

LORD SANDS—When I first read the rubric in *Langston's* case, [1911] 2 K.B. 1019, I was under the impression that it was directly in point. My own *prima facie* impression upon the section was the other way, and I conceived that the question might arise how far we should regard it as appropriate and proper in construing a revenue statute to depart from a decision of the Court of Appeal in England of several years' standing. But it appears on examining that case that what was decided was really a very narrow and special point. I confess that after perusing the opinions of the learned judges more than once I am not quite satisfied that they themselves realised how narrow and how special was the point that they were deciding, but what was decided I think was merely that the statute was not retrospective.

Now if we can regard the case apart altogether from the authority of *Langston*, I do not think that it presents much difficulty. What is assessed is not the income of the year but an artificial income which is ascertained by an average of the three preceding years. The year current does not enter into the calculation at all. Each of the three past years leaves a shadow behind it, and as you go on year after year one drops out and another comes on. We do not need to look behind 1907, because it was only in 1907 that the system of deducting the income tax on payment of the patent duty came into existence. During the first three years when this duty was paid, whether it began in 1907 or began at some later date when the patents were first used, the users of the patents paid less to the Crown than they withheld or deducted from those to whom they paid the royalties. I mean that on account of this system of averaging on previous years they were not required in the first three years to give full effect to the deductions they made so as to be under the necessity of accounting to the Crown for all that they deducted; it was not until the fourth year of the royalty that they had to account to the Crown for the full amount of the sum which they annually retained in name of income tax, and which as a matter of fact they had retained in full in each of the three previous years. That was an advantage to them. When they ceased to use the patents, on the other hand, the previous years came into account in a similar way. They cast their shadow behind and in this way the matter rectified itself. But if it be looked into carefully, I think it will be found that, supposing a person begins to use a patent who has not used patents before, and continues to do so for five years, or ten years, and then ceases doing so, under the system which the Crown say is the proper interpretation of the statute, I say I think it will be found that while he pays too little to begin with and perhaps too much at the end, over the whole period he exactly accounts to the Crown for the amount that he deducts from those whom he pays his royalties to. I do not think therefore that a proper construction of the statute really leads to an unreasonable result. I concur in the judgment proposed.

LORD JOHNSTON was absent.

The Court found in answer to the question in the case that the assessment should be on the sum of £2848.

Counsel for the Appellants—Constable, K.C.—Greenhill. Agents—Fyfe, Ireland, & Company, W.S.

Counsel for the Respondent—The Lord Advocate (Clyde, K.C.)—R. C. Henderson. Agent—Sir Philip Hamilton Grierson, Solicitor of Inland Revenue.

Thursday, June 20.

FIRST DIVISION.

MURDOCH'S TRUSTEES v. MURDOCH AND OTHERS.

Succession—Trust—Construction—“Free Revenue”—Incidence of Income Tax as between Trust and Annuitant.

By his will a testator left his widow the free revenue and proceeds of the free residue of his estate. By a codicil he provided that “in the event of the income of the free residue of my estate exceeding in any year the sum of £2000, my trustees shall restrict the payment to my wife out of the said income to the sum of £2000.” For a number of years after the testator's death the trustees paid the widow (the income of the residue always exceeding £2000) £2000 less income tax. *Held*, in a Special Case, that the widow was entitled to £2000 per annum without deduction of income tax if the income of the free residue permitted, and that she was entitled to recover the tax which had been deducted, with interest, less the income tax on the interest.

Mrs Catherine Hutchison or Murdoch, widow of Alexander Murdoch, wine and spirit broker, Glasgow, and others, his testamentary trustees, *first parties*, the said Mrs Catherine Hutchison or Murdoch, *second party*, and Alexander Norman Murdoch and others, the testator's children, *third parties*, brought a Special Case for the determination of questions with regard to the incidence of income tax upon provisions made by the testator in favour of the second party.

The *trust-disposition and settlement* conveyed the whole estate to the first parties for various purposes, which included—“(Fifth) I direct my said trustees to hold the whole of the free residue and remainder of my estate for behoof of my said wife in life for her life for her alimentary use only, and to pay to her the free revenue and proceeds thereof so long as she remains my widow and unmarried, burdened always with the maintenance and education of our children in a manner suitable to their station in life while they continue to reside in family with her and are unable to support themselves.”

