

Saturday, November 23.

FIRST DIVISION.

SMITH'S TRUSTEES v. GAYDON AND OTHERS.

*Succession — Trust — Construction — "Net Annual Proceeds"—Incidence of Income Tax as between Liferentrix and Trust.*

A testator directed his trustees to pay out of the "net annual proceeds" of one-half of the residue of his estate £750 yearly to his niece for her liferent alimentary use. *Held* that the sum of £750 fell to be paid to the niece annually without deduction of income tax therefrom.

*Murdoch's Trustees v. Murdoch*, 1918, 55 S.L.R. 664, *followed*.

David Stewart and others, the testamentary trustees of John Smith, merchant, Dundee, *first parties*, Mrs Leonora Hean Smith or Gaydon, niece of the testator, *second party*, Harold Wallace Gaydon, husband of the second party, as tutor and administrator-in-law of her pupil children, *third party*, and the Corporation of the Dundee Royal Infirmary and others, *fourth parties*, brought a Special Case to determine questions as to the incidence of income tax upon a bequest by John Smith in favour of the second party.

The *trust-disposition and settlement* of John Smith, after conveying his whole estates, heritable and moveable, to the first parties for a variety of purposes, provided—“(Fifth) With regard to the residue of my estates I direct my trustees to divide the same into two equal parts or shares, and to hold one of said parts or shares and deal with the same as follows, viz.—I direct them to pay out of the net annual proceeds thereof the sum of £750 sterling yearly to my niece Mrs Leonora Hean Smith or Gaydon, and that for her liferent alimentary use alienarily, which provision in her favour shall not be assignable by her, and shall be exclusive of her debts and deeds and the diligence of her creditors, and shall be payable at two terms in the year, Whitsunday and Martinmas, by equal portions, and I direct them to add the balance of said net annual proceeds to the capital of said part or share; and on the death of my said niece should she survive me, or on my own death should she predecease me, I direct my trustees to convert said part or share of residue, with all accumulations of income, if any, into cash, and to divide the proceeds thereof equally amongst such of her children as shall then be alive, jointly with the issue *per stirpes* of any of her children who may have predeceased leaving issue . . . ; and with regard to the other part or share of said residue, I direct my trustees to hold same and deal with it as follows, viz.—I direct them to pay the whole net annual proceeds thereof to my said nephew John Alexander Hay Smith for his liferent alimentary use alienarily, which provision in his favour shall not be assignable by him, and shall be exclusive of his debts and deeds and the diligence of his creditors,

and shall be payable at two terms in the year, Whitsunday and Martinmas, by equal portions; declaring that should my said nephew be under twenty-five years of age at the time of my death my trustees shall, until he attains that age, pay or apply only such part of the said net annual proceeds in such way and manner and at such time or times as they shall think proper to or for his behoof; declaring, however, that in no case shall the part of the net annual proceeds so to be paid or applied exceed in any one year the sum of £750 sterling; and declaring further, that should my said nephew be under twenty-five years of age at the time of my death, and thus entitled to the liferent of the heritable and moveable subjects specified in the fourth purpose hereof, my trustees shall, in addition to the said sum of not exceeding £750, pay out of said net annual proceeds, and that until my said nephew attains the age of twenty-five years, all public and parochial burdens, feu-duties, repairs, and uphold generally rates, taxes (both proprietors' and occupiers'), and insurance of the whole subjects, heritable and moveable, liferented by him under said fourth purpose; and my trustees shall also pay out of said net annual proceeds the wages of such a number of outdoor servants as my trustees in their absolute discretion shall think reasonably necessary for the upkeep of the liferented subjects; and I declare that said net annual proceeds, so far as not so paid or applied, shall be accumulated and added to and form part of the capital of said part or share; and on the death of my said nephew, should he survive me, or on my own death should he predecease me, I direct my trustees to convert said part or share of residue, with all accumulations of income, if any, into cash, and to divide the proceeds thereof equally amongst such of his children as shall then be alive jointly with the issue *per stirpes* of any of his children who may have predeceased leaving issue.”

The *trust-disposition and settlement* further provided that in the event (which happened) of his nephew dying without leaving issue who should survive to take, his share should be converted into cash and divided in certain proportions between the Dundee Royal Infirmary and the Royal Victoria Hospital for Incurables, Dundee, the fourth parties.

The *questions of law* were—“1. Is the second party entitled to payment of the sum of £750 yearly, without deduction in respect of income tax? or 2. Is the second party entitled only to payment yearly of the amount remaining after deduction from the said sum of £750 of the income tax payable in respect thereof?”

