gow, for an extension of the boundaries of that parish by separating and disjoining a district or area forming part of the Barony Parish of Glasgow and uniting and annexing the same *quoad sacra* to the said parish of Kelvinhaugh *quoad sacra*, the Court held (1) that the petition was competent under the Statute of 1707; (2) that the consent of a major part of the heritors was not required; and (3) that in the circumstances the petition should be granted—*Baird and Others, Petitioners*, 1893, 20 R. 973, 30 S.L.R. 829."

The Court without delivering opinions granted the prayer of the petition.

Counsel for the Petitioners—Watson, K.C. D. M. Wilson. Agents—J. Douglas Gardiner & Mill, S.S.C.

COURT OF SESSION.

Friday, July 2.

SECOND DIVISION.

HUDSON'S TRUSTEES *v.* M'INTOSH AND OTHERS.

Succession—Trust—Construction—Revenue—Income Tax—Specified Annuity Payable out of "Free Income and Proceeds"—Incidence of Income Tax.

A testator directed his trustees "to hold, invest, and manage the whole residue and remainder of my means and estate in their own names, and from the free income and proceeds thereof (*primo*) to pay to each of my brother Robert and my sister Margaret during their respective lives the sum of £250 sterling per annum as from the date of my death . . . and (*secundo*) so long as my said brother Robert and sister Margaret shall be alive, to divide and pay any surplus income or revenue . . ." to certain beneficiaries, "or to retain and accumulate such surplus income or any part thereof with capital as my trustees shall determine."

Held (*dub.* Lord Ormidale) that the terms of the deed did not take the case out of the general rule that a person who gets a benefit under a deed such as the foregoing must pay the tax which is exigible in respect of that benefit, and accordingly that the trustees were bound to deduct income tax from the annual payments of £250 to the testator's brother and sister.

Smith's Trustees v. *Gaydon*, 1919 S.C. 95, 56 S.L.R. 92, *distinguished.*

Robert M'Intosh and others, the testamentary trustees of the late Mrs Isabella M'Intosh or Hudson, London, *first parties;* the said Robert M'Intosh and Mrs Margaret Agnes M'Intosh or Gibson, a brother and sister of the testatrix, *second parties;* and Mrs Annie Holmes M'Intosh or Young and others, the residuary legatees under the trust-disposition and settlement of the testatrix, *third parties*, brought a Special Case on a question as to the incidence of the income tax payable in respect of a bequest to the second parties.

By her *trust-disposition and settlement* the testatrix conveyed her whole estate to trustees for, *inter alia*, the following purposes—"'*Fourth*. I direct my trustees to hold, invest, and manage the whole residue and remainder of my means and estate in their own names, and from the free income and proceeds thereof (*primo*) to pay each of my brother Robert and my sister Margaret during their respective lives the sum of £250 sterling per annum as from the date of my death, and that half yearly at the usual terms or at such times, in such sums, and in such manner as shall be suitable and convenient; declaring that the above provisions in favour of my said brother and sister shall be strictly alimentary to them respectively and shall not be assignable nor capable of anticipation, nor affectable, attachable, nor arrestable by the diligence of their creditors; and in the event of the total free annual income of my estate held under this article being or exceeding the sum of £1000 per annum in any year or years the said provisions shall both be increased to £300 for or in respect of such year or years when said free annual income shall be or exceed £1000; and in the event of such free annual income being in any year or years insufficient to yield the said provisions of £250 to each of my said brother and sister such provisions shall suffer diminution *pari passu*, but the shortage of any year shall be made up out of income in later years (but not from capital) if and when income shall be available, and my trustees shall be the sole judges of what the free annual income actually is in any year or years, and their judgment thereupon shall decide whether my said brother and sister shall have £250 each or £300 each in any year or whether their said provisions of £250 each shall suffer any deduction, and if so the amounts thereof, and my trustees' judgment shall be absolute and unchallengeable; and (*secundo*) so long as my said brother Robert and sister Margaret shall be alive, to divide and pay any surplus income or revenue that may remain in any year or years after satisfying the foregoing provisions to them contained in this fourth purpose among and to the beneficiaries mentioned in the fifth purpose hereof in proportion to their shares mentioned therein, but excluding the children of my said sister Margaret so long as both my said brother Robert and sister Margaret shall be alive, but admitting the children of my said sister Margaret to participate with the others in the event of the death of either of my said brother Robert or sister Margaret, or to retain and accumulate such surplus income or any part thereof with capital as my trustees shall determine. . . . *Sixth*. That all legacies and bequests excepting bequests of residue or of or from income shall be paid free of Government duties, which shall be paid out of the residue of my estate.'"

