Friday, February 9.

FIRST DIVISION.

[Exchequer Cause.

COLVILLE *v.* INLAND REVENUE.

Revenue—Super Tax—Legacy of Share of Net Income of Residue — Legacy Duty Deducted Annually by Trustees before Paying over Share—Whether Duty Deducted Part of Income for Super Tax Purposes—Deductions of Legacy Duty—Legacy Duty Act 1796 (36 *Geo. III, cap.* 52).

A beneficiary under a will was entitled to a share of the net income of the residue of the testator's estate. As the proceeds of the residue varied from year to year the trustees made annual payments of the legacy duty in respect of that legacy and deducted the duty from their remittance to the beneficiary. In assessing the beneficiary to super tax the Commissioners treated his income as consisting of the share of the net income actually received by him plus the amount of legacy duty paid by the trustees and the appropriate additions for income tax. *Held* that the legacy duty annually paid by the trustees was part of the beneficiary's income for super tax purposes.

The Legacy Duty Act 1796 (36 Geo. III, cap. 52) enacts—Section 6—". . . That the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue which he, she, or they shall be entitled so to retain either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and in case any person or persons having or taking the burthen of such execution or administration as aforesaid shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy or any part of a legacy, or the residue of any personal estate, or any part of such residue which such persons shall be entitled so to retain either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this Act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable in virtue of this Act, having received or deducted the duty so chargeable, then and in every of such cases the duty which shall be due and payable upon every such legacy, and part of legacy and residue respectively, and which shall not have been duly paid and satisfied to His Majesty, his heirs, and successors according to the provisions of this Act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid to His Majesty, his heirs, and successors; and in case any such person or persons so having or taking the burthen of such execution or administration as aforesaid shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon (such duty not having been first duly paid to His Majesty, his heirs, or successors according to the provisions herein contained) then, and in every such case, such duty shall be a debt to His Majesty, his heirs, and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made."

John Colville of Braidwood House, Braidwood, Lanarkshire, *appellant*, being dissatisfied with a decision of the Commissioners for the Special Purposes of the Income Tax Acts at Glasgow, *respondents*, confirming assessments to super tax made upon him for the years ending 5th April 1919, 1920, 1921, and 1922 respectively, under the provisions of the Income Tax Acts relating to super tax, took an appeal by way of Stated Case.

The Case stated, *inter alia* — "The following *facts* were admitted or proved: — 1. The appellant is entitled under the will of Mr David Colville, who died on 16th October 1916, to receive, as being one of the trustees of the will, certain annual sums out of the income of the residue of the estate, as provided for in the following clause of the will:—'And I direct my trustees to hold and apply my said means and estate, and the proceeds and produce thereof, as follows, viz.— . . . *In the fourth place*, I direct my trustees, so long as they administer the trust, to deduct from the nett accrued income of the residue of my estate from year to year administered by them two and a half per cent. for themselves (other than my wife and children), which they are to divide equally, as a mark of gratitude for their services.' 2. The amounts paid to the appellant under the said clause were as follows:—

For the year ended 5th April	1918	£199 13 1
,, ,,	1919	£221 18 9
,, ,,	1920	£130 7 1
,, ,,	1921	£849 10 7

3. Legacy duty was chargeable on the annual sums payable under the clause above referred to as follows:—

For the year ended 5th April	1918	£10 10 2
,, ,,	1919	£9 4 10
,, ,,	1920	£5 8 7
,, ,,	1921	£35 7 11

The legacy duty so chargeable was duly paid by the trustees to the Crown, and the appellant only received the sums mentioned in the preceding paragraph numbered 2. 4. For super tax purposes income tax falls to be added to the amounts receivable by the appellant under the said clause of the will. 5. The Special Commissioners in making the assessments appealed against treated the income receivable by the appellant under the said clause as represented by the amounts actually received by the appellant as detailed in paragraph 2 hereof, plus the amounts of legacy duty as set out in paragraph 3 hereof, with the appropriate additions for income tax. For example, for the super tax year 1918-19 such income was treated as follows :—

Actual amount received by the appellant	£199	13	1
Legacy duty paid by the trustees	10	10	2
	£210	3	3
Add one-third for income tax	70	1	1
Gross income . . .	£280	4	4"

The *question of law* for the opinion of the Court was—"Whether the legacy duty paid by the trustees each year in respect of the sums payable to the appellant under the will is part of the appellant's income for super tax purposes?"

