p. 266; *Bowles* v. *Attorney-General*, [1912] 1 Ch. 123, *per* Parker, J., at p. 134; *Doxat* v. *Doxat*, [1920] W.N. 262. *Wimble* v. *Bowring*, [1918] W.N. 265, 34 T.L.R. 575, showed the method of apportioning the super tax. The terms of the marriage contract interpreted the additional annuity conferred by the will.

At advising—

LORD JUSTICE-CLERK — The questions which fall to be decided in this Special Case depend on the construction of two deeds—(1) a marriage contract between the late Mr Wordie and his wife dated 1902, and (2) Mr Wordie's trust-disposition and settlement dated 28th February 1911, and codicil thereto dated 8th January 1913.

Mr Wordie died on 27th June 1913. The first parties are his trustees. The second party is his widow. There were no children of the marriage. [*His Lordship narrated the provisions of the deeds, and after dealing with certain of the questions for the opinion of the Court proceeded*]—

The sixth question raises a point of more general importance. The provision is of a "free liferent annuity or yearly sum" free of income tax. The marriage contract was dated in 1902, when there was no super tax. But super tax is in the statute imposing it described as an additional income tax, and it must be taken that that correctly describes it. If so, it seems to me to follow that a provision of a free annuity free of income tax must be read as relieving the annuitant from liability to pay super tax, the trustees being bound to pay both super tax and income tax. In my opinion therefore this question falls to be answered in the affirmative.

In my opinion the seventh question in both its branches falls to be answered in the negative, and that on the short ground that the trust-disposition and settlement neither says nor suggests anything to the effect that this annuity is to be paid to the second party free of income tax. I do not think it is legitimate to argue that the words "in addition to the annuity payable under the marriage contract" imported from the marriage contract the conditions applicable to the annuity thereby provided so as to make them affect the further annuity provided under the trust-disposition and settlement and codicil. . . .

LORD ORMIDALE—The most important question submitted for our consideration is the sixth, for in answering it we have to determine what is a matter to some extent of general interest, viz., whether "income tax" includes super-tax. In my opinion it does. The statutory definition of super tax is "an additional duty of income tax," and it is assessed under the Income Tax Acts by the Special Commissioners of income tax. It is a tax imposed on income and nothing else. Ordinary income tax no doubt is, as a rule but not universally, deducted before, and super tax after, receipt of the income, but that does not alter the root idea of the duty but merely affects the manner of its collection. Only incomes which are above a certain amount are liable to the super tax, but at the other end of the scale incomes below a certain amount are free even from ordinary income tax. The general words "free from income tax" appear to me therefore to cover and include super tax. In several cases in the English Courts "income tax" has been held to apply to super tax—*Bowles* v. *Attorney-General*, [1912] 1 Ch. 123; *Brooke* v. *Inland Revenue Commissioners*, [1918] 1 K.B. 257; *Oldham* v. *Crosse*, [1920] 1 Ch. 240; and *In re Doxat*, [1920] W.N. 262. The case of *Crawshay*, [1915] W.N. 412, is not an authority to the contrary, the decision in that case being reached on the construction of the special terms of the bequest, which were quite different from those used in Mr Wordie's marriage-contract. It is true that the super tax falling to be paid by the second party is dependent on the amount of the total income received by her, of which the annuity in question only forms a part. The adjustment of the proportion payable by the first parties to the second party should not, however, occasion any difficulty —*In re Bowring*, [1918] W.N. 265; *In re Doxat*.

The sixth question must therefore be answered in the affirmative.

I cannot, however, see any reason why we should find that the annuity of £1000 payable under the trust-disposition and settlement and codicil falls to be paid free of income tax. The testator does not say that the annuity is to be paid free of income tax, and the declaration that it is to be "in addition to the annuity" already conceived in her favour in no way warrants an inference to that effect. Moreover, the earlier annuity was under a deed of a different nature, to wit, the marriage-contract between the parties. . . .

I agree that the questions should be answered as your Lordship proposes.

LORD BLACKBURN concurred.

LORDS DUNDAS and SALVESEN did not hear the case.

The Court answered the sixth question of law in the affirmative, and the seventh question in the negative.