The Case stated—"6. The free annual income of the trust has varied in amount, but it has not in any year reached the sum of £1000. It is all subject to income tax,

payment of which is made either by deduction before the income comes into the hands of the first parties or by payment by the first parties in respect of the income received by them without deduction of tax. 7. Since the inception of the trust the first parties have paid to each of the second parties a sum of £250 per annum in quarterly amounts under deduction of income tax. The second parties have all along protested against the deduction of income tax and contended that they are entitled to payment of the full sum of £250 each per annum without any deduction. The first parties having doubt as to the incidence of the tax applicable to the annual sums due to the second parties accumulated the income tax from time to time until in 1910 the whole accumulations amounted to £225. In that year the first parties, having been advised by counsel that they were bound to deduct income tax from the payments due to the second parties, divided the said accumulated sum of £225 among the residuary beneficiaries as part of the surplus revenue of the trust, and they have continued to deduct income tax from the sums paid to the second parties and to distribute among the residuary beneficiaries the whole surplus revenue of the trust estate in each year."

The *questions of law* were—"1. Are the first parties bound to deduct income tax from the said annual payments of £250 (or £300) directed to be made to the second parties? 2. Are they entitled to make such deduction? or 3. Are the second parties entitled to payment of the said sums of £250 (or £300) without deduction of income tax?"

Argued for the second parties—The trustees were bound to make the payments to the second parties without deduction of income tax, *i.e.*, to pay to each of them annually the full sum of £250, and to account to the revenue for the tax thereon out of the surplus income of the trust estate. Trustees were liable to be assessed and taxed on their income as trustees. Accordingly the direction to the trustees to "manage" the residue of the estate included a direction to pay and account for the income tax. The settlement must be looked at as a whole, and so read the bequest was without deduction of income tax—*Smith's Trustees* v. *Gaydon*, 1919 S.C. 95, 56 S.L.R. 92; *Murdoch's Trustees* v. *Murdoch*, 1918 S.C. 738, 55 S.L.R. 664; *Brooke* v. *Price*, [1917] A.C. 115. The present case was *a fortiori* of *Smith's* case. The expression "free income and proceeds" in the present case corresponded to the expression "net annual proceeds" in *Smith's* case. *Wilson's Trustees* v. *Wilson*, 1919 S.C. 359, 56 S.L.R. 256, was distinguishable. In that case there was a gift of income, whereas in the present case there was a bequest of a specific sum to be paid out of a certain fund. *Menzies* v. *Menzies' Trustees*, 1919, 2 S.L.T. 43, and the Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 40, were also referred to.

Argued for the first and third parties—The trustees were bound to deduct income tax from the payments to the second parties, *i.e.*, to pay to each of them annually the sum of £250 less the amount of income tax applicable thereto. "The thing that is given is the thing that is to pay the tax"—*Wall* v. *Wall*, (1847) 15 Simons 513, *per* Shadwell, V.C., at 520—and unless the terms of the deed indicated otherwise a bequest should not be paid free of income tax. Moreover, it should not be presumed that a testator intended a bequest to be tax free unless he used a suitable expression to indicate that intention—*Kinloch's Trustee* v. *Kinloch*, (1880) 7 R. 596, 17 S.L.R. 444, *per* Lord Gifford at 7 R. 600, 17 S.L.R. 446.

LORD JUSTICE-CLERK (SCOTT-DICKSON)—Some misunderstanding has been created by what seems to me a misreading of the case of *Smith's Trustees* (1919 S.C. 95), and the increase in the amount of income tax has probably occasioned the raising of questions relating to the incidence of the tax upon annuities and liferents.

In this case the testatrix left the beneficiaries in question a sum of £250 each, to be paid out of the free income and proceeds of "the residue and remainder of my means and estate." She provides also that if the annual income of the estate exceeds £1000 per annum, then the £250 is to be increased to £300 in each year when the total amount of the income exceeds £1000; and there is also a provision that if the income is not sufficient to pay £250 each the trustees are to make up the shortage in any year out of the income of subsequent years if the income will allow of that being done. Then finally she directs that the surplus income or revenue that may remain in any year after all these provisions have been satisfied is to be divided among the beneficiaries mentioned in another purpose of her settlement, or to be accumulated in whole or in part with capital as the trustees shall determine.