Argued for the appellant—The legacy duty which fell to be paid was not part of the appellant's income. The trustees paid it to the Crown under the Legacy Duty Act 1796 (36 Geo. III, cap. 52), sec. 6. It really amounted to a debt due by them to the Crown, and constituted its share of the legacy. Counsel referred to *Nisbett's Trustees* v. *Learmonth*, 1845, 8 D. 69; *Attorney-General* v. *Wade*, (1910) 1 K.B. 703; *In re Loveless*, (1918) 2 Ch. 1; *Lethbridge* v. *Thurlow*, (1851) 15 Beavan 334.

Argued for the respondents—The legacy duty was not a charge on income, and therefore did not fall to be deducted in computing the appellant's income under the will. It accordingly ought to be included in the appellant's annual income for assessment to super tax. Counsel referred to *Lord Advocate* v. *Miller's Trustees*, 1884, 11 R. 1046, *per* Lord President Inglis at p. 1055, 21 S.L.R. 709.

At advising—

LORD PRESIDENT—The appellant is entitled under Mr David Colville's will to a legacy consisting in a share of the net income of the residue of the estate. The proceeds of the residue vary greatly from one year to another. The appellant's share being derived from the net income is payable to him income tax paid, and the true amount of his legacy is thus his share of the net income plus the income tax on it. The executors as accountable persons pay the legacy duty in respect of the appellant's legacy. Owing to the variation from year to year in the proceeds of the residue they pay the duty, not once for all but annually, on the amount of the appellant's legacy in each year, and deduct the duty from their remittance to the appellant.

The appellant is chargeable to super tax and the annual amount of this legacy is part of his income. It follows from what has already been pointed out that the true annual amount of this part of his income is his share of the net income of the residue plus the income tax upon it. The appellant has accordingly been assessed to super tax for certain years on the annual amount so ascertained or calculated.

He objects on the ground that the legacy duty deducted from such annual amount by the executors, in accounting to him for his share of the residuary income, is no part of the income received by him, but is a payment made by the executors in the discharge of their statutory obligations. No doubt the executors are primarily accountable for the duty, but it is payable in respect that the appellant is the donee in a gift flowing from the bounty of the testator, and the executors are entitled to deduct it when they pay him. If they did not retain and pay the duty themselves, the result would be to make it a Crown debt exigible against the appellant as well as against themselves—(the Legacy Duty Act 1796 (36 Geo. III. cap. 52), section 6). The duty is thus in substance an obligation of the appellant himself in respect of his becoming an object of the testator's bounty. It does not diminish the amount of the legacy or the amount of the income in which that legacy consists.

I think the question put to us must be answered in the affirmative.

LORD SKERRINGTON—This appeal is taken against a determination by the Special Commissioners confirming assessments to super tax made upon the appellant for the years ended 5th April 1919, 1920, 1921, and 1922 respectively. His complaint relates to the manner in which the Commissioners have dealt with payments of legacy duty which were made in each of these years by the testamentary trustees of a testator who died in the year 1916 leaving a will by which he directed his trustees (of whom the appellant is one) as follows:—"*In the fourth place*, I direct my trustees, so long as they administer the trust, to deduct from the net accrued income of the residue of my estate from year to year administered by them two and a half per cent. for themselves (other than my wife and children), which they are to divide equally, as a mark of gratitude for their services."

The sums actually received by the appellant in respect of this bequest amounted for the year ending 5th April 1918 to £199, 13s. 1d., and for the three following years to £221, 18s. 9d., £130, 7s. 1d., and £849, 10s. 7d. respectively, while the legacy duty chargeable on these sums and paid by the trustees to the Crown amounted to £10, 10s. 2d., £9, 4s. 10d., £5, 8s. 7d., and £35, 7s. 11d. respectively.

The Special Commissioners in making the assessments appealed against treated the income receivable by the appellant for each of the four years in respect of the bequest as consisting of the sum which he received in the previous year plus the corresponding sum paid for legacy duty. Thus for the

super tax year 1918-19 his income was treated as follows:—

Actual amount received by the appellant - - - - -	£199	13	1
Legacy duty paid by the trustees	10	10	2
	£210	3	3
Add one-third for income tax	70	1	1
Gross income - - - -	£280	4	4

According to the appellant's contention the correct amount would have been £199, 13s. 1d. plus £66, 11s. 0⅓d., in all £266, 4s. 1d.

