Schedule E, or at any rate under Schedule D". To argue that a decision on Schedules D and E and their respective Rules, which refer to money or money's worth only, governs the incidence of Income Tax chargeable in respect of the occupation of lands under Schedule A is, in my opinion, clearly a fallacy. And to select passages from the judgments of the noble and learned Lords, which were delivered on the terms and Rules of Schedules D and E, and then to apply them to the terms and Rules of Schedule A—as the Appellant's Counsel did—only tends to create confusion in the construction and application of the latter Schedule the words of which are clear. In the course of his opinion Lord Watson said(3): "Schedule A which assesses property accord-"ing to its annual value, includes all lands, tenements, heredita-"ments, and heritages capable of actual occupation. Schedule B "imposes an additional assessment in respect of occupancy upon "some of the lands comprehended in Schedule A, the occupation "of which in itself constitutes a trade or business. The Appellant "(Mr. Tennant) is not a proprietor, neither is he an occupier within "the meaning of Schedule B. The Bank are the only occupiers,

(1) 1 T.C. 199. (2) 3 T.C. at p. 170. (3) *Ibid.* at p. 166.

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" being, as Lord Herschell said in *Russell* v. *The Town and County* " *Bank*(1), 13 App. Cas. 418, p. 426 ' in the same position as if that " portion of their bank premises were used in any other way in the " strictest sense for the purposes of the Bank, and the business of " the Bank ' ".

I read his Lordship's opinion as laying down the rule that in all cases falling under No. I of Schedule A occupancy is the test of chargeability to Income Tax under Schedules A and B, as contrasted with pecuniary value which is the test of chargeability under Schedules D and E. If this is the correct interpretation of his Lordship's judgment, the whole basis of the Appellant's argument is destroyed.

The learned Counsel for the Appellant did not contend that the tax on the annual value of Manderston was not recoverable at all. He said that it could and should be levied on the trustees *qua* proprietors. I do not agree with this contention. The only cases under Schedule A in which its tax is chargeable and leviable on a proprietor of subjects capable of actual occupation are (1) the cases mentioned in Rule 8 of No. VII which do not apply, and (2) the case under Rule 9 in which the proprietor makes a request in writing to the Commissioners to be assessed and charged " as if he were the occupier ". Although the proprietors here might have applied under this Rule it is admitted that they did not do so.

With your Lordships' judgment in her favour, the Appellant, though the occupier of Manderston during her lifetime, can never be made liable in Property Tax or in Super-tax on its annual value. The Crown cannot, in my view, compel the trustees to make an application under Rule 9 of No. VII of the Schedule, and if they refrain from doing so they are also immune from chargeability. If the trustees are not chargeable they cannot be sued for the tax as a debt due to the Crown under Section 169 of the Statute.

The only recourse open to the Crown for the recovery of arrears is the doubtful expedient of distress on the possessions of some future occupier in terms of Section 164 of the Act.

We were referred to three judgments of Mr. Justice Rowlatt in regard to the application of the Rules in Schedule A. I venture with respect to concur in the decisions pronounced and I confess I share the difficulties which the learned Judge expressed in regard to the case of *Wemyss*(2), 1924 S.C. p. 284. Some of the reasoning in the judgments delivered in that case appears to me to be inconsistent with the decision of the House of Lords and the Court of Appeal in the case of *Bensted*(3), [1907] A.C. 264, and [1907]

(1) 2 T.C. 321. (2) 8 T.C. 551.

(3) Ystradyfodwg and Pontypridd Main Sewerage Board v. Bensted, 5 T.C. 230.

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1 K.B. 490. Further, the leading argument on the Rules of Schedule A submitted by the Crown in that case—which the learned Solicitor-General said was his main contention here—is noticed only in the opinion of Lord Sands. But as Mr. Justice Rowlatt points out in the case of *Tollemache*, 1926, 11 T.C. 277, the facts found in the case of *Wemyss* were special. It was not suggested during the debate that its decision ruled the present one.

