

I am accordingly of opinion that the application for a remit which has been made by the appellant's counsel ought not be entertained, and that the judgment under appeal must be affirmed and the appeal dismissed with costs.

LOED CHANCELLOR—My Lords, having had an opportunity of reading in print the judgments which have now been delivered by my two noble and learned friends, and agreeing with them, I think it unnecessary to add anything further.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Counsel for Appellant and Defender—Solicitor-General (Herschell) and H. R. Johnstone. Agents—William Robertson—J. Smith Clark, S.S.C.

Counsel for Respondents and Pursuers—Kay, Q.C.—Brewster, Q.C. Agents—Simson & Wakeford—Finlay & Wilson, S.S.C.

COURT OF SESSION.

Thursday, March 10.

SECOND DIVISION.

SPECIAL CASE—ELDER AND OTHERS
(ELDER'S TRUSTEES) *v.* M'DONALD AND
OTHERS (COLLEGE COMMITTEE OF
FREE CHURCH OF SCOTLAND).

*Trust—Settlement—Direction to Accumulate—
Period of Payment.*

A trustor died leaving a trust-disposition and settlement in which he directed his trustees, after paying, *inter alia*, an annuity to his wife, to hold the whole residue of his estate, with the income arising therefrom, till his wife's death, and to pay out of such residue any other legacies he might leave. By the same deed he left, *inter alia*, a specific legacy of £10,000, and disposed of the residue of his estate for behoof of certain endowments. *Held* that in the interest of his residuary legatees the trustees were bound to accumulate the surplus income of his estate as directed till his wife's death, before which period the specific legacies could not be paid, although the estate was large enough to satisfy them and to secure the widow's annuity.

Thomas Elder, wine merchant in Leith, died on 5th December 1869 leaving a trust-disposition and settlement in which he conveyed to his trustees his whole means and estate, heritable and moveable, real and personal, then belonging or which should pertain and belong to him at the time of his death, for the following uses, ends, and purposes:—1st, Payment of debts, &c.; 2d, Payment of a provision settled on his widow Mrs Elder by their marriage-contract; 3d and 4th, Payment of various legacies to relations and charities, amounting to £5050. The fifth, sixth, seventh, and last purposes were as follows:—“5th, That my trustees shall hold the whole rest, residue, and remainder of my estate remaining after fulfilment of the above-written provisions,

with the income arising therefrom, until the death of my wife, and shall, out of such residue and income, make payment of any other legacies or provisions I may leave by any writing to be hereafter signed by me expressive of my will, although not formally executed.” “6th, That my trustees shall, upon the death of my wife, set aside out of the residue of my estate the sum of £10,000, and shall either hold the same themselves or invest the same in name of the general trustees for the time being of the Free Church of Scotland and their successors in office, or in the name of any other persons, as my trustees shall think best, in trust, to apply the free interests and profits accruing annually from the said sum, after deduction of all expenses, as a provision or endowment of a Professor of Natural Science in the said New College of Edinburgh in connection with the Free Church of Scotland, and subject to such burdens, conditions, rules, and regulations as to my trustees may seem best: Declaring that my trustees shall have power to make all such rules and regulations as appear to them requisite for effecting the object above mentioned; and in the event of my trustees not making such rules and regulations, then and in that case the said general trustees for the time being of the said Free Church shall be entitled, and they are hereby authorised, to make such rules and regulations, which shall be as effectual as if prescribed by myself; And I declare that I have made this provision for the endowment of a Professor of Natural Science in said College in the expectation that the trustees of said College will continue to the Professor, for the purpose of purchasing objects of Natural History, and of otherwise contributing to the sufficiency of the Professorship, the sum of £100 annually now paid to Dr Duns as salary.” “7th, That my trustees shall, upon the death of my wife, apply £7000 of my remaining property to and for the erection of a territorial church on the principle of the late Dr Chalmers, and in connection with the Free Church of Scotland, and that in some destitute part of the city of Edinburgh or of Leith, and shall apply the further sum of £3000 for a partial endowment for the minister of said church; and they shall also apply such further sum as they shall see proper for the purchase or erection of a manse for said minister, in or as near to the district as possible; and I commit to the sole discretion of my trustees all the details, regulations and provisions requisite in their opinion for carrying out the purposes specified under this seventh head. And lastly, after all the above purposes shall have been fulfilled, I appoint and direct my trustees to apply and pay over the whole residue and remainder of my estate, if such there shall be, to and for the use and benefit of such four of the schemes of the Free Church of Scotland, and in such proportions, as to my trustees shall appear most expedient.” The gross amount of his estate amounted to £34,839, from which fell to be deducted for debts, inventory-duty, furniture bequeathed to Mrs Elder, and pecuniary legacies, &c., the sum of £7532, leaving as the amount of residue at Mr Elder's death, subject to Mrs Elder's annuity, a sum of £27,307. In terms of Mr Elder's settlement the residue was held by the trustees for the following purposes:—(1) Payment to Mrs Elder of her annuity of £300 a-year: (2) Payment of the following sums:—(1st) Endowment of Natural