Counsel for the First Parties—Hon. W. Watson, K.C.—Black. Agents—Macpherson & Mackay, W.S.

Counsel for the Second Parties—D. P. Fleming, K.C. — Patrick. Agent — Peter Dowie, W.S.

Wednesday, November 9.

FIRST DIVISION.

COLQUHOUN'S TRUSTEES *v.* COLQUHOUN.

Succession — Will — Bequest — "Annuity" — Whether Annuity Payable out of Capital on Income becoming Insufficient.

A testator directed his trustees, *inter alia*, to pay to his son a "free yearly annuity" of £3000, with interest on each half-year's payment during the non-payment, and one-fifth part more of each term's payment as penalty in case

of failure. After the death of the testator the trustees proceeded to make payment of the annuity out of the annual income of the estate. The income having become insufficient for this purpose, and questions having arisen as to the duty of the trustees, *held* that the annuity was payable out of capital to the extent to which the annual income was insufficient, that being the ordinary legal quality of an annuity, and there being no sufficient evidence in the deed of a different intention.

Sir Colin George Macrae, W.S., Edinburgh, and others, the trustees acting under the general trust-disposition and settlement of the late Sir Alan John Colquhoun of Colquhoun and Luss, Baronet, K.C.B., *first parties*, and Sir Iain Colquhoun, Baronet of Colquhoun and Luss, *second party*, presented a Special Case for the opinion and judgment of the Court.

The Case stated—"1. The late Sir Alan John Colquhoun, Baronet of Colquhoun and Luss, and heir of entail in possession of the entailed portion of these estates (hereinafter termed 'the testator'), died on 14th March 1910 leaving a general trust-disposition and settlement dated 1st February 1910, and relative codicils dated 1st and 9th February 1910.

"2. The estate of the testator at the time of his death consisted of moveable property to the value of £54,500, heritable property held by him in fee-simple valued at £362,000, and entailed heritable estate valued at £85,000, together with £5000 of entailed money, in all amounting to an approximate gross value of £506,500. The debts affecting the testator's estate, including Government duties arising on his death, and provisions, annuities, and other debts affecting the heritable estate, amounted approximately to £225,500. The testator was succeeded in the baronetcy and as heir of entail in possession of the entailed estate by his son Sir Iain Colquhoun, Baronet. The said Sir Iain Colquhoun is the second party to this case.

"3. By the said general trust-disposition and settlement the testator, under declaration of being desirous to arrange his affairs after his death, 'and in that event to provide for the payment of the debts on my estates which have been occasioned by the sums borrowed to meet Government duties exigible on my succession thereto and family provisions secured thereon, and in order to make such arrangements as will preserve the estate from alienation and with a view to the ultimate advantage of my son Iain Colquhoun and the heirs who shall succeed to me,' directed—(*primo*) payment of his debts and funeral and trust expenses; (*secundo*) the implementing of the obligations arising under the antenuptial contract of marriage entered into between the testator and his first wife, including payment of £40,000 to the children of the marriage other than the heir succeeding to the estates of Colquhoun and Luss; (*tertio*) payment to his wife of the sum of £1000 contained in a policy of assurance on the testator's life; (*quarto*) the handing over to the second party of the plate, china, furniture, &c., in the mansion-house of Rossdhu; (*quinto*) payment of any legacies he might direct; (*sexto*) payment out of the free annual rent and revenue of his said means and estate of (first) an annuity of £2500 to his wife, and (second) an annuity of £1500 to the widow of his predecessor, the late Sir James Colquhoun of Luss, and which annuity had been secured upon part of the fee-simple estates by a bond of provision granted during Sir James's lifetime; (*septimo*) payment of the annual interest of sums of money borrowed by the testator 'until such times as the principal sums of these debts and sums of money shall be paid off as hereinafter provided'; (*nono*) payment of the premiums of a policy of assurance on the life of his son Iain Colquhoun; (*decimo*) a provision in the event of his son Iain Colquhoun marrying for his wife and children; while in the eleventh, twelfth, and thirteenth purposes the testator gave the first parties directions as to the paying of the debts affecting the heritable estate, and thereafter increasing the income to be paid to Sir Iain Colquhoun. The fourteenth and fifteenth purposes dealt with the destination of the testator's estate after the death of Sir Iain Colquhoun. Power was further given to the first parties to determine the trust and convey the whole trust estate to the second party, notwithstanding anything to the contrary expressed in other portions of the settlement, on the concurrence of two events, viz., the reduction of the debts secured on heritage, other than the annuities provided for in the sixth and tenth purposes, to £50,000, and the attainment of the second party to the age of forty; to sell the whole or any part of the truster's lands and estates for the purpose of meeting the debts thereon or for any other purpose whatever; and also to borrow on the security of the heritable estate, in the execution of any of the purposes of the trust or for the payment of Government duties or family provisions, such sums of money as from time to time they might think necessary or expedient.

