in favour of allowing the amendment, and I see no reason for differing from him.

In the matter of expenses I agree with your Lordship that it is only fair that in the circumstances of this case the payment of expenses should be made a condition of the pursuer being allowed to proceed.

LORD GUTHRIE—I agree. On the question of the pursuer's position as assignee of Andrew Hay I think what your Lordships propose to do is exactly in accordance with what Lord Dunedin announced in the case of *Paxton* v. *Brown*, 1908 S.C. 406, 45 S.L.R. 323, where his Lordship says—"But the question remains, what is to be done next? I think that here the modern practice of not multiplying actions and not putting parties to unnecessary expense comes to our help." And then later he says—"The defender will not be prejudiced in any way, and the expenses of preparing and serving new actions and paying the fee fund dues will be avoided."

The Court recalled the interlocutor of the Lord Ordinary and remitted to him to allow the pursuer (subject to the condition as to payment of certain expenses incurred) a proof of his averment dealing with his right as assignee of Andrew Hay, and to the defenders a conjunct probation.

Counsel for the Pursuer and Reclaimer—Christie, K.C.—Scott. Agent—J. Anderson, Solicitor.

Counsel for the Defenders and Respondents—Chree, K.C.—Hamilton. Agents—Webster, Will, & Company, W.S.

Saturday, February 8.

FIRST DIVISION.

WILSON'S TRUSTEES *v.* WILSON AND OTHERS.

Succession — Trust — Construction — "Free Yearly Income"—Incidence of Income Tax.

A testator left to his widow "after payment of [his] debts and the cost of the administration of [his] estate . . . the free yearly income [of his whole property] up to if possible £600 *per annum* as an alimentary provision . . . to cover all rent, rates, and taxes . . ., any remaining annual income to be paid" to his nephews and nieces. He further directed that all his household furniture and effects in his dwelling-house, which he held on a lease, should at the date of his death be handed over to his widow as her absolute property. At the date of his death the testator possessed no heritable estate, his estate amounting to £14,000 being moveable. *Held* (*dub.* Lord Mackenzie) that the income tax upon the bequest to the testator's widow was payable by her.

Murdoch's Trustees v. *Murdoch*, 1918, 55 S.L.R. 664, and *Smith's Trustees* v. *Gaydon*, 1918, 56 S.L.R. 92, *distinguished.*

Bruce Rennie and others, the testamentary trustees of the late John Millar Wilson, *first parties*, Mrs Lilian Harriette Wilson, widow of John Millar Wilson, *second party*, and Christina Mary Wilson and others, nephew and nieces of John Millar Wilson, *third parties*, brought a Special Case for the opinion and judgment of the Court upon questions relating to the incidence of the income tax payable in respect of a bequest of income to the second party.

The *last will and settlement* of John Millar Wilson (the testator) conveyed his whole estate, real and personal, heritable and moveable, to the first parties in trust for a variety of purposes, which included the following:—"After payment of my debts and the cost of the administration of my estate to pay to my wife Lilian Harriette Wilson the free yearly income thereof half yearly or as received so long as she remains my widow up to if possible the sum of Six hundred pounds per annum as an alimentary provision not assignable by her or affectable by her debts or deeds or attachable by her creditors to cover all rent rates and taxes and in full satisfaction of all claims against my estate legally competent to her upon or through my death any remaining annual income from the estate above Six hundred pounds to be paid (failing my leaving any lawful issue) to or for the benefit of my nephews and nieces to be distributed as and when my trustees may determine and to cease at the death or re-marriage of my said wife."

The Case set forth—"1. The testator died on 4th January 1914 domiciled in England. He left a last will and settlement dated 3rd January 1914, under which he appointed the first parties to be trustees, and provided that the trust thereby constituted should be administered in Scotland. 2. . . . The testator further provided that in the event of his wife marrying again the said annual income above provided to her should thereupon cease, that the household furniture and effects at Darrochmore should at his death be handed over to his wife as her absolute property, and that (failing his leaving lawful issue) on the death or re-marriage of his wife the capital of the estate should be divided equally among his brothers and sisters alive at the date of his death. 3. The testator was survived by his widow. He left no issue. He left a number of nephews and nieces. At the date of his death, which occurred on the day following the execution of the said last will and settlement, the testator was not possessed of any heritable estate or house property. He was tenant under a five years' lease, entered into about six months before his death, of the house 'Darrochmore,' Ipswich,' in which he resided 4. The testator's estate after payment of debts and death duties amounts to about £14,000. The income, exclusive of income tax, amounts to about £900 per annum. The income is taxed at its source before it is paid to the first parties, and the whole income is brought into charge."

The *questions of law* were—"1. In each year in which the income of the testator's estate, exclusive of income tax, amounts to or exceeds £600, is the second party entitled, so long as she remains unmarried, to pay-

ment of that sum in full without deduction in respect of income tax? or 2. Is the second party in each such year entitled to payment only of the amount remaining after deducting from the said sum of £600 the income tax payable in respect thereof?"

