sideration of section 3 (2) of the Act of 1918. That was the contention urged by the respondent's counsel, but, for the reasons which your Lordships have stated, I am quite clear that no such inference can be drawn from the terms of section 3 (2), which in my opinion, agreeing with your Lordships, is not concerned with such matters at all.

The Court answered the question of law in the negative.

Counsel for the Appellant — Dean of Faculty (Sandeman, K.C.)—Keith. Agents —Ross Smith & Company, S.S.C.

Counsel for the Respondent—Wark, K.C. —James Walker. Agent—George Forsyth, S.S.C.

COURT OF SESSION.

Thursday, March 20.

SECOND DIVISION.

DUNN'S TRUSTEES *v.* DUNN.

Succession — Testament — Construction — Settled Legacy—"Free of Legacy or other Duty"—Estate Duty—Finance Act 1914 (4 *and* 5 *Geo. V, cap.* 10), *sec.* 14.

A testator who died on 29th April 1919, by his trust-disposition and settlement dated 14th June 1911, left a large number of legacies regarding which he provided that they should be "given free of legacy or other duty," and should "be payable without interest as soon after my death as the trustees in their sole discretion may find convenient." Among these legacies was a legacy of £12,000 to his brother in liferent and to the latter's children in fee. The residue of the trust estate was to be divided among such charitable institutions in Great Britain as the trustees in their sole discretion should select. *Held* that the estate duty falling to be paid under section 14 of the Finance Act 1914 on the liferented sum of £12,000, upon the death of the liferenter, was a charge against the residue of the trust estate, and did not fall to be paid out of the *corpus* of the legacy.

Patrick Smith Dunn and others, the testamentary trustees of the late Robert Hunter Dunn, Glasgow, *first parties*, and the said Patrick Smith Dunn, who was a brother of the testator, and the said Patrick Smith Dunn's four children, *second parties*, presented a Special Case for the opinion and judgment of the Court as to the meaning and effect of a provision of the truster's settlement.

The Case set forth, *inter alia*—"1. The late Robert Hunter Dunn, formerly merchant and shipowner in Glasgow (hereinafter referred to as 'the testator'), died on 29th April 1919 leaving a trust-disposition and settlement dated 14th June 1911, and . . . registered in the Books of Council and Session on 29th May 1919. . . . 2. By his said trust-disposition and settlement the testator conveyed his whole means and estate to the first parties in trust for the purposes therein set forth, and appointed them to be his sole executors, and also tutors and curators to such of the beneficiaries as might be in pupilarity or minority. By the second purpose of the said trust-disposition and settlement the testator made bequests of certain legacies, including a bequest to his brother the said Patrick Smith Dunn in liferent for his liferent alimentary use only, and after his death to his four children, the said James Valentine Dunn, William Alexander Dunn, Miss Margaret Jean Fairlie Dunn, and Mrs Sarah Constance Dunn or Kelso, equally among them in fee, of a sum of £12,000. The third and fourth purposes of the said trust-disposition and settlement provide for payment of a legacy to the Church of Scotland, and of legacies to certain charities mentioned in a schedule annexed to the trust-disposition and settlement. 3. By the fourth purpose of the said trust-disposition and settlement it is declared 'that the whole of the foregoing legacies and any legacies which I may hereafter bequeath in any codicil hereto are given free of legacy or other duty, shall vest at my death and shall be payable without interest as soon after my death as the trustees in their sole discretion may find convenient.' By the last purpose the trustees are directed to pay and divide the residue of the estate to and among such charitable institutions in Great Britain as they in their sole discretion shall think proper, and in such proportions as they shall decide. 4. The testator was survived by his brother the said Patrick Smith Dunn and by the four children of the said Patrick Smith Dunn named in the above-quoted provision of the testator's trust-disposition and settlement. The said children are all of full age. *The trustees, the parties of the first part, on 18th December* 1919 *set apart out of the testator's estate to meet the said legacy of* £12,000 *to the second parties a sum which they have invested in War Loan. Further, the said trustees have paid estate duty in respect of the testator's whole estate and legacy duty in respect of the said legacy.* [The words in italics were added by way of amendment.] 5. A question has arisen as to the meaning and effect of the provision in the fourth purpose of the said trust-disposition and settlement that the whole of the legacies are to be given 'free of legacy or other duty,' viz., whether the estate duty falling to be paid under section 14 of the Finance Act of 1914 on the said liferented sum of £12,000 upon the death of the liferenter is a charge against the residue of the trust estate or falls to be paid out of the *corpus* of that legacy. 6. . . . The first parties as trustees aforesaid are now in a position to distribute the balance of the residue of the said trust estate in accordance with the provisions of the said trust-disposition and settlement."