"4. The eighth purpose of the trust-disposition and settlement is in the following terms:—'Considering that I have in contemplation the immediate disentail of the presently entailed portions of my estates of Colquhoun and Luss and others and that I anticipate that at my death the whole of the said estates will be held by me in fee-simple, I direct my trustees to ingather the whole rents and produce of my said estates both presently entailed and unentailed and after meeting the foresaid annuities and interests to pay to the said Iain Colquhoun a free yearly annuity of three thousand pounds sterling free of income tax and that at two terms in the year Whitsunday and Martinmas by equal portions beginning the first payment at the first of these terms which shall happen after my death of the proportion applicable to the period from the date of my death to said term and the second term's payment of one thousand five hundred pounds sterling at the next term thereafter for the half-year preceding and so forth half-yearly termly and proportionally

thereafter during the lifetime of the said Iain Colquhoun with interest at the rate of five pounds per centum per annum on each term's payment during the non-payment thereof and one-fifth part more of each term's payment as penalty in case of failure and also to allow him to retain the use and management free of rent of the mansion-house and policies of Rossdhu and also of the deer parks in the said policies and of the shootings on any part of my said estates which had not been let but were retained for my own use and that over and above the annuity above or after provided: Declaring that my said trustees shall have power to allow the said Iain Colquhoun a further sum of one thousand pounds sterling per annum for the upkeep of Rossdhu House and policies provided same are maintained in a good state of order and repair and to enable my trustees to satisfy thomselves that this condition is fulfilled they shall have power to visit and inspect the subjects at their discretion either by themselves or by some person appointed by them for this purpose: And in the event of the said house and policies not being so maintained my trustees shall be entitled to withhold payment of said allowance: And said allowance shall be paid at the same terms and in the same manner as before described in reference to said annuity of three thousand pounds per annum: Declaring further that in the event of the said lands presently entailed not having been disentailed at the time of my death the said annuity of three thousand pounds sterling per annum and additional allowance of one thousand pounds sterling shall only be paid to the said Iain Colquhoun if he shall allow my said trustees to collect and receive the rents of the said entailed estates along with the rents of the unentailed properties, and in the event of his not agreeing to do so and of his entering himself into the possession and management of the said entailed lands and estates then and in that event he shall not receive the said annuity of three thousand pounds sterling nor allowance of one thousand pounds sterling above mentioned or any part thereof.'