The tax imposed by Schedule A is an old one. During each year of its existence I am convinced that there were many instances where Property Tax has been charged, levied and paid by liferenters *qua* occupiers of heritable property, wholly irrespective of whether they could convert their occupation into a money return or not. In such experience as I have had, it has always been charged and levied on the occupier—apart from the excepted cases where the tax is small. It has hitherto been easy to assess and collect in Scotland, and extremely few questions have arisen in regard to it. If I understand the Appellant's argument correctly, its result is that in cases of a " proper liferent ", the duty is chargeable on the liferenter because, under the deed conferring his title to the subjects, he can convert his right of possession into a money return. On the other hand, a liferenter with a personal right of occupation escapes chargeability and the tax must be levied on the proprietor although he is prohibited, during the subsistence of the liferent, from making any use whatever of the subjects. In my humble opinion the Rules of Schedule A give no countenance to such anomalies. If the novel test of chargeability laid down for the first time in *Wemyss'* case is to be extended, then, I think, the assessment of the tax will be extremely difficult, its incidence will be uncertain and its recovery problematical. It is because it is of the highest importance that taxes should be levied on the subject, in strict accordance with the Rules laid down by Parliament, as I conceive them to be, that I feel compelled, with reluctance and much respect, to dissent from the judgment which your Lordship proposes.

The Crown having appealed against this decision, the case came before the House of Lords (Lord Buckmaster, Viscount Dunedin, Lord Blanesburgh, Lord Warrington of Clyffe and Lord Tomlin) on the 25th and 26th November, 1929, when judgment was reserved. On the 6th February, 1930, judgment was given unanimously in favour of the Crown, except as regards a minor point abandoned by the Crown, with costs, reversing the decision of the Court below.

The Attorney-General (Sir W. A. Jowitt, K.C.), Mr. A. M. Latter, K.C., Mr. R. P. Hills and Mr. A. N. Skelton appeared as Counsel for the Crown, and Mr. D. Jamieson, K.C., Mr. N. A. MacLean and Mr. A. Ralph Thomas for the Respondent.

JUDGMENT.

Lord Buckmaster.—My Lords, the circumstances that have given rise to this appeal are special and need to be summarised in order that the point at issue may be made plain.

Sir James Miller, by a trust disposition and settlement dated December 4th, 1901, directed his trustees to hold his lands and estates at Manderston in the County of Berwick to pay all duty and burdens and the cost of repair and maintenance and in the event of his death without issue to " allow his said wife to occupy and possess " during her lifetime, free of rent or taxes (both landlord's and " tenant's), the said mansion house of Manderston and offices and " furniture and other effects therein, and the game on his said lands " of Manderston and others, and the other subjects of which he had " directed his said wife to have the liferent in the event of his death " survived by a daughter : And he directed his trustees during the " liferent of his said wife to pay the wages of the foresters employed " in connection with the said establishment, the wages of the game-" keepers and gardeners to be paid by his said wife ".

Sir James Miller died in 1906 without issue, and Lady Miller by virtue of her rights under the trust disposition occupied and possessed the mansion house and lands at Manderston during the year ending April 5th, 1920. For the said year the assessments under Schedules A and B of the Income Tax Acts were as follows :—" Policy Parks, Schedule A. . . . £165 10*s.* 0*d.* Policy Parks, Schedule B. . . . £452 0*s.* 0*d.* Part farm, Briery Hill, Schedule B. . . . £89 5*s.* 0*d.* Mansion House, Schedule A. . . . £319 10*s.* 0*d.*" No question arises as to the liability in respect of the Briery Hill subjects which were rented by Lady Miller from the trustees.

The trustees under the authority, above set out, of the trust disposition and settlement, paid the following sums during the said year out of income received by them :—Forester's wages, £60 0*s.* 0*d.* Rates on mansion house, £65 0*s.* 0*d.* Rates on policy parks, £32 0*s.* 0*d.*

In assessing Lady Miller for Super-tax for the year ending April 5th, 1921, none of the items above-mentioned under Schedules A and B were included, nor any of the above payments, and an additional assessment was made for that purpose. Against such additional assessment, Lady Miller appealed to the Commissioners for Special Purposes who rejected her appeal, but on further appeal to the Court of Session she was more successful, for they reversed the decision of the Commissioners, Lord Morison dissenting, and from their Interlocutor of 7th July, 1928, the Commissioners of Inland Revenue have come before this House.

That the original assessments for Income Tax under Schedules A and B were correct was not originally disputed, though it is doubted by the Lord President, but it is urged that Lady Miller's right to

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occupy is no part of her income and that its equivalent in money value cannot be regarded for Super-tax.