A *codicil* dated 21st September 1899 provided, *inter alia*—“And (Second) I direct that in the event of the income of the free

residue of my estate, which in terms of the fifth article of my said trust-disposition and settlement is to be paid to my wife so long as she remains my widow and unmarried, for the support of herself and our children as therein specified, exceeding in any year the sum of Two thousand pounds, my trustees shall restrict the payment to my wife out of said income to the sum of Two thousand pounds per annum, and as regards any surplus income they shall accumulate and invest the same along with and as part of the capital of the trust estate, and it shall be dealt with in the same manner as I have directed with reference to the capital of the trust estate."

The Case set forth—"1. Alexander Murdoch died at Glasgow on 11th July 1900 survived by his wife and by five children. . . . All of the said children, except Alan Murdoch, have attained the age of twenty-five. The said Alan Murdoch has attained majority. 2. . . . By the sixth purpose the trustees were directed to hold the residue of the testator's estate for such of his children as should attain the age of twenty-five, all as set forth in the said purpose. . . . 4. The free income of the trust estate, after meeting all expenses of the trust and after deduction of income tax from the gross income of the trust estate, has always largely exceeded the sum of £2000. Since the testator's death his trustees, of whom the second party was one, have regularly paid to the second party in monthly instalments the said sum of £2000 per annum, less income tax, for which she has regularly granted receipts in similar terms to the following receipt for the monthly instalment due for June 1917:—'Received from the trustees of the late Alexander Murdoch, Esquire, *per* Wilson, Stirling, & Company, their factors, the sum of One hundred and twenty-five pounds sterling, being my annuity for June less income tax. CATHERINE MURDOCH.' The parties hereto are agreed that the total deductions in respect of income tax up to 11th July 1917, including the appropriate interest thereon to said date, are to be taken as amounting as at said date to the sum of £2634, 9s. 2d. The sums so deducted as income tax from the second party have been invested as surplus income of the trust estate and accumulated by the first parties. 5. When the said payments were made to the second party no question was ever raised as to the deduction in respect of income tax, and in accepting the said payments and granting receipts therefor in the above-recited terms she was unaware that there was any possibility of question regarding the legality of the said deductions. She was not separately advised with regard to her rights. She has, however, recently been separately advised to the effect that the aforesaid deductions were unwarrantable, and that according to the true import of the testator's directions in the said will and codicil the first parties were in the circumstances bound to pay to her the full sum of £2000 per annum."

The second party contended—"That in each year in which the free income of the

trust estate, after deduction of expenses and income tax, exceeds £2000, and the payment to her falls to be restricted, in terms of the said codicil, she is entitled (while she remains unmarried) to payment of the sum of £2000 in full without any deduction in respect of income tax; that the first parties were not entitled to make the said deductions from the payments to her in the past and are now bound to pay to her in respect of the said past deductions and interest thereon the agreed-on sum of £2634, 9s. 2d., with interest thereon from 11th July 1917 till payment, less tax, and that she is not barred from recovering the amount of the said deductions."

The third parties contended—"That on a sound construction of the testator's said testamentary deeds the amount payable to the second party in each year in which the income of the free residue of the testator's estate exceeds the sum of £2000, and she remains unmarried, is the sum of £2000 less the amount of income tax payable in respect of that sum, and that the second party is not entitled to recover the amount of the past deductions. *Separatim, quoad* the past the third parties maintain that by the said receipts the second party has discharged all right competent to her to recover payment of the aforesaid deductions, and that they are binding on her."

The *questions of law* were—"1. Is the second party, in each year in which the payment to her from the testator's estate falls, in terms of his said codicil, to be restricted to the sum of £2000, and she remains unmarried, entitled to payment of that sum in full without deduction in respect of income tax? 2. Is the second party in each such year entitled to payment only of the amount remaining after deduction from the said sum of £2000 of the income tax payable in respect thereof? (3) Are the first parties bound to pay to the second party the said sum of £2634, 9s. 2d., with interest thereon at 5 per cent. from 11th July 1917, less the income tax on such interest? or (4) Is the second party now barred from demanding payment of the amount of the said deductions and interest?"