Apart from recent authority I should have said that the provisions in this settlement were quite clear to the effect that the beneficiaries must pay income tax, and that it was not intended that they should receive as the legacy bequeathed to them, not an annuity of £250 in each year, but, as the income tax now stands, a sum of £355 each year, that being, we were told, the amount of the legacy plus the present income tax. I think that is a contention which, apart from recent decisions, would hardly have been put forward. I do not think it can be supported by the case of *Murdoch's Trustees* (1918 S.C. 738), to which Mr Jamieson referred. In that case the Court proceeded upon the special terms of the particular deed before them. Lord Mackenzie, in particular, said the bequest was in the will, and that the words which were said to have raised the difficulty were only introduced by a codicil, which, as he said, contained no bequest at all but merely restricted the amount of the legacy in certain events. I do not think the case of *Murdoch* has any bearing at all on the question we are now considering.

The case of *Smith's Trustees* was different from the case of *Murdoch's Trustees*, because

the terms of the deed in that case were different, and we have to consider its bearing upon this case. In the case of *Smith's Trustees* the truster directed his trustees to pay out of the net annual proceeds of the half of his residue the sum of £750 as an annuity to one of his nieces, and he provided also in the same clause that they were to add the balance of the annual proceeds to the capital of the estate. I think the ground of judgment is most clearly stated by Lord Cullen, thus—"He [the truster] 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."

That is the ground of judgment, and it seems to me that it quite accounts for the conclusion at which the Court arrived in that case. It cannot, in my judgment, be applied in this case, because, as I have pointed out, the surplus income in that case was to be added to capital, whereas in this case it is to be paid to certain other beneficiaries subject to the discretion of the trustees as to adding it to capital. In *Smith's* case the words used in the deed were—"the net annual proceeds" of one half of the residue, while the words in this case are—"the free income and proceeds" of the "whole residue and remainder of my means and estate;" and the destination in this case is that the surplus is not to be added to capital—as in *Smith's* case—but, subject to a discretion as aforesaid, it is to be paid to certain other beneficiaries. I presume that these beneficiaries will have to pay income tax on the amount they receive under that provision, just as they will have to pay income tax on the amount they receive under any other provision, and I do not think the liability to pay income tax can depend on the discretion of the trustees.

In the recent case of *Menzies' Trustees* decided by Lord Sands, I observe that his Lordship also took the view that the case of *Smith's Trustees* depended upon the particular terms of the deed. I think the terms of the deed here do not take the case out of the general rule, namely, that a person who gets a benefit under a deed such as this must pay the tax which is exigible in respect of that benefit, and that the bequest is not to be held payable free of income tax unless that is made clear by the terms of the deed itself. In this deed I find no such terms as would justify us in taking the case out of the general rule. With regard to the English case of *Brook* v. *Price* ([1917] A.C. 115), I think the view expressed by Lord Finlay on p. 122 is adverse to the contention of the second parties, but it is not necessary to rely upon the judgment in that case.

I think this case falls within the general rule, that the contention advanced by the second parties is unsound, and that we should answer the first question in the affirmative and the third in the negative.

LORD DUNDAS—I quite agree. It is not disputed that, apart from express words or clear implication to the contrary, the general presumption favours the view that these annuitants must themselves bear the income tax exigible in respect of their annuities. I do not think Mr Jamieson has succeeded in taking his clients' case out of that general rule. Any difficulty I have felt during the argument was occasioned by the case of *Smith's Trustees*, which at first sight seemed to stand a little out of the line as compared with some other decisions; but I agree with what your Lordship in the chair has stated with regard to that case. It seems to have been decided on the special words of a rather specially expressed instrument, which certainly are not identical with the words that we have before us. Besides, *Smith's* case was considered by the same Division of the Court very shortly afterwards in the case of *Wilson's Trustees* (1919 S.C. 359), where it was distinguished and not felt to be irreconcilable with the decision then arrived at. So far as the other cases quoted — apart from *Smith's* case — are applicable, I agree with your Lordship that they favour the contention of the third parties. But after all the question depends on the deed itself, and I see nothing in its terms to take the case out of the ordinary rule. I think, therefore, the first question should be answered in the affirmative and the third in the negative.

LORD SALVESEN—I am of the same opinion. The whole of Mr Jamieson's argument hinges upon the meaning that he attaches to the word "free" as qualifying "income." He reads "free income" as meaning income after deduction, not merely of the ordinary charges of administration and the like, but after deduction of income tax. I am unable to adopt that construction of these words. Free income seems to me just revenue. There is no revenue until you have deducted the necessary charges from the gross revenue. "Revenue" used by itself, or "income" used by itself necessarily means —when you come to divide it among the beneficiaries—"available" or "free" for the purpose of division. Accordingly I think this is just the ordinary case of a bequest of an annuity of £250 to each of these beneficiaries, and they must bear the income tax which is exigible in respect of the income which they receive from the trust.