This argument has found favour with the Court of Session, but their judgments are in part influenced by decisions some of which do not bind this House, in part by the consideration of whether Lady Miller's interest was that of a liferent, and partly by the view on more general grounds that her interest was not income, while in Lord Blackburn's opinion in determining liability to Super-tax " the " question must always be whether the right of occupation gives " the occupier any right to earn income from the subjects ". I will reserve for the present the consideration of the various cases ; it is well to examine this matter in the first place apart from their assistance.

The discussion as to whether the rent of the Respondent can properly be called a liferent does not appear to me to help the solution and it is unfortunate that the Special Case defined the question under this head. It is not the name by which the estate is described that matters, nor its legal incidents except so far as they are relevant for the purpose of determining whether they are such as to involve the liability in dispute. Fortunately the case was argued on the broader basis in the Court of Session though its more limited aspect received closer attention than in the circumstances it required.

The real question is whether the assessable value of the property in question is to be regarded as income for the purposes of the tax.

So far as Schedule A is concerned the matter, but for the Lord President's judgment, seems reasonably plain. The tax is charged upon " hereditaments, and heritages in the United Kingdom, for " every twenty shillings of the annual value thereof." As Lord Morison points out, it is not a tax upon the interests of the person in possession but it is charged on and payable by the occupier for the time being and he according to his interest bears or passes it on by deduction *pro tanto* from the rent he pays.

In the present case that the Respondent was the occupier and was consequently chargeable under the statute with the tax, though doubted by the Lord President, is found in the words of the Special Case—she did in fact occupy and possess the house for the year in question—and that she was entitled to have the taxes paid by the trustees does not affect her position in this respect. Her occupation was in her own right and she was not occupying as the representative of the trustees. This being so, the next question is whether the annual value of the house is to be brought into computation for purposes of Super-tax. The determination of income for this purpose is, as is well known, to be " 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

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"income,"(1) and the "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".(2)

Now in the case of a person occupying his own house, the annual value is income for purposes of the Act. If he occupies under a beneficial lease the difference between the rent he pays and the annual value is again his income and must be included in his Super-tax return, see *Commissioners of Inland Revenue* v. *Fargus*, 10 T.C. 665, and this, not because he could let or sublet it, for, under a beneficial lease, he might be subject to an absolute unqualified restriction against letting or assigning which, until recent legislation, would have deprived him of any means of obtaining income from the property without his landlord's consent. The same position would result if, without the intervention of trustees, a house was devised by will to the use of a named beneficiary until he conveyed, let or otherwise parted with the right to possession thereof and, upon the happening of such event or on his death whichever first occurred, the house was devised to some other beneficiary.

Unless it can be said that in such a case no one is liable for the tax the liability must fall on the first devisee during his interest although he cannot make any profit out of it. Nor can the intervention of trustees alter the position of the beneficiary or devisee. If authority were needed for this view it is to be found in *Johnstone* v. *MacKenzie*, [1912] A.C. 743. Again, even where trustees are legal owners not in occupation they cannot be made chargeable with the tax unless under Rule 9 of No. VII of Schedule A they can establish their position as landlords and obtain the General Commissioners' consent. Without such consent the occupier is chargeable with the tax.

It is true that the trustees may in the present case enter the house for the purposes of repair or making additions to the furniture, and the grounds for other specified objects; such powers might be reserved to a landlord under a beneficial lease but they could not enable a tenant to escape liability for the tax to the extent of his beneficial interest, and I cannot assent to the view that such powers render the trustees the occupier within the meaning of No. VII, Rules 1 and 2. Unless therefore it could be said that in such instances there was no property to tax, the annual value of the lands must be the income taxable under Schedule A without regard to whether the occupier could receive that value by other means than occupation and such income would properly be included in a claim for abatement.

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(1) Income Tax Act, 1918, Sec. 5 (1) as amended by the Finance Act, 1920.
(2) *Ibid*, Sec. 19.

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The Lord President found himself unable to accept this view. In his opinion "the body of Sir James Miller's trustees—and not "the Appellant—is the 'occupier' of the mansion house and "policy parks within the meaning of No. VII, Rules 1 and 2 of "Schedule A. The trustees, and not the Appellant, are occupiers "of those heritages and have the right to 'occupy' and 'use' "them for every possible purpose including that of allowing to the "Appellant the privilege of personal residence therein."

I find it difficult to agree with this conclusion as it appears to me to ignore Lady Miller's interests under the will, and these clearly include a right to occupy which the trustees would be compelled by the Court to recognise.