If the annual sum payable to the appellant had been an annuity, the amount of which did not vary from year to year, legacy duty would have been charged in the manner directed by section 8 of the Legacy Duty Act 1796, as amended by section 31 of the Succession Duty Act 1853, viz., upon the capital value estimated according to the tables annexed to the last-mentioned Act. The duty thus ascertained would have been payable in four equal instalments, of which the first would have fallen to be paid before or on completing the payment of the first year's annuity, and in like manner as regards the three remaining instalments, with a proviso that any instalments accruing due after the death of the annuitant should cease to be payable, and that a portion of the duty should be repayable if the annuity should determine upon any other contingency than death. These provisions are obviously inapplicable to an annuity the amount of which varies from year to year. Accordingly the duty in the present case fell to be charged and paid in the manner directed by section 11 of the Act of 1796, which enacts that "such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes or charged with answering the same."

I have referred to section 8 of the Legacy Duty Act 1796 because it is plain that in a case falling within that section each of the four instalments of legacy duty paid to the Crown would be a payment to account of the duty on the capital value of the bequest. Accordingly it could not in such a case be successfully maintained that the payment of an instalment of the legacy duty was a fact which must be kept in view in estimating the annuitant's income for the purpose either of ordinary income tax or of super tax. It would, I think, be correct both in legal and in popular language to say that the annuitant's income had been increased by the whole amount of the annuity as given by the will (provided of course that there were funds to pay it), but that by accepting the bequest he had incurred a contingent liability for a capital sum payable in four instalments. On the other hand, in a case like the present where each year's annuity, after it has once accrued due and its amount has been ascertained, becomes chargeable with the payment of a certain percentage which falls to be retained by the trustees of the will and paid over to the State in name of legacy duty, no one but a lawyer would hesitate to say that the measure of the legatee's income so far as derived from the bounty of the testator is the actual as distinguished from the nominal amount which he is entitled to receive, and does in fact receive, from the trustees of the will in respect of the income of the trust estate for any particular year. Why should a different measure be applied in ascertaining his income for the purpose of the Income Tax Acts? In such a case there is no room for the argument that the legacy duty is a tax upon capital. On the contrary, the tax in the present case is a percentage or part of a sum which consists exclusively of income.

I confess that I was at first disposed to think that the determination of the Commissioners attributed an unnatural meaning to the word "income" as used in the Income Tax Acts, and that it violated the principles which underlay the decision in the leading case of *Tennant* v. *Smith* (*Inland Revenue*), (1892) 19 R. (H.L.) 1, [1892] A.C. 150. On further consideration, however, I have come to the conclusion that the question which we have to decide is essentially different from that which arose in *Tennant's* case. In that case the House of Lords decided that the advantage of a free residence for himself and his family which was enjoyed by a bank agent as part of his remuneration was not a part of his income in the ordinary sense of the word, and that it was not a subject of assessment under any of the schedules of the Income Tax Acts. In the present litigation we are concerned with an asset of a very different kind—an asset which, in ordinary parlance, forms part of a man's income and which is specially dealt with in the schedules of the Income Tax Act 1918, and in particular Schedule D 1 (*b*) and Case III, Rules 1 and 2. For the purpose of assessment to ordinary income tax the measure of the amount of the appellant's annuity is in my opinion determined by Schedule D of the Income Tax Act 1918, Case III, Rule 2, which directs with reference to, *inter alia*, any annuity or other annual payment that "the tax shall be computed in each case on the full amount arising within the year ending on . . . and shall be paid on the actual amount as aforesaid without any deduction." If it had been intended to authorise the deduction of a percentage charged annually in name of legacy duty special provision would have been made to that effect as was done in the case of excess profits duty—Schedule D, Cases I and II, Rule 4. The language of Rule 2 is not ambiguous. It states the principle to be applied both positively and negatively. The "full amount arising" means the full amount which the trustees of the will have to account for to the appellant in respect of a particular year, and not the amount which they can pay him after satisfying the claim for legacy duty. Further, any deductions from the "actual amount as aforesaid" is expressly forbidden.