"5. The eleventh, twelfth and thirteenth purposes are as follows:—'(*Undecimo*) I direct and appoint my said trustees out of the rest and remainder of the yearly revenue or proceeds of my said lands and estates after paying the annual interest of the money borrowed and secured over my estates and the annuities and provisions before referred to and the public and parochial burdens and any sums that are required to pay the factor and commissioner or agent in managing the estates and any sums on account of drainage repairs on farm buildings or fencing that it may be found requisite to expend for the advantage and good management of the estates to pay off from time to time as they shall find themselves in a position to do so the various heritable debts due by me or created by them in virtue of the powers hereinafter conferred upon them and secured over my said lands and estates and that in such order and at such times as they may consider most expedient, it being my wish and intention that the debts over my said estates shall be paid off as soon as may be and for this purpose I give them power if they shall deem it advisable to substitute bonds of annual rent for bonds and dispositions in security payable over such a period of years as they in their sole discretion are hereby empowered to arrange: (*Duodecimo*) As soon as my trustees shall have reduced the amount of the debt due by me or created by them as aforesaid and secured over the said lands and estates to one-half of the sum due and addebted and secured over the same at the time of my death (exclusive always of the capital value of the said annuities of two thousand five hundred pounds sterling and one thousand five hundred pounds sterling before referred to and exclusive also of any annuities or provisions to the widow and family of the said Iain Colquhoun granted by my said trustees under the tenth purpose hereof) I hereby direct and appoint that the sum or allowance or annuity payable to the said Iain Colquhoun my son shall be increased by the additional sum of two thousand pounds sterling per annum making the annuity payable to him five thousand pounds sterling per annum in addition to the said allowance of one thousand pounds sterling for upkeep of Rossdhu House and policies before referred to and the said additional sum of two thousand pounds sterling per annum shall be paid at the terms and in the manner before appointed in reference to the annuity already provided and shall be paid to him whether the said estates presently entailed shall have been disentailed at the time of my death or not and irrespective of whether he shall have consented to allow the said entailed estates (if not disentailed at my death) to be managed and the rents thereof received by my trustees: (*Tertiodecimo*) As soon as my trustees shall by the accumulation of the rents as aforesaid have paid and discharged all the debts and obligations due by me at the time of my death or created by them as aforesaid (exclusive of annuities and provisions as aforesaid) and secured over the said lands and estates or any part thereof I direct and appoint them to pay to the said Iain Colquhoun my son and that during all the days of his life thereafter the whole free annual rents or income or produce of the said estates not required in order to meet the annuities or provisions public and parochial burdens and management outgoings before referred to and that at the terms and in the manner before appointed in reference to the annuities or allowances before provided to him: Declaring however that in the event of the said lands and estates at present entailed not having been disentailed at the time of my death and of the said Iain Colquhoun entering himself into the possession and management of the said entailed lands and estates and not allowing the rents thereof to be collected and managed by my said trustees then and in that event (but only when the said debts and obligations have

been fully discharged as aforesaid) his right to the free annual proceeds of my said estates shall be restricted and is hereby restricted to the sum of three thousand pounds sterling per annum inclusive of and not in addition to the annuity or allowance of two thousand pounds sterling per annum before provided for in the said event.'

"The testator died before carrying out his intention to disentail the entailed portions of the said estates, and the second party, in view of the direction in the eighth purpose that the annuity of £3000 and the additional allowance of £1000 should be paid to him only in the event of his allowing the first parties to collect and receive the rents of the said entailed portions of the estates, granted to the first parties a factory and commission for that purpose, dated 22nd June 1910. . . .

"8. The first parties have in virtue of the said factory and commission collected the rents of the entailed estate and they have paid the annuities of £2500 and £1500 before referred to, and have also paid to the second party the annuity and allowance as directed in the eighth purpose of the said settlement. They have further paid off out of surplus income a substantial amount of the heritable debt. Owing, however, to the increase of imperial and local taxation, and of the general expenses of the maintenance of heritable property, and of the increased rate of interest payable on the heritable debt, the first parties now find that the free income of the entailed and trust estates is now insufficient to pay the said annuity and allowance to the second party. Questions have therefore arisen as to the duties and powers of the first parties with regard to the said payments, and in particular as to their power to encroach on the capital of the trust estate in order to make said payments . . ."

The first parties maintained, *inter alia*, that they were not bound to pay to the second party the said annuity of £3000 out of the capital of the trust estate.

The second party maintained, *inter alia*, that upon a sound construction of the testator's settlement the first parties were bound to pay the said annuity out of capital in so far as income was not available.

The *questions of law* included the following one—"(1) Are the first parties bound to pay to the second party out of the capital of the trust estate, to the extent to which the annual income of the entailed and trust estates is insufficient for that purpose, (*a*) the said annuity of £3000."