Occupation in the ordinary sense could never be enjoyed by the trustees. A right to enter is not a right to occupy. The word "occupier" as used in the statute has its ordinary meaning and the ascertainment of whether a person is an occupier or not is a question of fact and not of law. In my opinion Lady Miller was rightly found to be the occupier and was rightly charged with tax as such occupier, the annual value of her beneficial enjoyment was income for the purpose of the Act, was of a nature to be included in a claim for abatement, and was liable to Super-tax.

This appears to me to be the direct and natural conclusion from the words of the Act, but in course of time there have been many encrustations upon the statute to which attention must be paid. No fewer than fifteen cases were quoted in the course of argument and some deserve attention.

The first and by far the most important is the case of *Tennant* v. *Smith*(1), [1892] A.C. 150. In that case Alexander Tennant, the Agent for the Bank of Scotland at Montrose, resided on part of the Bank premises which it was part of his duty to occupy. The whole of the Bank premises were assessed under Schedule A as against the Bank; neither the whole nor any part of the tax was, or was sought to be, recovered from Alexander Tennant under that Schedule. His total income, excluding any advantage from residing on the premises, was £374 and he accordingly sought abatement on the ground that his income was under £400. This claim was refused upon the ground that Tennant ought to be assessed either under Schedule D or Schedule E for a sum of £50 as representing the value of his residence on the Bank premises. It was this claim on the part of the Inland Revenue authorities that was refused by this House. It is impossible to examine the judgments closely without realising that they were based upon the fact that, whatever advantage the Agent might have enjoyed from his residence, it could not possibly be made the subject of assessment

(1) 3 T.C. 158.

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under Schedules D and E. As Lord Watson said at page 158: "The Appellant is not a proprietor, neither is he an occupier within "the meaning of Schedule B. The Bank are the only occupiers, ". . . The Appellant does no doubt reside in the building, but he "does so as the servant of the Bank and for the purpose of "performing the duty which he owes to his employers. His position "does not differ in any respect from that of a caretaker or other "servant, the nature of whose employment requires that he should "live in his master's dwelling-house or business premises, instead "of occupying a separate residence of his own."

Again, Lord Macnaghten, at page 162, says this: "Property, ". . . in the house he has none, of any sort or kind. He has the "privilege of residing there. His occupation is that of a servant, "and not the less so because the Bank thinks proper to provide for "gentlemen in his position in their service accommodation on a liberal "scale. It is clear, therefore, that the appellant is not chargeable "under Schedule A in respect of the bank house, or liable to pay "the duty as occupying tenant. The bank and the bank alone is "chargeable and liable to pay."

It is unnecessary to investigate this decision further but it is well to add that, in referring to phrases used by the other members of your Lordships' House who heard the case, such as those relating to the inability of the Agent to make a profit out of his occupancy, these phrases must all be read in relation to the central facts and features of the case to which I have referred. To my mind, therefore, this case in no way governs the present. But it is at least useful to keep in mind that Lord Macnaghten, at page 161, distinctly stated that income in the Income Tax Acts certainly means more than income properly so described; it includes more than profits and gains chargeable under the last three Schedules of charge, it includes the annual value of property chargeable under Schedule A and the annual value of the occupation chargeable under Schedule B; while, finally, the case shows that there is no distinction whatever between the meaning of income for the purposes of abatement and that for purposes of taxation—a matter of some importance since liability to Super-tax is determined with reference to claims for abatement.

The case that is closer to this and causes more difficulty is the case of the *Inland Revenue Commissioners* v. *Wemyss*, 8 T.C. 551. In that case there was a right of occupation which arose in favour of the Respondent if the testator's second wife released her life-rent, and in that case it was provided that the Respondent should, during the subsistence of a trust made subject to certain conditions, be entitled to occupy the castle so long as the trustees kept it unlet; and it was held by the Lord President that the trustees were, in the circumstances, the true owners and possessors and occupiers of

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the subjects. It is plain from the judgments that one of the circumstances that influenced some of the learned Judges in their opinion was the fact that the Respondent had no power to let. This however did not convince Lord Sands who states definitely at page 586: "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 sublet them. "'I cannot collect civil fruits.'" I think it is plain that, had the learned Judge been sitting alone, he would have come to a different conclusion to that which he reluctantly expressed. I think his hesitation was well justified and that the reasoning which he gives in its explanation is sound and ought to be followed. The case of *Shanks* v. *Inland Revenue Commissioners* (1), [1929] 1 K.B. 342, is indistinguishable from the present and the position is shortly and exactly stated in the judgment of Lord Justice Russell.