There remains the question whether payments annually made by the trustees for legacy duty out of moneys which, for

reasons already explained, I regard as forming part of the appellant's assessable income, constitute a charge upon that income of such a kind that he would have been entitled to a deduction in respect thereof if he had claimed for exemption from or abatement of income tax. If the answer is in the affirmative, any such payment by the trustees must be deducted in order to ascertain the amount of his income for the purposes of super tax. Although sections 5 (1) and 27 (1) of the Income Tax Act 1918 were referred to in the course of the debate, no argument was addressed to us in regard to their construction and effect. Nor was it argued by the appellant's counsel that the payments in question, though made out of the appellant's income, nevertheless fell within the description of "yearly interest or other annual payments reserved or charged" on his income, "whereby his income is or may be diminished." Presumably it was thought that a person's income cannot be said to have been "diminished" if at his implied request and for his benefit a portion of his income from a bequest is paid by the trustees of the will to the State in order to secure that the balance shall come into his pocket. A legatee who accepts a legacy instead of disclaiming it may probably be regarded as having impliedly requested the trustees of the will to incur any expenditure on his behalf which he might have foreseen to be necessary in order to give effect to his request. I express no opinion as to points which were not raised and argued.

The important changes in the law contained in the Finance Act of 1920, and the consequential and minor amendments on sections 5 and 27 of the Income Tax Act 1918 contained in the third schedule to the Act of 1920, do not appear to me to affect the present controversy, though the Act probably applies to the latest of the assessments appealed against.

In my judgment the determination of the Special Commissioners must be affirmed.

LORD CULLEN—The appellant is one of the trustees under the testamentary settlement of the late David Colville, who died in October 1916. By his settlement the testator made the following direction—"I direct my trustees, so long as they administer the trust, to deduct from the net accrued income of the residue of my estate from year to year administered by them two and a half per cent. for themselves (other than my wife and children), which they are to divide equally, as a mark of gratitude for their services."

In accordance with this direction the appellant received for the years 1918, 1919, 1920, and 1921 respectively the sums set forth in the Stated Case. These sums so paid were arrived at after deducting the appropriate amounts of legacy duty which were paid by the trustees to the Crown.

Subject to one question it is not disputed that the annual payments falling to the appellant under the settlement form part of his income and are chargeable with super tax. The question in dispute is whether the amounts so chargeable are the net amounts actually received by him (after payment of legacy duty), or the gross amounts made up of what was actually received by him plus the duty deducted and paid to the Crown by the trustees.

Now so far as the gift under the settlement is concerned, it is the gross amount which the appellant is entitled to receive.

For the sake of clearness let it be supposed that the trustees pay over the gross amount to the appellant. The appellant is then by the statute under debt to the Crown for the legacy duty. For this debt his whole estates are affectable. I am unable to see why the amount of it should be regarded as an allowable deduction from his income for income tax or super tax purposes, any more than the amounts of other ordinary capital debts having a similar incidence on his estates. The only distinction is in the origin of the legacy duty debt. It arises *vi statuti* in respect that the gross amount of the legacy on which the duty is calculated comes to the appellant through the particular channel of a testamentary bequest. I am unable to see that this distinction in the origin of the debt makes any difference in principle. The fact that the trustees, in accordance with the obligation imposed on them by the statute, themselves pay the duty and then deduct the amount of it from the amount of the legacy on which it is calculated in making payment to the appellant, only goes to the matter of collection of the duty and cannot affect the result.

If the direction in the settlement had been one for payment of a sum certain annually during life or for a fixed period, the legacy duty would have been payable (in instalments) on the capitalised value of the bequest, and I am unable to see how such duty could under the Income Tax Acts be figured as an allowable deduction from the annual income of the legatee. And I do not see how it can make a difference that owing to the uncertainty in the amounts of the annual payments and their duration, the mode of collection of the duty is the special one prescribed by section 11 of the Act of 1796.

LORD SANDS — I agree in the result at which your Lordships have arrived. Although both income tax and legacy duty are debts due to the Crown, no equities arise from that fact in the absence of statutory direction. The collector of income tax and the collector of legacy duty must be regarded as independent creditors. The former collects a duty charged upon the whole income. He is not concerned with the use the taxpayer makes of his income. The taxpayer may apply it in payment of any of his debts, and it makes no difference that one of these debts happens to be a debt payable to the collector of legacy duty. In my view legacy duty, though it may be collected either from the executors or the legatee, is a debt of the latter to the Crown. The only specialty here suggested is that subjection of the legatee to deduction of the legacy duty by the executors, who pay it on

his behalf, is a necessary condition of payment to him of the legacy. I do not think, however, that this affects the matter. Payment by Government officials of the price of receipt stamps is a necessary condition of cashing the warrants for their salaries. Conceivably the price of the stamps if deducted from the year's income might just avoid the turning of a corner of total income which would infer a higher rate of income tax. But I do not think that there is any warrant for such a deduction, although a benignant provision will mitigate the hardship by permitting the taxpayer to surrender the superplus instead of paying the higher duty.