The *questions of law* were—"1. On a

sound construction of the terms of the said trust-disposition and settlement, does the estate duty on the said legacy of £12,000 payable under the provisions of the Finance Act of 1914 form a charge upon the residue of the said trust estate? or 2. Does the said estate duty fall to be paid out of the *corpus* of the said legacy?"

Argued for the first parties—The testator contemplated that the duties payable would be those exigible in consequence of his death, not those payable because of the death of the liferenter. The testator had no idea of duties which might emerge twenty or thirty years afterwards. The provision in the will that the legacy was to be "given free of legacy or other duty" meant that the legacy fund was to be handed over free of all duties exigible at the testator's death. The earmarking of the legacy fund by the trustees was tantamount to payment of the legacy. The testator did not have estate duty in his mind when he enfranchised the legacies, and a gift of the duty in question could only be included in the bequest if there was a clearly expressed intention to include it. There was no such intention expressed. If estate duty had to be paid out of the residue of the trust estate at a postponed date great difficulty would be experienced by the trustees. The weight of authority was in favour of the view maintained by the first parties—*In re Duke of Sutherland, Chaplin* v. *Leveson-Gower*, [1922] 2 Ch. 782, *per* Sargant, J., at 788; *In re Fenwick, Lloyd's Bank, Limited* v. *Fenwick*, [1922] 2 Ch. 775, *per* Sargant, J., at 778; *In re Wedgwood, Allen* v. *Public Trustee*, [1921] 1 Ch. 601, *per* Lord Sterndale, M.R., at 611, and Warrington, L.J., at 619; *In re Parker, White* v. *Stewart*, 1917, 117 L.T. 422; *In re D'Oyly, Vertue* v. *D'Oyly*, [1917] 1 Ch. 556, *per* Neville, J., at 559; *In re Gunn, Harvey* v. *Gunn*, 1916, W.N. 283; *In re Palmer, Palmer* v. *Palmer*, [1916] 2 Ch. 391, *per* Pickford, L.J., at 401; *In re Snape, Elam* v. *Phillips*, [1915] 2 Ch. 179, *per* Eve, J., at 183; *In re Turnbull, Skiffer* v. *Wade*, [1905] 1 Ch. 726.

Argued for the second parties — The expression "given free of legacy or other duty" was unambiguous. The correlative of "give" was "receive," and the expression was not appropriate to denote a gift which was received by the legatees diminished by either legacy duty or estate duty. The expression "other duty" might be expanded thus "other duty arising out of the bequest or dispositions contained in the will." The fiars' right in the legacy was an independent right, and the construction which the first parties sought to put upon the expression would result in the fiars having to bear the burden of a Government duty, although none of the other legatees had to bear a similar burden. The construction contended for by the first parties gave no effect to the words "or other duty." It was a fair construction to put upon the words "or other duties" to say that by using these words the testator was providing for the possibility of estate duty being charged against the legacy. The principle of the English authorities was that the words "free of duties" must be construed according to the context of each particular case. The weight of authority was in favour of the view maintained by the second parties—*In re Wedgwood, Allen* v. *Public Trustee*, [1921] 1 Ch. 601, *per* Warrington, L.J., at 621, and Younger, L.J., at 630; *In re Parker, White* v. *Stewart*, 1917, 117 L.T. 422; *In re Eve, Hall* v. *Eve*, [1917] 1 Ch. 562, *per* Astbury, J., at 566; *In re Tinkler, Lloyd* v. *Allen*, [1917] 1 Ch. 242, *per* Younger, J., at 247; *In re Kennedy, Corbould* v. *Kennedy*, [1917] 1 Ch. 9, *per* Warrington, L.J., at 14, and Scrutton, L.J., at 16; *In re Stoddart, Bird* v. *Grainger*, [1916] 2 Ch. 444, *per* Sargant, J., at 447; *In re Palmer, Palmer* v. *Palmer* (*cit.*), *per* Lord Cozens Hardy, M.R., at 398; *In re Turnbull, Skiffer* v. *Wade* (*cit*), *per* Farwell, J., at 732; *In re Parker-Jervis, Salt* v. *Locker*, [1898] 2 Ch. 643, *per* Kekewich, J., at 651.