Argued for the second party—Correctly read the provision of the trust-disposition and settlement and the codicil imported a gift to the widow of a minimum sum of £2000. Free revenue meant the revenue of the trust after all charges had been met, including income tax. The codicil did not affect the quality of the bequest in the settlement, but merely set a limit to the amount of the free revenue that was to be paid to the widow. The testator's intention was that his trustees should pay the income tax on the revenue so that his widow in a question with the Crown should be in a position to say that income tax had been paid upon her life rent. If the third parties were right the widow would receive less than £2000. *Brooke v. Price*, [1916] 2 Ch. 345, *per* Warrington, L.J., at p. 350, [1917] A.C. 115, *per* Lord Finlay, L.C., at p. 121, and Lord Wrenbury at p. 125; and *in re Musgrave*, [1916] 2 Ch. 417, were referred to.

Argued for the third parties—Income tax had to be paid by the recipient of the income, but it was collected at the source. A company or trustees therefore paid it, and then paid the dividend or liferent less income tax to the person entitled thereto. If a testator intended to include in his gift a gift of income tax he must do so in express terms. Here the terms used were free revenue. That meant the income of the trust estate after the annual deductions, not income tax, had been met—*Dalrymple v. Dalrymple*, 1902, 4 F. 545, per Lord Adam at p. 549, 39 S.L.R. 348; *Gleadow v. Leatham* (1882), L.R., 22 Ch. D. 269, per Kay, J., at p. 271; *in re Saillard* [1917], 2 Ch. 401. Further, if the second party was right £2600 would be required to produce an income of £2000 after the income tax had been paid. But the tax on income up to £2000 was at 3s. 8d. per £1, while on incomes above that figure the tax was at 5s. The trustees would pay at 5s., and when the second party claimed repayment of one-fourth of the tax the Crown would be entitled to say that her income was £2600. The sums which had been deducted could not be recovered, for they had been paid under an error in law. *Ashton Gas Company v. Attorney-General*, [1906] A.C. 10, per Lord Halsbury, L.C., at p. 12 was referred to.

At advising—

LORD PRESIDENT—The contention advanced by the second party in this Special Case is in my judgment sound and ought to receive effect. By the 5th purpose of his trust-disposition and settlement the testator directed his trustees to pay to his widow the free revenue of the free residue of his estate. Had that direction remained unaltered the question now in controversy would never have arisen. The trustees would in the ordinary course have paid the income tax out of the estate of the trust which they were directed to hold in their hands, and the second party would have received the free revenue. But by his codicil the testator made an alteration upon the 5th purpose. By the codicil he directs his trustees in the event of the free revenue of the free residue of his estate exceeding in any year the sum of £2000 to restrict the payment to his wife to the sum of £2000 per annum.

The question is—Did that alteration upon the 5th purpose of the settlement affect the incidence of the income tax? In my opinion it had no such effect, and obviously it was not intended to have such an effect. The sole result of the codicil was in my opinion to add a proviso to the 5th purpose of the trust-disposition and settlement, which now reads thus—“I direct my trustees to pay to my widow the free revenue of the free residue of my estate provided it does not exceed £2000, but if it does exceed that amount then they are to pay to my widow only the £2000 and to dispose of the surplus as directed.” If that be, as I think it is, the correct reading of the 5th purpose of the settlement combined with the alteration made by the codicil, then it follows as a matter of course that the widow shall

receive her £2000 free from any deduction on account of income tax.

I propose therefore that we should answer the questions put to us as follows:—The first question in the affirmative, the second in the negative, and it follows, counsel were agreed, that the third question should be answered in the affirmative and the fourth in the negative.

LORD JOHNSTON—[*Read by the Lord President*].—I think that the first question in the case should be answered in the affirmative and the second in the negative. The fourth is, I understand, withdrawn.

By his settlement Mr Murdoch directed his trustees to hold “the whole of the free residue and remainder” of his estate for behoof of his wife in liferent allenerly, and “to pay to her the free revenue and proceeds thereof.” On this footing her interest must have suffered deduction of income tax, for there was no other source whence it could be paid, and till it was paid the free revenue and proceeds could not be ascertained.

But his estate having increased, by codicil Mr Murdoch altered this—not, indeed, in very happily chosen words, but with, I think, a clear enough intention—to the effect that his widow should be restricted to a round sum of £2000, but that she should receive this without deduction. He has his eye fixed on what is to be paid to his wife, and says that if the income of the free residue of his estate, which is to be paid to her, exceeds £2000 in any year his trustees are to restrict the payment to her out of said income to £2000 per annum. There was to be paid to her under the settlement, not the taxable income, but the income from which tax had been deducted. If that exceeded £2000 the trustees were under the codicil to pay her, not £2000 of taxable income, but £2000 out of the income which would remain in their hands after the tax had been deducted.