I accordingly agree in the proposal to affirm the determination of the Commissioners.

The Court answered the question of law in the affirmative.

Counsel for the Appellant — Dean of Faculty (Sandeman, K.C.) — Normand. Agents—J. & J. Ross, W.S.

Counsel for the Respondents—Solicitor-General (D. P. Fleming, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Friday, February 9.

FIRST DIVISION.

[Bill Chamber.

DICK LAUDER, PETITIONER.

Entail—Disentail—Heir of Entail—Application for Authority to Uplift and Acquire Consigned Money—Money Arising from Redemption of Casualties—Entail (Scotland) Act 1848 (11 *and* 12 *Vict. cap.* 36), *sec.* 26—*Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 18—*Feudal Casualties (Scotland) Act* 1914 (4 *and* 5 *Geo. V, cap.* 48), *sec.* 15.

An heir of entail who was in a position to disentail the whole estate without any consents, in applying for authority to disentail the superiority of a small portion of the estate, also sought authority, under section 26 of the Rutherfurd Act of 1848, to acquire in fee-simple certain moneys, consigned in the hands of the Accountant of Court, arising from the redemption of certain casualties effeiring to the entailed estate. The Lord Ordinary (Murray) having reported the case, *held* (1) that section 26 of the Rutherfurd Act was not limited to the case of money invested in trust for the purpose of purchasing lands, but covered also the case of money arising from the redemption of casualties if carried out under statutory powers, and (2) that neither the Conveyancing (Scotland) Act 1874 nor the Feudal Casualties (Scotland) Act 1914 had any restrictive operation on the effect of the Entail Acts with regard to the rights of heirs of entail *quoad* money derived from entailed estate so as to withdraw it from the operation of section 26 of the Rutherfurd Act, and authority *granted* to the heir of entail in possession to acquire the moneys in fee-simple.

The Entail (Scotland) Act 1848 (11 and 12 Vict. cap. 36) enacts—Section 26—"And be it enacted that in all cases where money has been derived, or may hereinafter be derived, from the sale or disposal of any portion of an entailed estate in Scotland, or of any right or interest in or concerning the same, or in respect of any permanent damage done to such estate under any private or other Act of Parliament, or where any money has been invested in trust for the purpose of purchasing lands to be settled upon the series of heirs entitled to succeed to such entailed estate, and where such money would fall to be invested in lands or heritages to be entailed on the same series of heirs as are called to the succession of such entailed estate by the tailzie thereof, and under the same prohibitions, conditions, restrictions, and limitations as are contained in such tailzie, and where the heir in possession of such entailed estate could by virtue of this Act acquire to himself such estate in fee-simple by executing and recording an instrument of disentail as aforesaid, it shall be lawful for such heir to make summary application to the Court in manner hereinafter provided for warrant and authority, and the Court upon such application shall have power to grant warrant and authority, to and in favour of such heir of entail for payment to such heir of such sums of money as belonging to himself in fee-simple. . . ."

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94) enacts—Section 18—"Casualties subject to the fetters of an entail may be redeemed as aforesaid notwithstanding such entail, the redemption money being consigned in one of the banks in Scotland incorporated by royal charter or Act of Parliament in name of the Accountant of the Court of Session, who shall be allowed a reasonable fee for his trouble out of such money, and being applied by the heir of entail in possession under the orders of the said Court for the benefit of the entailed estate, the accruing interest being payable to the heir of entail in possession during the time the same shall arise. . . ."

The Feudal Casualties (Scotland) Act 1914 (4 and 5 Geo. V, cap. 48) enacts—Section 15 "Subject to the provisions of this Act the provisions of section 18 of the principal Act shall apply to the redemption of casualties under this Act. . . ."

Sir George William Dalrymple Dick Lauder of Grange and Fountainhall, Baronet, *petitioner*, presented an application to the Court craving authority to disentail and acquire in fee-simple part of the lands of Grange. No answers were lodged. The petition showed that the petitioner was entitled to disentail without any consents in respect that he was in possession of the lands under a deed of entail dated prior to 1st August 1848, and that he was born after 1st August 1848.

In the course of the proceedings the