At advising—

LORD JUSTICE-CLERK (ALNESS)—In this case the testator by his trust-disposition and settlement, which was dated 14th June 1911, left a large number of legacies, regarding which he provided that they should be "given free of legacy or other duty." Among these legacies was a legacy of £12,000 to his brother in liferent and to the children of his brother in fee. The question has arisen whether the estate duty falling to be paid under section 14 of the Finance Act 1914 on the liferented sum of £12,000 upon the death of the liferenter is a charge against the residue of the trust estate or falls to be paid out of the *corpus* of the legacy. The second parties to the case, who are respectively the liferenter and the fiars of the legacy of £12,000, maintain the former contention. The first parties, who are the trustees under the testator's trust-disposition and settlement, maintain the latter contention.

It is matter of admission between the parties (the admissions have been added by way of amendment to the Special Case) that securities amounting in value to £12,000 have been earmarked by the first parties for payment of the legacy in question, and also that the first parties have paid estate duty in respect of the whole of the testator's estate and legacy duty in respect of the said legacy. The liferenter accordingly received his legacy free of duty. It is clear, however, that another duty, viz., estate duty, will fall to be paid on the death of the liferenter, and that that second payment will have to be made either by the trustees or by the fiars of the legacy. The contention of the first parties is, as I have already indicated, that that second payment falls to be defrayed out of the *corpus* of the legacy payable to the fiars, while the second parties maintain on the other hand that that payment must be borne by the residue of the trust estate.

There appears to be no case in Scotland which bears upon the controversy between the parties. Many English cases, however, were cited to us, but they are, if I may say so with respect, perplexing and difficult to reconcile. The only principle to be deduced from them would appear to be that the

words "free of duties" have no general meaning stamped upon them which applies to all wills, but that the question of their meaning in each case falls to be determined by the terms of the deed under consideration, and in particular by reference to the context in which the words appear. The Master of the Rolls (Cozens-Hardy) said *In re Palmer* ([1916] 2 Ch. 391, at p. 398)—"In my view there is no general principle which can be relied upon. A testator may use language which is sufficient to cover a duty not in force at his death. . . . His intentions must be found from the language of the will." Again, *In re Wedgwood* ([1921] 1 Ch. 601) Lord Sterndale, then Master of the Rolls, says (at p. 615)—"Future duties not chargeable by reason of the death of the testator may be charged upon the residue to the exoneration of particular legacies. Whether they are so charged or not depends upon the construction of each particular will." The question which we have to determine may be formulated, as indeed it was formulated in more than one of the English cases, thus — Did the testator intend that the legacy which he left should be paid free of death duties arising in consequence of his death or in consequence of the dispositions made in his will? If the former, the fiars must bear the burden; if the latter, the estate of the testator must bear it.