LORD MACKENZIE—I am of the same opinion. I am quite unable to assent to the contention put forward by the parties of the third part that when the testator directed his trustees to restrict the payment to “my wife out of the said income to the sum of £2000 per annum” he meant that in the present state of the income tax the trustees were to pay his wife only £1400 per annum. I think the fallacy arises from supposing that there is anything in the nature of a bequest in the codicil. The bequest is in the will, and in the will what the testator leaves is the whole—I introduce the word “whole,” because that is plainly what is meant—the whole free revenue of the free residue of his estate. It is the trustees who are accountable for the income tax; and what they hand over to the widow is the whole of what remains in their hands after they have satisfied the claims of the Inland Revenue. When in the codicil there is a limitation of that bequest I think it plainly means the same thing as was meant in the will itself, and refers to a *de facto* payment and not to a *de jure* right. Accordingly I am of opinion that the answers should be as your Lordship proposes.

LORD SKERRINGTON—By his will the testator gave to his widow the whole free income of the residue of his estate. By his codicil he revoked that to a certain extent, and there is a question whether the revocation was intended to operate in the more limited sense for which the widow contends, or in the more drastic sense which is contended for by the third parties. I have come to the conclusion that your Lordships are right in thinking that the revocation was intended to operate to the more limited extent only.

The Court answered the first and third questions of law in the affirmative and the second and fourth in the negative.

Counsel for the First and Second Parties—Chree, K.C.—Mitchell. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Third Parties—Blackburn, K.C.—W. T. Watson. Agents—A. & W. M. Urquhart, S.S.C.

Friday, June 21.

FIRST DIVISION.

[Sheriff Court at Airdrie.

GORMLEY v. SCOTTISH IRON AND STEEL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation—Memorandum of Agreement—Recording—Notice of Approved Society—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Schedule, secs. 9 (d) and (e) and 10—National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), sec. 11 (1) (c).

A workman was injured on 2nd October 1916. His employers paid him compensation at the rate of £1 per week till 11th December 1916—in all £10. On 12th December 1916 they paid him £6, and took a receipt from him whereby in consideration of the £16 received by him from his employers he discharged all claims he might have against them “under the Workmen's Compensation Act 1906, the Employers' Liability Act 1880, or at common law in respect of the injury sustained by” him on or about 2nd October 1916. On 13th December 1916 the workman returned to work, and thereafter recorded a memorandum of the agreement. No intimation of the agreement was made to the workman's approved society. Further compensation was thereafter claimed, the workman's approved society suing in his name. *Held (dis. Lord Skerrington)* that the agreement was not one of which the employers were bound to give notice to the approved society in terms of the National Insurance Act 1911, section 11 (1) (c), and that the agreement being validly recorded the application for further compensation was incompetent. The approved society found *liable in expenses*.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Second Schedule—“(9) Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by Act of Sederunt, by the committee or arbitrator or by any party interested to the [sheriff-clerk], who shall, subject to such Act of Sederunt, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a [sheriff] court judgment: Provided that . . . (d) where it appears to the [sheriff-clerk], on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum . . . ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the [sheriff], who shall, in accordance with Act of Sederunt, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just; and (e) the [sheriff] may, within six months after a memorandum of an agreement as to the redemption of a weekly payment by a lump sum . . . has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement was obtained by fraud or undue influence or other improper means, and may make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just. (10) An agreement as to the redemption of a weekly payment by a lump sum if not registered in accordance with this Act shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the weekly payment is payable from liability to continue to make that weekly payment, . . . unless . . . he proves that the failure to register was not due to any neglect or default on his part.”

The National Insurance Act 1911 (1 and 2 Geo. V, cap. 55) enacts—Section 11—“(1) Where an insured person has received or recovered, or is entitled to receive or recover, . . . from his employer . . . any compensation . . . under the Workmen's Compensation Act 1906 . . . in respect of any injury or disease, the following provisions shall apply: . . . (c) Where an agreement is made as to the amount of such compensation as aforesaid, and the amount so agreed is less than ten shillings a-week, or as to the redemption of a weekly payment by a lump sum, under the Workmen's Compensation Act 1906, the employer shall, within three days thereafter, . . . send to the Insurance Commissioners, or to the society or committee concerned, notice in writing of such agreement giving the prescribed particulars thereof. . . . (2)