Argued for the third parties—Where a bequest of income was given, the recipient had to pay the income tax, for that was a tax upon income, *i.e.*, the subject of the bequest—Income Tax Act 1842 (5 and 6 Vict. cap. 35), sections 102 and 103. To elide that result the testator must have made manifest an intention that the income tax should be paid by someone else. Such an intention might be expressly manifested by using clear words to that effect. In the present case there were no such words. That intention must be necessarily implied from the terms of the will. There was nothing in the will from which a clear inference could be drawn to the effect that the testator meant to bequeath the income and the tax upon it. On the contrary, the bequest of income was to cover all rates, taxes, &c. The word "free" did not mean free of income tax, but merely free of administrative and similar charges. *Murdoch's Trustees* v. *Murdoch*, 1918, 55 S.L.R. 664, and *Smith's Trustees* v. *Gaydon*, 1918, 56 S.L.R. 92, were distinguishable. Those decisions were upon special words, and did not decide that in general free income meant income free of income tax. *Rodger's Trustees* v. *Rodger*, 1875, 2 R. 294, 12 S.L.R. 204; *Kinloch's Trustees* v. *Kinloch*, 1880, 7 R. 596, 17 S.L.R. 444; *Dalrymple* v. *Dalrymple*, 1902, 4 F. 545, 39 S.L.R. 348; *Wall* v. *Wall*, 1847, 15 Simon 513, 16 L.J. Ch. 305; *Gleadow* v. *Leetham*, 1882, 22 Ch. D. 269; *Farrer* v. *Loveless*, [1918] 1 Ch. 223—Dowell, Income Tax Laws, p. 481—were referred to.

Argued for the second party—The authorities cited by the third parties and collected in Dowell were not in point. They merely laid down (1) that deductions or abatement did not include income tax in the general case, so that a gift given free of deductions or abatement was not given free of income tax, and (2) that the words free of deductions or abatement might be so associated with income tax in a particular deed as to give rise to a necessary inference that they were used with reference to and included income tax. The law to that effect was summarised in Theobald, Law of Wills, p. 196, and Jarman on Wills, vol. ii, p. 1134. There was no presumption against a gift being free of income tax—*In re Saillard*, [1917] 2 Ch. 401, *per* Swinfen Eady, L.J., at p. 403. *Murdoch's* case and *Smith's* case applied. The testator's intention in the present case was that the second party should receive a *de facto* annual payment of £600, not that she should have a *de jure* right thereto. The reference to rates and taxes was clearly connected with the gift of the house to the second party, and referred to the rates and taxes payable in respect of it. "Taxes" was to be construed as referring to something of the same genus as rates, viz., assessment in respect of heritable property and upon rental, and did not include imperial taxes—*Tidswell* v. *Whitworth*, 1867, L.R., 2 C.P. 326; Stroud's Judicial Dictionary, *voce* Assessment.

At advising—

LORD PRESIDENT—We have listened to an excellent argument in this case and have had a full citation of authority, but after all the question which we have to decide is, to use the words of Vice-Chancellor Hall in *In re Bannerman's Estate* (1882, 21 Ch. D. 105, at p. 108), "one of construction of the language of the will."

Now I think this testator by his will makes it quite plain that he did not intend the wife, as a recipient of his bounty, to have her income tax, in addition to the share of the income of the free residue of the estate paid to her. The terms of the settlement seem to me to stand in marked contrast to those found in the cases to which we were referred, like *Murdoch's Trustees*, 1918, 55 S.L.R. 664, and *Smith's Trustees*, 1918, 56 S.L.R. 92, for here the testator distinctly says his widow is to have the free yearly income of the whole of his estate up to, if possible, the sum of £600 per annum. Now that income, when it comes into the hands of the widow, is undoubtedly liable to income tax. In her hands it is taxable income. She has to pay the income tax not out of the free yearly income of the estate, but because she receives the free yearly income of the estate. That has been pointed out very distinctly in most of the cases which were cited to us.

Free yearly income means, I think, the yearly income after all deductions and abatements have been made, such as debts, cost of administration, and so forth, but it has been held over and over again that income tax is not a deduction or abatement. It is a tax which is imposed upon the person who receives a free yearly income from an estate or an annuity from an estate. Accordingly in this case, even if there were no special words relating to the freedom from tax, I should be of opinion that it was quite clearly intended that the widow should pay the income tax out of the free yearly income, just as I think the recipients of the remainder of the income must pay their income tax because they receive the free yearly income of the estate.

It is unnecessary to consider whether or no the expression we find in this settlement, "to cover all rents, rates, and taxes," includes income tax. I am rather disposed to think it does; but it is unnecessary to decide that question, because even if this clause were absent from the settlement I should be of opinion that the testator had clearly indicated his intention that the income tax was to be borne by each recipient of part of the yearly income of his estate.