It does not appear to me necessary to consider closely further authorities. Those to which I have referred contain the substance of the decided matter upon which the Respondent chiefly relies, but for clearness it may be well to state that in my opinion the case of *Fry* v. *Inland Revenue*(2), 22 R. 422, was right in the result but wrong so far as it made the power to let the rigid exclusive test of liability. The case of *Inland Revenue* v. *Sutherland*(3), 21 R. 753, was wrongly decided. The policy parks under Schedule B stand in the same position and the rates and taxes follow the other property. With regard to the foresters' wages, there is not sufficient information to enable judgment to be passed upon this claim and it was abandoned by the Inland Revenue.

Upon the whole, therefore, I am of opinion that the judgment of Lord Morison is an accurate exposition of the law and this appeal must succeed.

Viscount Dunedin.—My Lords, much of the judgments of the Court of Session are occupied with the discussion of whether the right which Lady Miller took under the will of her husband as to the house, etc., of Manderston was a "proper" liferent. I do not think this discussion helps the question to be determined. I should be prepared to say that no liferent was a "proper" liferent which was not a feudal liferent, and that is not the quality of Lady Miller's right. But the question remains whether what Lady Miller got, by whatever name you call it, was or was not income in the sense of the Income Tax Act. Now that the benefit which a person gets from lands which, for taxation purposes, fall under Schedule A can be and is income was settled by the judgment of this House in the

(1) 14 T.C. 249. (2) Corke *v.* Fry, 3 T.C. 335.
(3) M'Dougall *v.* Sutherland, 3 T.C. 261.

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case of the *London County Council* v. *Attorney-General.*(1) That that income is not dependent on the fact whether hard cash comes to the holder of the property is apparent in every case where *e.g.*, a person occupies a mansion house and grounds which, so far from bringing in money, cost much money to keep up and which are never let. Nor do I think can it possibly be dependent on the fact whether the person holding the property can or cannot turn it into a money-producing subject by letting it to others. The value for Schedule A is, in cases where the Surveyor of Public Taxes is taken as the assessor under the Valuation Act, the value entered in the valuation roll and in other cases it is as the Surveyor of Taxes may fix, subject to appeal against his decision: 20 & 21 Vict. c. 58: *Menzies* v. *Inland Revenue*(2), 5 R. 531. I am naturally speaking here of Scotland as this is a Scotch case. The framer of the valuation roll only inquires whether the property is let, not whether it can be let, and that only to see if the rent for which it is let is a fair value. Take the case of a property let for a ridiculously small sum for a term of years. That is not, in the phraseology of the statute, let at a rack rent. That sum would not be entered as the value in the valuation roll made up as aforesaid but a sum at which, if it were free, it might be let, and yet the owner in that case could not let it for that sum for he had already let it at the smaller sum. I am therefore of opinion that the distinction taken between what might be let and what might not be let is not a relevant distinction and the Free Church Manse(3) case which was distinguished from the Established Church Manse(4) case on that ground was wrongly decided.

The whole argument of the Appellant has depended on his introducing the word "owner" into the words of Schedule A. "Owner" is not mentioned in Schedule A and one can see at least one very good reason why it should not be so. The Income Tax Act was framed to apply to England and Scotland alike, but if the word "owner" had been introduced it would have led at once to confusion. A person who, in London, holds a fifty years' lease from the Duke of Westminster is commonly called the owner of his house, but in Edinburgh a person in the same position would not be called the owner. That term is reserved for him who is infeft, ordinarily in Edinburgh the feuar, but equally of course the proprietor who holds from the Crown where there has been no sub-infeudation.

The tax due under Schedule A is not imposed on the owner, it is imposed on the occupier. It is quite true that in certain cases he may have a right to relief by way of deduction from what he has to pay to the owner, but when he has no such right the tax remains where it falls. That is the case here. Lady Miller is occupier of the house, etc., and must pay tax under Schedule A for the subjects of her

(1) 4 T.C. 265. (2) 1 T.C. 148.
(3) M'Dougall *v.* Sutherland, 3 T.C. 261. (4) Corke *v.* Fry, 3 T.C. 335.