Argued for the first parties—The scheme of the will favoured the view that the annuity was intended to be paid only out of income. Its main purpose was to provide for the gradual reduction of debt and to preserve the capital. The direction for this annuity was one of a series dealing with the application of revenue. Thus the jointures provided in the sixth purpose were expressly confined to income although they were in fact capital charges. Any significance that might attach to the word "annuity" was discounted by its being used alternatively with the word "sum." In England the rule was that when an annuity was directed to be paid out of income it was necessary to connect it with the *corpus* of the estate in a definite way before it could be made a charge thereon—Jarman on Wills (6th ed.), vol. ii, p. 1147; *Hindle* v. *Taylor*, 1855, 20 Beav. 109; *In re Boden*, [1907] 1 Ch. 132; *In re Howarth*, [1909] 2 Ch. 19; *In re Watkins*, [1911] 1 Ch. 1. In the only Scots case on the point the annuity was thus connected with the *corpus* of the estate—*Stewart* v. *Stewart's Trustee*, 36 S.L.R. 625.

Argued for the second party—The scheme of the will was to provide for the payment of the debts and for the maintenance of the son meantime. The use of the word "annuity" in a careful deed such as this must be taken to be deliberate. It was well settled in Scotland that failing income an annuity was payable out of capital—*Kinmond's Trustees* v. *Kinmond*, 11 Macph. 381; *Knox's Trustees* v. *Knox*, 7 Macph. 873; *Adamson's Trustees* v. *Adamson's Executors*, 18 R. 1133, 28 S.L.R. 869; *Ewing's Trustees* v. *Mathieson*, 1901, 9 S.L.T. 367. The case of *Stewart* v. *Stewart's Trustee* supported this view. The English cases cited by the first parties were peculiar to Chancery law. The following English cases were cited in support of the second party's contention, viz.—*Phillips* v. *Gutteridge*, 1862, 3 de G. J. & S. 332; *In re Watkin's Settlement; In re Howarth; Stephens* v. *Draper*, [1915] 1 I.R. 95. The provision for interest and penalty in case of non-payment of the annuity, and also the provision that the jointure of the second party's wife should be secured on the heritage, were inconsistent with the first parties' contention.

At advising—

LORD PRESIDENT—The first and second questions in the case depend for their answer on a sound construction of the language used in the trust-disposition and settlement of the late Sir Alan Colquhoun, and precedents are of little value except in so far as they show that any of the words or expressions used in it have a definite construction attached to them. Those questions relate primarily to the provision in favour of his son of what the testator calls "a free yearly annuity of £3000 sterling," and the point for decision is whether this provision is payable out of capital to the extent to which the annual revenue of the estate is insufficient.

The legal qualities of a bequest of an annuity (1) as an annual charge payable out of income preferably to the liferenter of the income of residue, and (2) as a special annual legacy payable out of capital if the income runs short, and immune from abatement in a question with residuary or reversionary interests in the capital, are firmly established in the law of Scotland; and therefore when a testator designates his bequest as an annuity he is understood to mean that it shall have effect accordingly in the absence of declared intention to the contrary. In the case of *Hutcheson's Trustees* (13 R. 915) the effect of a bequest of an annuity was held to be qualified by the adoption of a

special form of security for the payment of the so-called "annuity," which reduced it to nothing more than a liferent of the security subjects limited to the amount of the "annuity." Again, a testator may possibly frame the bequest of an annuity in such a way as to charge each year's payment on the income of that and future years, and it may be a question whether a continuing or cumulative charge of this character does or does not involve a capital liability. This latter form of bequest is not familiar according to our Scottish forms, and so far as I am aware it has never been even referred to in any case in Scotland except it be in that of *Stewart's Trustee*, 36 S.L.R. 625.

The first parties' argument was that Sir Alan's settlement does declare an intention that the "free yearly annuity of £3000 sterling" provided to his son shall not be payable out of capital even though the income of the estate is insufficient to meet it. I think they were right in contending that the leading object in Sir Alan's mind was to deal with the income of his estate so as to preserve the capital. So much was this the case that, for example, the provisions of the sixth purpose are expressly confined to income although, as we were informed, the annuities or jointures therein mentioned are in fact capital charges, and while the powers to borrow and to sell conferred upon the trustees are of a wide character, the general scheme of the settlement is that all the burdens existing at the date of the testator's death, and also all those imposed by the trustees in the course of their administration, are to be paid off out of income before the destinations in the settlement receive effect. But this does not carry one very far, and it is to be observed that the annuity of £3000 per annum is not expressly connected (in the eighth purpose) with a direction to pay out of income, though it may fairly be deduced from the context that the testator had income in his mind as certainly the primary source of payment both of it and of the jointures referred to in the sixth purpose. Moreover, the annuity is to bear interest in case of non-payment and to carry a penalty in case of failure. These are qualifications which are not necessarily inconsistent with a limitation of chargeability to income, but they cannot be said to be favourable to it. Taking the deed as a whole, I am unable to find in it evidence sufficient to show that the testator intended to subvert the ordinary legal qualities which in the absence of such intention attach to a bequest in the form of an annuity. I am therefore for answering branch (*a*) of question (1) in the affirmative.