LORD ORMIDALE—I quite agree with what has been said as to the general rule. I think under the general rule the beneficiaries here would be liable for the income tax payable in respect of the provision made for them in the will; and the question seems to me to be whether there is anything in the language of this particular deed to take the case out of the general rule. I should have

thought that there was nothing had it not been for the case of *Smith's Trustees*, and it seems to me rather more difficult than it appears to your Lordships to distinguish that case from the present.

I do not think there is anything in the words of the fourth purpose descriptive of the funds, to wit, "the free income and proceeds," to suggest that it is a fund from which income tax has been deducted; nor do I think that in the clause introduced by (*primo*) is there anything of that kind. But in the clause (*secundo*) I think that there is at least a suggestion that income tax has been deducted from the fund with which this particular clause is dealing. I think so, because there is not only a direction to the trustees to divide and pay the surplus income or revenue to certain other beneficiaries, but there is an alternative power given to them to retain and accumulate the surplus income or any part thereof with the capital. That indicates to my mind that before they can do so that surplus must be income from which no further deduction was liable to be made at the instance of anybody.

Your Lordships take a different view, and I do not feel constrained to differ from the result reached, because after all each will must be decided on its particular terms, and the phraseology of this will is certainly not identical with that in the case of *Smith's Trustees*. I should not myself have thought that the words "income and proceeds" are equivalent to the words "net annual proceeds" as these words are construed in that case, nor that the words here "surplus income or revenue" need have just the same effect as the word "balance" in that case. Therefore I agree in thinking that the questions may be answered as your Lordships suggest.

The Court answered the first question in the affirmative, and the third question in the negative.

Counsel for the First Parties—Mackay, K.C.—Taylor. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Second Parties—Chree, K.C. — D. Jamieson. Agents — Webster, Will, & Company, W.S.

Counsel for the Third Parties—Mackay, K.C.—Taylor. Agents—M. J. Brown, Son, & Company, S.S.C.

Friday, May 28.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

CURLE'S TRUSTEES *v.* MILLAR AND OTHERS.

Succession — Construction — Accretion — "Survivors."

Testamentary trustees were directed to hold the residue of the testator's estate, in equal shares, in liferent for the testator's son and two daughters and in fee for their issue; "In the event of my son or daughters or any of them dying without leaving lawful issue" the trustees were directed to hold "the fee . . . of the [shares in question] for behoof of the survivors of my said son and daughters . . . in the same way as . . . provided with regard to the shares originally taken by [such] survivor or survivors in their own right." Then followed clauses dealing with the case of children predeceasing the testator with and without issue; and then the settlement provided—"Failing any survivor of my said son and daughters or issue of any of them, I direct my trustees to pay over the said shares of my said son and daughters to their nearest heirs and representatives in moveables." The testator was survived by his three children. The son died without issue; a daughter predeceased the son but left issue; the other daughter survived the son and had issue. *Held* that the clause first above quoted applied literally to the circumstances which had arisen, to the effect of excluding the issue of the daughter who predeceased the son from taking any part of his share, and that its literal meaning was not to be departed from because of inferences founded upon the clause of destination-over, inasmuch as that clause only applied to the case of the children and their issue predeceasing the testator, which had not occurred.

Authorities upon the construction of "survivors" as equivalent to "others" *examined per* Lord President (Clyde).

Mrs Isabella Curle or Millar and another, the testamentary trustees of the late Robert Curle (*the testator*), *pursuers and real raisers*, brought an action of multiplepoinding against (1) Mrs Millar, who was a daughter of the testator, and others, and (2) the children of the deceased Mrs Lamont, another daughter of the testator, and others, *claimants*, raising questions as to the distribution of the estate of the testator.

The testator died on 8th June 1879 leaving a *trust-disposition and settlement*, whereby he conveyed his whole estate to the pursuers and real raisers for various purposes, which included the payment of an annuity of £80 to his widow and a bequest of £12,000 for his son, and with regard to the residue directed as follows:—"And further, I direct my trustees to hold and retain the residue and remainder of my means and estate for behoof of my three children, the said Robert Barclay Curle, Mrs Isabella Curle or Millar, and Mrs Jane Curle or Lamont, equally amongst them, share and share alike, the said shares being to be retained and invested as hereinafter mentioned—that is to say, I direct my trustees to hold and retain and invest the said shares in their own names, as trustees foresaid, for the respective liferent uses allenarly of my said son and two daughters, and for behoof of their lawful issue respectively in fee, in such proportions among such issue respectively if more than one child, and whether there be one or more children, subject to such restrictions and conditions as such son or daughters may