Science Chair in New College, Edinburgh, £10,000; (2d) Territorial Church, £7000; (3d) Endowment for minister of ditto, £3000; (4th) Purchase or erection of manse for ditto (sum to be fixed by trustees); (5th) Residue to be divided by trustees among such four schemes of the Free Church of Scotland, and in such proportions, as to the trustees appeared most expedient. The annual income of the said residue of £27,307 as at the truster's death being much larger than what was necessary to meet Mrs Elder's annuity, the trust-fund had been largely increased by accumulation, and amounted to about £32,400. Mrs Elder, who was born on 5th August 1812, stated to the trustees that she would be satisfied if payment of her annuity was secured by the £10,000 above mentioned being retained in the hands of the trustees in addition to a sum of £10,000 or thereby, the income of which sums would be primarily liable for her annuity, it being understood and agreed that if the income of the latter sum of £10,000 should for any cause prove insufficient to meet the said annuity the same should be made up from the income of the former sum of £10,000. In her marriage-contract there was no declaration to the effect that her annuity was alimentary, nor was there any prohibition against her anticipating or assigning it. Disputes having arisen as regards the proper construction of the latter clauses of the trust-disposition and settlement between the trustees thereunder on the one hand and the college committee of the Free Church of Scotland on the other, this Special Case was presented to the Court for opinion and judgment by the trustees of Mr Elder as parties of the first part, and the College Committee of the Free Church as parties of the second part.

The parties of the second part maintained that on a sound construction of the said Thomas Elder's settlement the interest or income of the trust-estate during Mrs Elder's survivance did not fall to be accumulated for the purpose of enlarging the residue, and that as there were sufficient funds now in hand to meet both the annuity to Mrs Elder and the specific legacies directed to be paid or set aside at her death, the trustees were entitled, after setting aside a sufficient sum to meet Mrs Elder's annuity, now to set apart in terms of the settlement the sum of £10,000 for the endowment of the Professor of Natural Science in the New College, Edinburgh.

The parties of the first part, on the other hand, maintained, that on a sound construction of the said settlement they were not entitled to apply any sum for the endowment of the Professor of Natural Science in the New College, Edinburgh, until Mrs Elder's death, but that they were bound to accumulate the surplus income of the residue, after payment of Mrs Elder's annuity, for the benefit of such four schemes of the Free Church of Scotland as the trustees who may be acting at the period of Mrs Elder's death may then think most expedient, subject always to the provisions of the Thellusson Act, should it come into operation by Mrs Elder surviving the 5th of December 1890, in which case they maintained that it would be the duty of the first parties to pay the said accumulations from that date till her death to whatever parties might then be found to have right thereto.

The questions proposed to the Court were—

“Whether the parties hereto of the first part are entitled at present to set aside the sum of £10,000 provided by Mr Elder's trust-disposition and settlement for the endowment of the Professor of Natural Science in the New College, Edinburgh? or, Whether the interest or income of the said sum falls to be accumulated therewith during Mrs Elder's life (subject to the provisions of the Thellusson Act, 39 and 40 Geo. III. c. 98), for the purposes specified in the residuary clauses of the testator's settlement?”