LORD MACKENZIE—This is one of those unfortunate cases in which the anticipations of the testator have been falsified by events. Sir Alan Colquhoun anticipated that at his death the entailed estates would be held by him in fee-simple, and that the rents of these, together with the rents of the estates held by him in fee-simple at the date of the settlement, would be sufficient for the purposes provided for in the settlement. These purposes were for payment of annuities and interest on debts charged on the fee-simple estate, and after meeting these prior charges then to pay to his son Iain, his heir, a free yearly annuity of £3000. There is power to his trustees to allow his son a further sum of £1000 for the upkeep of Rossdhu House and policies subject to certain conditions. There follows a direction to pay the heritable debts out of the rest and remainder of the yearly revenue as the trustees shall from time to time find themselves in a position to do so. There is a direction that when the debts are so far reduced, the sum, allowance, or annuity payable to his son is to be increased. When the debts have all been paid off (exclusive of annuities and provisions) the whole free annual rents not required to meet the annuities or provisions and necessary outgoings are directed to be paid to his son. After payment of all the debts and obligations, and at the termination of the annuities, then on the death of his son the whole estates and all accumulations of income, are directed to be conveyed to the next heir succeeding to the baronetcy of Colquhoun and Luss. There is also power to the trustees, in certain other contingencies to which it is not necessary to refer, to terminate the trust.

To provide for the contingency of the entailed estates not being disentailed at the date of his death the testator made it a condition of the trustees paying the annuity of £3000 that his son Iain should allow the trustees to collect and receive the rents of the entailed estates along with the rents of the unentailed properties. The entailed estates were not disentailed at the date of the testator's death. The heir has allowed the trustees to collect the rents of the entailed estates, and has granted a factory and commission to the trustees for that purpose.

The free income of the entailed and unentailed estates is insufficient to pay the annuity of £3000 to the heir. The first question in the case relates to the duties and powers of the trustees in regard to this payment. The answer turns upon the proper construction to be put upon the settlement, particularly clause (*Octavo*). It appears to me on a fair reading of the deed that there is here an unqualified gift, and that there is no necessary implication, as the trustees contend, that the annuity of £3000 is to be paid "therefrom," thus limiting the fund out of which payment was to be made to the rents and produce which the trustees are directed to ingather. The annuity is directed to be paid after meeting the annuities and the interest on debt secured over the fee-simple estates. These were prior charges on the fee of those lands. The use of the word "after" means that the annuity to the heir is not to defeat the rights of prior creditors. There is no indication of an intention that, as matters have turned out, the heir is to be deprived of all or any part of his annuity. If this construction be correct, then it is sufficient to determine the question as regards the annuity of £3000. It is payable out of

capital if the income is insufficient. The succeeding words were urged as supporting the view that the testator did not intend to limit his son to a partial liferent, as the stipulation for interest on failure of payment is inconsistent with this. It is unnecessary to express an opinion upon what the effect of this clause would have been had the true construction of the initial words been other than that above adopted. The point arising on the interest clause was not fully argued to us.