Accordingly I think that we ought to answer the first question in the negative and the second in the affirmative.

LORD MACKENZIE—I do not think that this case is governed by the previous decisions of *Murdoch*, 1918, 55 S.L.R. 664, and *Smith*, 1918, 56 S.L.R. 92. The question turns upon the construction of the particular words of the settlement in question, and although I confess I have considerable

difficulty in reaching the same conclusion as your Lordship, my doubts are not so strong as to lead me to dissent from the judgment proposed.

LORD BLACKBURN—I agree in the answers proposed to be given to these questions. I think it is well settled that, short of an express or implied direction by a testator that an annuity is to be paid free of income tax, the tax has to be paid by the recipient of the annuity. Income tax itself is levied on and payable out of the "free" or "net" income of the trust estate by the persons entitled thereto, and in order to imply a direction that the annuity should be paid free of income tax I think one would require to find something more in the deed than a mere direction that it is to be paid out of the very subject which is liable to the tax. I can find no such additional direction in the deed under consideration, and accordingly I think the widow must pay the tax herself.

LORD SKERRINGTON and LORD CULLEN were absent.

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

Counsel for the First and Third Parties—D. Jamieson. Agents — Webster, Will, & Co., W.S.

Counsel for the Second Party — Cooper. Agents—Macpherson & Mackay, W.S.

Thursday, February 20.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

PENNEY *v.* CLYDE SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

Contract — Sale — Ship — Contract to Build Ship — Passing of Property in Uncompleted Ship.

War—Trading with the Enemy—Contract —Executory Contract—Uncompleted Ship —Property Passed and Part Instalments Paid—Ship Requisitioned and Purchased by Admiralty — Right of Custodian to Equivalent of Instalments Paid—Counter-Claim—Trading with the Enemy Amendment Acts 1914 (5 *Geo. V, cap.* 12), 1915 (5 *and* 6 *Geo. V, cap.* 79), *and* 1916 (5 *and* 6 *Geo. V, cap.* 105).

A contract between a shipbuilding company and an Austrian firm for the construction of a steamer provided that "the steamer as she is constructed . . . shall immediately as the work proceeds become the property of the purchasers." The contract gave the purchaser a right of rejection after the ship was finally completed if she did not conform to the contract in certain respects. She was partially constructed at the date when war was declared. Of the price of £103,000, which was payable by instalments, instalments amounting to £79,732 16s. 4d. had been paid, but that did not represent the value of the vessel so far as constructed. The ship was requisitioned by the Admiralty, who paid the builders £86,000 for her, the difference between that sum and the instalments paid being for work which had not been covered by the instalments. The builders did not make any return to the Custodian for Scotland to the effect that they held any property of or for an alien enemy. The Custodian brought an action against the builders for £79,732, 16s. 4d. as property held by them on behalf of an alien enemy. The builders stated a counter-claim to the effect that they had suffered loss owing to the occupation of part of their yard by the vessel, upon which they had ceased to work on the outbreak of war. It was admitted that the effect of the war was to bring the contract for the construction of the ship to an end, but that the rights *hinc inde* which had at the outbreak of war accrued under the contract were unaffected. *Held* (1) that the right of property in the ship so far as she was completed had under the contract passed to the alien enemy at the outbreak of war; (2) that of the price paid by the Admiralty £79,732, 16s. 4d. was a *surrogatum* for the unfinished ship, and as such was held by the builders on behalf of the alien enemy, and that accordingly the Custodian was entitled to decree therefor; (3) that the counter-claim stated by the builders was irrelevant.

War — Trading with the Enemy—Moneys Due to Alien Enemy—Interest—Trading with the Enemy Amendment Acts 1914 (5 *Geo. V, cap.* 12), 1915 (5 *and* 6 *Geo. V. cap.* 79), *and* 1916 (5 *and* 6 *Geo. V, cap.* 105).

The Custodian for Scotland brought an action against a firm of shipbuilders for payment of certain sums of money as property held by them on behalf of an alien enemy, in which he concluded for interest from the date when the same was received by the defenders till payment. No right to interest had accrued to the alien enemy at the outbreak of war. *Held* that the Custodian was only entitled to interest as from the date of decree.

Joseph Campbell Penney (the Custodian for Scotland under the Trading with the Enemy Amendment Act 1914), *pursuer*, brought an action against the Clyde Shipbuilding and Engineering Company, Limited, *defenders*, concluding for decree for payment of £79,732, 16s. 4d., "being moneys owing to or held for or on behalf of or on account of the Royal Hungarian Sea Navigation Company 'Adria,' Limited, of Budapest, Hungary, in terms of an agreement between the defenders and them, dated 25th July 1913, with interest at the rate of 5 per cent. per annum from the date or dates on which the same was received by the defenders until payment."

The *agreement* between the defenders (therein called the builders) and the Royal Hungarian Sea Navigation Company "Adria," Limited, Budapest (therein called the purchasers), dated 25th July 1913, pro-