Now the answer to that question must be found in the language which the testator has himself selected. What did the testator intend by the disputed direction? The legacies are to be "given free of legacy or other duty." Apart from authority I should have thought the direction unambiguous. The bequests are *given* free of legacy or other duty. If one looks at the question, not from the point of view of the trustees who are directed to "give" the legacy, but from the point of view of the legatees who are to *receive* the legacy, the bequest would appear to mean that the legatees should receive £12,000 undiminished by Government charges. The legacy is to reach their pockets without deduction. In other words, they are to receive their legacy *net* without deduction of duty of any kind. That certainly is the position of the other legatees under the settlement—I mean the legatees whose enjoyment of their legacies is not postponed by reason of the interposition of a liferent. Why should their position differ from that of the second parties? Is there any reason to suppose that the testator intended to place deferred legatees in a less favoured position than immediate legatees? I can see none. I should therefore be indisposed to accept a construction of the words under review which resulted in debiting the second parties with payment of a duty from which the other legatees of the testator are exempt, and which limits the duties payable by the trustees to those only which are exigible on the death of the testator. If the legacy to the fiars is paid over less duty, then I think less is paid them than the testator directed his trustees to pay to them. We are here dealing not with one bequest but with two—a bequest to the liferenter and a bequest to the fiars. They are independent, in my view, the one of the other. I see no warrant in the settlement for the suggestion that the liferenter's bequest shall be free of duty, but that the fiars' bequest shall be burdened by it. If the latter construction were correct, then, as I have already indicated, the fiars of the legacy of £12,000 would be the only legatees called upon by the settlement to bear the burden of Government duty. For myself I do not think that the testator could have discovered more comprehensive language to compass the result contended for by the second parties than that which he has employed.

Mr Aitchison for the second parties argued that the view of the first parties if it received effect would be to deny all meaning to the words "or other duty." He pointed out that estate duty is in the ordinary case payable out of residue, and that the provision which relates to "other duty" is superfluous if the first parties are right in their contention. The argument is, I think, well founded, and I regard it as reinforcing the view of the settlement which I have already ventured to express.

It was contended by the first parties that a decision against them would entail inconvenience in the administration of the trust. To that contention there are two answers. The first is that if the language of the testator is clear, as I think it is, it must receive effect, and that the resulting inconvenience to the trustees is an irrelevant consideration. But apart from that it is not unimportant to observe that in this case the testator has expressly provided for the continuation of the trust as the discretion of the trustees may dictate.

I have read and re-read the English cases which were cited to us, and I have weighed the principle—if indeed it can accurately be termed a principle—which underlies them, and which I have already endeavoured to summarise. I, however, find nothing in these cases which derogates from the view which I have ventured to express, and I accordingly consider myself absolved from a detailed examination of them.

I propose to your Lordships that the first question should be answered in the affirmative and the second question in the negative.

LORD ORMIDALE—The second purpose of the late Mr Dunn's trust-disposition and settlement, which is dated 14th June 1911, provides for a number of legacies to relatives and friends, including one to his brother Patrick of the sum of £12,000 in liferent for his liferent alimentary use only, and after his death to his four children equally among them in fee. The third purpose provides for the payment of a legacy to the Church of Scotland, and the fourth for the payment of legacies to various charities. The testator then goes on to delare that "the whole of the foregoing legacies and any legacies which I may hereafter bequeath in any codicil hereto are given free of legacy or other duty shall vest at my death and shall be payable without interest as soon after my death as the trustees in their sole

discretion may find convenient." Lastly, he directs his trustees to pay and divide the residue of his estate among such charities as they may think proper. Power is given to the trustees, *inter alia*, to continue the trust estate in the state of investment in which it is at his death, until such time as they think proper.

The testator died in 1919. Accordingly, while the will was executed prior to the Finance Act 1914, the testator's death occurred subsequent thereto, a fact which while it may not be of very great importance, is of some importance and must be kept in view in determining the question which has arisen. That question is whether the estate duty falling to be paid under section 14 of the Finance Act 1914 on the sum of £12,000 bequeathed to Mr Patrick Dunn and his children in liferent and fee has to be paid out of the residue of the trust estate or out of the *corpus* of the legacy. The duty is not payable until the termination of the liferent, and the rate at which it is chargeable is calculated according to fiscal requirements on the total value of the liferenter's estate, which is taken to include as part of it the £12,000 of which he enjoyed the liferent only.