LORD SKERRINGTON—The terms of the trust-disposition and settlement which we have to construe are very special. I do not think it necessary to say more than that I can find no clear and unequivocal direction that the annuity of £3000 shall be paid out of income, though there are, no doubt, indications that the testator contemplated that it would be so paid. Accordingly I do not need to consider whether such a direction would have prevented the annuitant from claiming against the capital of the estate. It follows that the first parties are bound to resort to capital if the income is insufficient to pay this annual sum in full. The opinion which I have expressed is consistent with what I regard as the general scheme of the will. It is difficult to suppose that the testator intended to restrict his son to an annuity payable out of income only which might through a fall in the free rental prove to be insufficient for his son's comfortable maintenance, while at the same time authorising the latter to provide an annuity of £1000 for his (the son's) widow secured over the fee of the heritable estates, and also substantial provisions similarly secured in favour of his (the son's) children.

The first question ought, in my opinion, to be answered affirmatively as regards branch (*a*).

LORD CULLEN—The unentailed estate left by the late Sir Alan John Colquhoun was affected by debts and obligations of a large amount, stated in the case to be about £225,500. To provide for this indebtedness appears to have been a matter of first concern with the testator, who by his settlement constituted a trust for the purpose of holding his whole estate until the indebtedness should be, wholly or for the most part, paid off out of the free annual revenue. As regards the fee of the unentailed estate, he provided that when the heritable debt (apart from certain annuities) had been reduced to £50,000 the trustees should have power to convey it to his only son Sir Iain Colquhoun, provided he had attained the age of forty. Failing the exercise of this power the fee is destined, on the death of Sir Iain Colquhoun, to the heir succeeding to him in the baronetcy of Colquhoun, if such heir should be an heir-male of the body of the testator's father John Colquhoun, otherwise it is destined to the testator's eldest daughter and the heirs of her body, whom failing his second daughter and the heirs of her body, &c.

The entailed lands possessed by the testator, and in which he was succeeded by his son, were of much smaller value than the unentailed lands. The testator anticipated that they would be disentailed prior to his death, but the provisions in his settlement are framed with a view to either contingency.

As the testator's son might never succeed to the fee of the trust estate at all, or in any event would not do so until the greater part of the debt had been paid off and he had attained the age of forty, the testator naturally made it an object to provide him with an income during the period before he succeeded, or if he never succeeded, during his life. This was all the more necessary if the entailed lands were, according to the testator's expectation, disentailed before his death so as to pass under his settlement, Accordingly there is a series of directions to that end contained in his settlement. Under head *octavo* of the trust purposes the trustees are directed to "ingather the whole rents and produce of my said estates both presently entailed and unentailed, and after meeting "(certain family annuities and the annual interest of the debt) " to pay to the said Iain Colquhoun a free yearly annuity of £3000 sterling yearly free of income tax," &c., it being declared, however, that in the event of the contemplated disentail not having been carried through the said annuity should only be payable on condition of Sir Iain allowing the trustees to collect and receive the rents of the entailed lands along with those of the unentailed lands. Under head *duodecimo* of the trust purposes it was directed that when the debt should have been reduced by the trustees to a certain defined extent, they should increase the annuity to £5000, and that irrespective of whether Sir Iain did or did not allow the trustees to collect or receive the rents of the entailed lands. And under head *tertiodecimo* it was directed that when all the debts on the trust estate (exclusive of certain annuities and provisions) had been paid off, the trustees should pay to Sir Iain during his life the whole free annual rents or income or produce of the trust estate, under condition that he should allow the trustees to collect and receive the rents of the entailed lands if no disentail had taken place, it being provided that otherwise his right to the said free annual proceeds should be restricted to £3000 per annum.

At the present stage of the trust administration the annuity provision applicable is that under head *octavo* already referred to, which directs the trustees to pay to Sir Iain Colquhoun a free yearly annuity of £3000. This annuity has heretofore been paid, Sir Iain having complied with the condition regarding the rents of the entailed lands by granting a factory and commission empowering the trustees to collect them. Owing, however, to the increase in taxation and in the expenses of maintenance of heritable property and the increased rate of interest on heritable debt, the free income of the trust estate is not sufficient to enable the trustees to continue paying the annuity out of income. Accordingly the leading question in this Special Case is whether the deficiency falls to be paid out of capital.