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occupation. She has no right of relief against the trustees because she owes them nothing from which she can deduct what she has to pay, and therefore it is her income and must be taken *in computo* in measuring the amount on which her Super-tax is to be reckoned. The fact that under the provision of the will the trustees are then out of their general fund bound to recoup her, and that consequently for convenience sake the trustees may pay the tax direct makes no difference. The liability to the Crown is really her liability.

I have already said that I think the Free Church Manse case ill decided. I think the same of the *Wemyss*(1) case. The Bank(2) case which was in this House and therefore is binding on me has, I think, been only misunderstood. The whole point was that it was found as a fact that the occupation of the bank by the agent was not truly his occupation but the Bank's occupation and the tax due under Schedule A was no more leviable on the agent than it would have been on a caretaker who lived on the premises to keep them clean.

I therefore concur in the motion made by the noble Lord on the Woolsack.

Lord Warrington of Clyffe.—My Lords, but that we are differing from the views expressed by the majority of the Judges in the First Division of the Court of Session, and are proposing to over-rule certain previous decisions of the Court of Session, I should have contented myself with a simple concurrence with the opinion of my noble and learned friend on the Woolsack, but under the circumstances I think it desirable to state as briefly as possible the reasons for such concurrence.

The main question in the appeal is whether for the purposes of Super-tax the Respondent is bound to include as part of her income for the year preceding the year of assessment the amounts at which she was assessed for Income Tax under Schedules A and B of the Income Tax Act in respect of her occupation under the trust disposition and settlement of her deceased husband of a mansion house and lands at Manderston in the County of Berwick.

A minor question is raised whether she is also bound to include certain payments for rates in respect of the same hereditaments made by the trustees of the disposition and settlement in pursuance of the provisions thereof.

Both these questions were decided against the Crown by the majority in the First Division; the Commissioners of Inland Revenue appeal.

By the said trust disposition and settlement, and in the event which has happened of the testator having died without issue leaving his wife surviving, the trustees were directed to hold and retain his lands and estates of Manderston and others and out of the income

(1) 8 T.C. 551. (2) 3 T.C. 158.

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of his estate generally, including the said lands and estates, to make certain payments therein provided for, and in particular " all public " parochial and local burdens of every kind exigible furth of " his " heritable estate," and to allow his wife the Respondent to occupy and possess during her lifetime the mansion house of Manderston and the other subjects therein mentioned including in particular the policy parks in respect of which the assessments to Income Tax under Schedules A and B respectively were made and he directed his trustees " during the liferent " of his said wife to pay the wages of the foresters employed in connection with the establishment.

Under these trusts the Respondent did in fact during the year ending the 5th April, 1920, being the year preceding the year of assessment, occupy and possess the mansion house and lands the subject of the assessments to Income Tax under Schedules A and B now in question.

It is unnecessary to repeat the several statutory provisions relating to the Income Tax under Schedules A and B and to Super-tax, and I propose to state what in my view, bearing in mind the several authorities on the subject, is the true result of those provisions.

Income Tax under Schedule A is a tax not upon rent but upon the annual value of the hereditaments in respect of the property on which it is charged. If lands are let at a rack rent the annual value is measured by such rent, in other cases by the rack rent at which they are worth to be let by the year. The tax is to be charged on and paid by the occupier, viz., the person having the use of the hereditaments. If the hereditaments are held by the occupier at a rack rent he is entitled to deduct the amount of the tax on payment of his rent. If they are held at a rent less than a rack rent, he is entitled to deduct from such rent the proportionate part of the tax appropriate thereto. If they are not subject to any rent then the occupier bears and pays the entire tax. He does so because in such case he is the only person in enjoyment of the annual value. On this point I entirely agree with the opinion expressed by Lord Sands at page 24 of the Appendix. It seems to me to follow on principle, and for the moment without reference to authority, that in the case last mentioned the annual value is, for the purposes of the Income Tax Act, to be treated as income of the occupier, and I feel sure that on this point also I am in agreement with Lord Sands. He seems to have come to a conclusion to the contrary only because he felt himself bound by authority to do so.

The majority of the Judges in the Court of Session appear to have based their conclusion on the view that unless the annual value is capable of conversion into actual money either by letting or otherwise it cannot be treated as income of the occupier, and further that, in the present case, on the construction of the settlement, it was not capable of such conversion. Thinking as I do

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that there is no ground in law for their general proposition, I do not think it necessary to decide the point on the construction of the particular settlement, and, so far as I am concerned, the point remains open.