The answer to a question of this sort must depend on the intention of the testator as disclosed in his will. That is recognised and asserted in most, if not all, of the cases cited to us, and is expressed in none of them perhaps more emphatically than in *In re Palmer* ([1916] 2 Ch. 391), where the Master of the Rolls (Lord Cozens-Hardy) says (at p. 398)—"In my view there is no general principle which can be relied on. A testator may use language which is sufficient to cover a duty not in force at his death, and in one at least of the clauses of his will the testator in this case has done so. His intention must be found from the language of the will."

In this case the intention of the testator appears to me to be reasonably clear. The clause of exemption, though expressed in brief and simple form, is about as comprehensive as such a clause can well be. The legacy is given "free of legacy or other duty." Why should an exemption so expressed not cover estate duty? It is said because the duty is not payable at the testator's death, and that what he had in his mind must have been a duty then payable in respect of his death and not a duty payable at a postponed date and arising on the succession to the liferenter. For my own part I venture to think that the testator had not in view any particular duty payable at any particular time. What he was concerned with and had in contemplation was the legacy and its amount. He had fixed on what he thought was an appropriate sum, and it was that sum of money which he had in mind when he said that he gave it "free of duty," meaning thereby that the beneficiaries to whom it was given were to receive it just as he gave it, no more and no less. There is nothing that I can discover in the language of the will to indicate any intention to differentiate between the settled legacy and the other legacies, all of which admittedly fall to be paid without any deduction whatever. The trustees, we are told, have set apart in their own hands to meet the legacy of £12,000 an investment in War Stock, and that may be quite a proper act of administration, but they are not directed by the testator to do so. In some of the cases cited to us such an appropriation was held, on the language of the particular wills under construction, to be equivalent to "payment," and so to aid in determining that the testator's death was the date at which the exemption clause was once and for all to become operative as in *In re Palmer*, but there is nothing in the language of the present will to infer such a result. The children of the liferenter take a vested right as at the date of the testator's death in the fee of the £12,000 and the legacy when they become entitled to receive it, that is, on the termination of the liferent, is to be given to them "free of legacy or other duty"; and the fact that the actual payment is postponed to a future date does not of itself, in my opinion, discharge the obligation of the trustees then to pay it "free of duty." In some of the cases cited to us, such as *In re D'Oyly* ([1917] 1 Ch. 556) and *Palmer*, the Court held that the exempting words "free of duty" and the like mean "free of duty arising only in consequeuce of my death" and in others "free of all duties arising in virtue of the dispositions made by the testator in his will." In the present case the latter construction ought, in my opinion, to be adopted as in *In re Stoddart* ([1916] 2 Ch. 444) and in *In re Parker* (1917, 117 L.T. 422) a construction that was also approved by Lord Justice Younger in his dissenting opinion in *In re Wedgwood* ([1921] 1 Ch. 601).

If effect be given to the dispositions of Mr Dunn's settlement, then the capital of the £12,000 of which in its entirety the liferenter enjoyed the income must be handed over undiminished to his children. The label "free of duty" is attached to the legacy from start to finish, and the estate duty must therefore be paid out of the residue of the estate. If the trustees pay the legacy to the children less the estate duty, then they are only handing over a balance of the sum bequeathed, that is, a sum less than they are directed to pay. The exemption clause would receive no effect at all in the case, and only in the case, of this particular legacy.

It was maintained that if estate duty had to be paid at a postponed date more or less remote great difficulty would be experienced by the trustees. I do not altogether appreciate this contention. The trustees have a direct warrant from the testator to retain his estate as long as they think proper. Some inconvenience may result, much depending perhaps on the amount of the residue. But however that may be, the consideration that some trouble may be occasioned in administering the trust does not in this case appear to me to affect in any way the construction of the language of the will.

I agree that the first question should be answered in the affirmative and the second in the negative.

LORD HUNTER—The question raised in this special case is whether estate duty payable on a settled legacy on the death of the liferenter falls to be paid out of the *corpus* of the legacy or out of the general estate of the testator. The duty is payable under section 14 of the Finance Act 1914, and comes in place of the settlement estate duty payable under the earlier Finance Acts, at the date of the death of the testator. The duty is payable on succession not to the testator but to the liferenter, and the amount of duty depends on the extent of the estate left by the latter.