This question is one of some difficulty. I have come to the conclusion that it should be answered in the affirmative. On a consideration of the scheme of testamentary disposition as a whole, it seems to me very improbable that the testator should have intended that his son and heir in the baronetcy should be left unprovided for—it might be wholly unprovided for—should free income fail, in order to keep intact the fee or capital for the purposes of a destination under which the first beneficial interest is, under conditions not unlikely to be realised, conferred on the son himself, who is expressly empowered to charge the fee with provisions in favour of his wife and children. And when we turn to head *octavo* of the trust purposes we find that while the trustees are directed to pay Sir Iain an annuity of £3000 per annum the testator does not say that the annuity is to be payable solely out of the revenue of the trust estate. It is quite true, as observed by the trustees, that this direction is one of a series dealing with application of revenue. But this does not seem to me to go far enough to make out the trustees' contention. The testator, no doubt, hoped and expected that the revenue of the trust estate would be sufficient for all the payments which he directed to be made out of it. But for some of these the fee or capital was undoubtedly affectable. The annuities mentioned under head *sexto* are, we were told by counsel, burdens on the fee or part thereof. Again the interests of the heritable debts directed to be paid out of revenue under head *septimo* are undoubted charges on the fee. Thus the testator's scheme of administration *quoad* these annuities and interests represents only what he desired to have done out of revenue, *primo loco*, if there should be sufficient revenue available, the fee remaining liable in recourse in the event of there being a deficiency of revenue. It does not follow, therefore, from the fact of the annuity provision here in question occurring among a series of directions relating to the application of revenue that the testator necessarily excluded liability of the fee for its payment. No doubt he contemplated that there would be sufficient revenue to pay it. But the question remains whether he is to be understood as meaning that revenue alone is to be liable for it. Now he does not expressly adject this limitation to the direction to pay the annuity. And on a consideration of the scheme of his settlement as a whole I do not think there is any sufficient ground for holding the limitation to be implied.

The Court answered branch (*a*) of the first question of law in the affirmative.

Counsel for the First Parties — Dean of Faculty (Constable, K.C.)—Skelton. Agents —Macrae, Flett, & Rennie, W.S.

Counsel for the Second Party — Chree, K.C. — Maconochie. Agents — Scott & Glover, W.S.

HOUSE OF LORDS.

Monday, December 12.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Sumner, and Lord Wrenbury.)

GALLOWAY *v.* EARL OF MINTO.

(In the Court of Teinds March 6, 1920, S.C. 354, 57 S.L.R. 297.)

Teinds—Stipend—Valued and Unvalued Teinds—Right of Heritor to Tender, in Satisfaction of Stipend Localled in Victual, Money Value of Teinds without Surrendering them—Tender where Teinds Unvalued, of One-fifth of Rent of the Lands.

Held (*aff.* judgment of Second Division) that a heritor whose teinds have been valued in money but have had a stipend localled upon them in victual, is bound, where the stipend exceeds the amount of the valued teinds, either to pay the amount or to surrender the teinds in perpetuity. He is not entitled to tender for the particular year the amount of his teinds as valued.

Where the teinds are unvalued and the stipend localled exceeds one-fifth of the rent, the heritor must either pay the amount of the stipend or lead a valuation and surrender.

The case is reported *ante ut supra.*

The Earl of Minto appealed.

At delivering judgment—

LORD DUNEDIN—The respondent is the minister of the parish of Minto. The appellant is a heritor in the said parish. His lands consist of various parcels, and the title as to the teinds of the lands is not uniform. As to some he is the heritable owner in respect of conveyance and sasine, as to the others he is not. Some of the teinds are valued, others are not. The respondent is in right of a decree of locality following a decree of augmentation and modification in the year 1907. By that decree a certain amount of victual, half meal, half barley, is localled on each separate parcel of the appellant's lands. According to ordinary practice the amounts of victual so modified are converted into money at the fiars prices of the year, and demand is then made by the minister from the heritor for payment of the sum so brought out. The appellant here resists. He says the fiars prices are, owing to the war, so high that the amount that he is called on to pay is more than the money valuation which he holds in the case of the lands whose teinds are valued, and are more than one-fifth of the rent of the lands where the teinds are not valued, as those lands are entered in the proven rental in the locality on which the augmentation was granted. The sum so brought out he tenders. The respondent might have taken the short way of charging upon his decree, which would doubtless have been responded to by a suspension, in which process the appel-