Argued for the second party—Upon the terms of the testator's *trust-disposition and settlement* it was clear that he intended the second party to get the £750 in full, the income tax being deducted not from the bequest to her but from the general revenue of the trust. The corresponding bequest to Alexander Hay Smith was certainly to be paid in full. The case was ruled by *Murdoch's Trustees v. Murdoch*, 1918, 55 S.L.R. 664.

Argued for the third party—"Net annual proceeds" did not mean the proceeds after payment of income tax. Further, income tax was not a "burden" upon the trust. The trustees merely acted as collectors of income tax, and deducted from the amounts payable to the beneficiaries a tax which was really due by them. *Murdoch's case (cit.)* was special, and turned on the relation of the terms of the codicil to the will. *Kinloch's Trustees v. Kinloch*, 1880, 7 R. 596, 17 S.L.R. 444, and *Mackie's Trustees v. Mackie*, 1875, 2 R. 312, 12 S.L.R. 222, were referred to.

LORD PRESIDENT—The question for our consideration in this case is certainly not free from difficulty, but on the whole I have come to the conclusion that the bequest of £750 sterling yearly to the niece of the testator is free of income tax. My reason for coming to that conclusion is that the testator expressly directs that the sum I have mentioned is to be paid out of the net annual proceeds of half the residue of the estate, and I think the fair construction of the expression "net annual proceeds" is that it means a sum from which income tax has already been deducted. That construction is, I think, reinforced by the passage in which the testator directs his trustees to add the balance of the said net annual proceeds to the capital of the said net part or share. I read "net annual proceeds" as meaning the whole balance of free income—once more, a sum from which income tax has already been deducted.

This construction of the settlement appears to be still further reinforced by the expression used in that portion of it in which the nephew's bequest is found. There we find throughout, in many parts, the expression "net annual proceeds" used, and I cannot conceive that it was intended by the testator that different conditions should apply to the bequest to the niece from those which apply to the case of the nephew.

The case of *Murdoch's Trustees v. Murdoch*, 1918, 55 S.L.R. 661, was pressed as an authority for the view I have indicated. I think it is. There the expression used is "the free revenue" of "the free residue" of the testator's estate. We had no difficulty in coming to the conclusion that that expression meant a sum from which income tax had already been deducted, and I am unable to draw any distinction between the expression used in *Murdoch's Trustees v. Murdoch* and the expression used here. "Net annual proceeds" seems to me to be equivalent to "free revenue" of "free residue."

If that is so, then there can be no doubt that although this bequest does not contain the words which are usually found and are decisive where a testator intends a bequest to be paid free of income tax, nevertheless we can, construing the deed as a whole, come to the conclusion that that was the testator's intention.

I propose to your Lordships, therefore, that we should answer the first question put to us in the affirmative and the second

in the negative. I observe that the parties have agreed with regard to past payments of income tax which are to be repaid.

LORD MACKENZIE—The decision of this case depends upon the true construction to be put upon the trust disposition and settlement as a whole, and particularly what the testator intended by the term "net annual proceeds." I agree that the questions should be answered in the manner proposed by your Lordship. In arriving at that conclusion I consider that we are construing the terms of this settlement in a way similar to that which we followed in the case of *Murdoch's Trustees*.

LORD CULLEN—I am of the same opinion. I think this is a special question depending entirely upon the terms of the trust deed before us. On a consideration of the will as a whole, and using the light which is thrown upon the question by the provisions in favour of the nephew, I think that when the testator uses the words "net annual proceeds" in the fifth purpose he means the free income of the estate after paying income tax. He directs that such proceeds are to be divided between the second party and the capital interests in the estate. The second party is to receive £750 thereof and the balance, that is, the whole balance after deduction of the £750, is to be added to the capital. Now I do not see how the balance could be added to the capital unless the trustees had already paid the income tax due on the income of the trust estate, because, if they had not, a very considerable portion of the balance after paying the £750, instead of being free for addition to the capital, would go to the Government in the shape of income tax.

LORD SKERRINGTON was absent.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the First and Second Parties—Constable, K.C.—R. M. Mitchell. Agents—Cowan & Stewart, W.S.

Counsel for the Third and Fourth Parties—Watt, K.C.—Macquisten. Agents—Alex. Morison & Co., W.S.

Thursday, November 28.

FIRST DIVISION.

[Lord Hunter, Ordinary.

LINDSAY v. CRAIG.

*Contract—Evidence—Principal and Agent—Sale—Competency of Parole Evidence.*

A document was granted by one party acknowledging the receipt from another of £150 "in payment of purchase price of 150 shares of £1 each (fully paid)" in a certain company, "the transfer for which will be sent you for signature in due course." In an action by the latter for delivery of the transfer, or alterna-