In terms of his settlement the late Mr Dunn, *inter alia*, provided "to my brother, the said Patrick Smith Dunn, in liferent for his liferent alimentary use only and after his deeth to his four children James Valentine Dunn, William Alexander Dunn, Miss Margaret Jean Fairlie Dunn, and Mrs Sarah Constance Dunn or Kelso, equally among them in fee, the sum of twelve thousand pounds." There were a number of different legacies left to other relatives and to charitable institutions. As regards all his legacies he provided that they were given "free of legacy or other duty." The residue of his estate was to be divided among such charitable institutions as his trustees in their sole discretion should select.

No Scots case was cited bearing upon the question whether a clause directing payment of a settled legacy to be made free of legacy and other duties covers not only estate duty payable upon the testator's own death but the further duty payable upon the death of the liferenter. A number of English cases were, however, brought to our notice. In the case of *In re Palmer*, ([1916] 2 Ch. 391) Lord Sterndale, then Pickford, L.J., said (at p. 401)—"No general rule for the interpretation of a clause freeing legacies from duty can, in my opinion, be laid down; the decision must rest in each case upon the words of the particular clause." The same learned Judge in the later case of *In re Wedgwood*, ([1921] 1 Ch. 691) said (at p. 613)—"I think it is settled that the words 'free of all death duties' have no general meaning as applied to all wills, and that they must be construed according to the meaning given to them by the particular will under consideration. Two meanings were mentioned in argument—(1) 'free of all death duties arising in consequence of my death,' and (2) 'free of all death duties arising in consequence of the dispositions made by my will.'" In both these cases the Court took the view that the first of these two meanings was to be attached to the expression "free of all death duties." The cases appear, however, to be distinguishable from the present in two respects—(First) the duty was in them unknown to the testator as imposed after his death, while in the case before us the duty was imposed several years before the testator's death and was therefore presumably known to him; (second) there was in them an express direction to the executors to pay to themselves as trustees to hold for the beneficiaries interested the specific amount of the legacies. This was treated as equivalent to payment to the beneficiaries themselves or to an independent body of trustees. In determining the meaning of the gift, the date of payment or handing over was regarded as the critical date. Here there is no express direction to the trustees to constitute a separate trust as regards the legacy in question, and although I do not doubt the competence or propriety of the trustees' action in purchasing War Stock to meet the legacy, I am not prepared, for the purpose of determining the present question, to regard such appropriation as equivalent to payment.

The words used by the testator appear to me to indicate sufficiently clearly that the testator intended both the liferenter and the fiars of this £12,000 to enjoy the provision made by him in their favour free of any duty arising out of the dispositions made by his will. This view receives support from the decisions reached in several English cases of which I may mention two —*In re Stoddart*, ([1916] 2 Ch. 444) and *In re Parker*, 117 L.T. 422. I think the first question ought to be answered in the affirmative and the second in the negative.

LORD ANDERSON—I concur in the opinion of the Lord Justice-Clerk, which I have had the advantage of perusing.

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

Counsel for the First Parties—MacRobert, K.C.—Thom. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Second Parties—Aitchison, K.C. — Blades. Agents — Connell & Campbell, S.S.C.

Tuesday, March 18.

FIRST DIVISION.

[Dean of Guild Court, Glasgow.

BOTANIC GARDENS PICTURE HOUSE, LIMITED *v.* ADAMSON.

Property — Building Restrictions — Community of Interest among Disponees —Title to Enforce—"Similar Clauses"—Jus quæsitum tertio.

A piece of ground which had originally been feued in one lot was disponed by the feuar in two separate portions in two contracts of ground annual in favour of the same disponee. The first contract, dated in 1873, which conveyed *part* A, contained building conditions and restrictions, including, *inter alia*, a condition that tenements of dwelling-houses were to be erected consisting of at least four rooms and a kitchen each, an undertaking by the disponer to insert "similar" clauses in any other dispositions to be