Independently of authority therefore I should come to the conclusion that so far as the assessment under Schedule A is concerned the contention of the Crown is correct.

As to the assessment under Schedule B I can find no material distinction and the same result follows.

I now turn to the authorities.

It is admitted by Counsel for the Respondent that there is no authority in England which supports his contention. But I think that the English authorities not only do not support but directly negative his contention. The most recent case is that of *Shanks* v. *Commissioners of Inland Revenue*(1), [1929] 1 K.B. 342, a decision of the Court of Appeal. I refer particularly to the judgment of Lord Justice Russell, which in my opinion concisely and correctly states the law on the subject.

The Respondent however relies on certain Scotch cases, and these it is therefore necessary to consider. The first is *Tennant* v. *Smith*(2), [1892] A.C. 150. I cannot help thinking that the decisions in the subsequent cases are to some extent the result of an erroneous view as to the nature of this case. The question there was whether the income from all sources of a servant of a bank includes as part of his emoluments under Schedule E the annual value of a portion of the bank premises in which as a servant of the bank he was required to reside. The bank itself was assessed in respect of the whole of the premises under Schedule A and paid the tax. It was held that nothing in respect of the annual value of the portion occupied by him of the bank premises could be treated as income under Schedule E. This case had nothing to do with Schedule A and in addressing this House Lord Macnaghten recognised that income from all sources includes the annual value under Schedule A, and the annual value chargeable under Schedule B. This case is no authority in support of the Respondent's case.

The next case is *M'Dougall* v. *Sutherland*, 3 T.C. 261. The question there was whether the annual value of the manse occupied by a Free Church minister by virtue of his office ought to be included in his income from all sources for the purposes of a claim to an abatement. It was held that it ought not, the decision being determined by the view that, inasmuch as in the opinion of the Court the Minister could not let the manse, or otherwise turn the annual value thereof into money, such annual value was not

(1) 14 T.C. 249. (2) 3 T.C. 158

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part of his income. In my opinion this case was incorrectly decided. I have already pointed out that in my view the annual value is taxed as against the occupier, in cases where he has no recourse to any other person, not as a mere collector but as a taxpayer, and that such annual value is therefore necessarily treated for the purposes of the Act as his income though he may not actually receive any money in respect thereof.

In *Corke* v. *Fry*, 3 T.C. 335, a similar case in reference to a manse of the Established Church, the decision was in favour of the Crown, but it was based upon the view that the Minister was entitled to let the manse. While, therefore, the decision was in my opinion correct, the point relied upon was irrelevant.

Lastly there is the case of *The Commissioners of Inland Revenue* v. *Wemyss*(1), 1924 S.C. 284. This was a decision that in a case somewhat similar to the present, the assessments under Schedule A and Schedule B were properly excluded in estimating the amount of income for purposes of Super-tax. The right of occupation in that case was in the discretion of the trustees and was in other respects of a restricted character, and it might be enough to say that the case was decided on its own facts and is not an authority in the present case, but I feel bound to say that in my opinion the special facts there relied upon were irrelevant; the taxpayer was in actual occupation of the hereditaments, the assessment was properly made upon him as the person in the enjoyment, so to speak, of the annual value the subject of taxation, and he had not under the Act any right of recourse to another person in respect of the tax or any part thereof. I do not think the decision in the case of *Wemyss* can stand with the present judgment.

On the minor point I think the rates were paid by the trustees for the benefit and on behalf of the Respondent and that the amount so paid must be treated as part of her income.

The figures are agreed.

I concur with the reasons given by the noble and learned Lord on the Woolsack and agree to the order proposed by him.

Lord Tomlin.—(read by Lord Thankerton):

My Lords, it is unnecessary for me to rehearse the facts of this case which have been already sufficiently referred to by the noble and learned Lord upon the Woolsack.

As however I have arrived at a conclusion which is not in accord with that of the majority of the Judges of the First Division it is proper that I should state the reasons which have guided me and this I think I can do briefly.

I will deal first of all with the items under Schedule A.

(1) 8 T.C. 551.

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The Respondent's argument as I understand it, is (1) that tax under Schedule A is charged in respect of "ownership" in lands; (2) that the Respondent's right "to occupy and possess" the mansion of Manderston and the policy parks was a personal right not in the nature of ownership because she could not turn it into money by letting the property or parting with her interest; and (3) that as her occupation had not inherent in it this quality of ownership she is not bound to include anything in respect of the annual value of the property under Schedule A in her return of total income for the purposes of Super-tax.

In my opinion upon the true construction of this Income Tax Act this argument is not well founded.

The nature of the tax under Schedule A was explained by Lord Macnaghten in his opinion in *London County Council* v. *Attorney-General*(1), [1901] A.C. 26, at page 35. The tax under that Schedule is a tax on "profits and gains" just as under the other Schedules. It is not a tax on ownership. The measure of the tax is annual value. The tax is cast upon the occupier, that is upon the person having "the use" of the lands. So far as the occupier is unable under the provision of the Act to pass on the tax to some one else he has to bear it as being the tax upon the part of the annual value representing the extent of his use.

Now Super-tax is an additional duty of Income Tax and is levied in respect of income the total of which from all sources exceeds £2,000. In *Tennant* v. *Smith*(2), [1892] A.C. 150, at page 161, Lord Macnaghten pointed out that total income from all sources means more than income properly so described. It includes the annual value of property chargeable under Schedule A and the annual value of the occupation charged under Schedule B.

My Lords, in my judgment the Respondent had the use of the property in question and was the occupier thereof within the meaning of Schedule A, No. VII, Rule 2. Accordingly, upon the reasoning which I have indicated, the annual value of the property of which she had the use was part of her total income from all sources.

This conclusion accords with the decision of the Court of Appeal in England in *Shanks* v. *Inland Revenue Commissioners*(3), [1929] 1 K.B. 342, and with other English decisions. It does not accord with the decision in Scotland in *Inland Revenue* v. *Wemyss*(4), 1924 S.C. 284. This last mentioned case was in my opinion wrongly decided. It follows also in my view that such cases as *M'Dougall* v. *Sutherland*, 3 T.C. 261, are also wrong so far as they rest upon the supposition that a money-producing quality is a necessary characteristic of an occupier's interest in order to render the annual value under Schedule A of the lands in which he has the interest part of his total income from all sources.

(1) 4 T.C. 265. (2) 3 T.C. 158. (3) 14 T.C. 249. (4) 8 T.C. 551.

(Lord Tomlin.)

With regard to the items under Schedule B, it is admitted that the tax is one upon occupation, but it is urged on the Respondent's behalf that here again unless the capacity to turn the interest into money can be found there is no obligation to include the annual value under Schedule B in the total income from all sources. Schedule A, No. VII, Rules 1, 2, 3, 4 and 5 are made applicable to Schedule B. The Respondent was therefore chargeable as occupier under this Schedule as under Schedule A. I can find nothing in the Act to support the Respondent's arguments or to justify the placing upon the observations of Lord Macnaghten in *Tennant* v. *Smith* to which I have already referred, a qualification which would exclude from total income the annual value under Schedule B because of some limitation upon the occupier's powers of dealing with his interest.

Having regard to the view which I have taken of this matter it becomes unnecessary to express any opinion as to the precise nature of the interest under the trust disposition and settlement which gives the Respondent her title to occupy the property.

There remain the smaller items of charge to be considered.

The Appellants at the Bar of your Lordship's House abandoned the claims in respect of the forester's wages recognising that there was not before your Lordships material sufficient for the determination of the question.

The rates fall primarily on the Respondent as occupier and, so far as the money for this liability is provided by the trustees, it is, in my opinion, money paid for her benefit which with the Income Tax upon it ought to be included in her total income for Super-tax purposes.

My Lords, in the result therefore I think this appeal should succeed so far as it has not been abandoned, and I concur in the motion proposed.

Lord Buckmaster.—My noble and learned friend Lord Blanesburgh desires me to state that he concurs with the opinion that I have already expressed.

Questions put :—

That the Interlocutor appealed from be recalled.

The Contents have it.

That the decision of the Special Commissioners with the necessary modification created by the forester's wages be affirmed.

The Contents have it.

That the Respondent do pay the costs of this appeal.

The Contents have it.

[Agents :—Messrs. Grahames & Co. for Messrs. J. & F. Anderson, W.S. ; the Solicitor of Inland Revenue, England, for the Solicitor of Inland Revenue, Scotland.]