Argued for second parties—There was no reason why the £10,000 should not be now set apart, as there were sufficient sums to provide for the primary purposes of the trust. On the authority of the case of *Lucas' Trustees*, Feb. 18, 1881, ante, p. 363, it was incumbent on the first parties to show that it was the ulterior definite purpose of the truster to deal otherwise with the fund.

Argued for the first parties—The direction to accumulate must, in accordance with the intention of the truster, be complied with—*Martin v. Masterman*, July 12, 1871, L.R., 12 Equity Cases, 559.

At advising—

LORD JUSTICE-CLERK—I do not think this case is attended with much difficulty. It arises out of several clauses of a trust-disposition and settlement executed by Thomas Elder, sometime a wine merchant in Leith; and the questions we are asked to determine are these:—

1. “Whether the parties hereto of the first part are entitled at present to set aside the sum £10,000 provided by Mr Elder's trust-disposition and settlement for the endowment of the Professor of Natural Science in the New College, Edinburgh?”
2. “Whether the interest or income of the said sum falls to be accumulated therewith during Mrs Elder's life (subject to the provisions of the Thellusson Act, 39 and 40 Geo. III. c. 98), for the purposes specified in the residuary clauses of the testator's settlement?”

The clauses of the settlement upon which these questions arise are briefly these—The fifth clause is, “That my trustees shall hold the whole rest, residue, and remainder of my estate remaining after the fulfilment of the above-written provisions”—that is, the payment of debts, the payment of the provision settled upon Mrs Elder by their marriage-contract, and the payment of various legacies to relations and charities,—“with the income arising therefrom, until the death of my wife, and shall, out of such residue and income, make payment of any other legacies and provisions I may leave by any writing to be hereafter signed by me expressive of my will although not formally executed.” When it says “in payment of any other legacies or provisions,” it means other than legacies and provisions already made.

No doubt at first sight it would rather appear that the only legacies and provisions mentioned in the last part of that clause are other legacies and provisions to be left by some other writings, but after reading it over very carefully I have come to be of opinion that that is not the true construction of it at all, but that the meaning of it is that the residue of it is to be held until the death of his wife, and that out of that all legacies and provisions other than those which

have been already mentioned, whether contained in that deed or to be left by some other deed, are to be paid. Whatever may have been the purposes mentioned before, it is perfectly clear that the residue and remainder of the estate remaining after the fulfilment of those provisions, and the income thereafter, are to be held by the trustees until the death of the wife.

And then follow the provisions that your Lordships have heard so much commented upon—*First*, there is a legacy to the Free Church College to endow a Chair of Natural Science; *secondly*, a sum for the erection and endowment of a Territorial Church on Dr Chalmers' principle; and *lastly*, a bequest of the whole remaining residue for such of the four schemes of the Free Church, and in such proportions, "as my trustees may see most expedient."

Now, Mr Elder's widow is still alive, and is apparently about the age of 68 years, and the question your Lordships have to determine is, whether the accumulating income of the fund is to be held in terms of that fifth direction and of the other directions until the death of the widow? I must say I have been unable to see the slightest ground upon which we can refuse to give effect to that direction. There have, no doubt, been many cases in which the words of the trust indicate accumulation, but in which, nevertheless, the substance of the will having been already performed, no reasonable object could be gained by allowing the fund to continue to accumulate, and therefore the Court have interposed to authorise the distribution of the fund at an earlier period than the death of the life-renter or widow, or any postponed period of that kind. If anything of the same kind could have been said here it would have made the case entirely different. I am of opinion that so far from that being at all the scheme and intention of the testator, his objects are too obvious to be overlooked, namely, that this accumulation should take place until the death of the widow, and that then the benefaction should take effect. The residuary legacies, namely, those in favour of the schemes of the Free Church, are quite specific, and the accumulation will make no difference on them, from which it follows that the residuary legatees were truly the persons whom the testator had mainly in view in the postponement of the distribution. Consequently I am of opinion that we should be doing injustice to those very important interests if we were to interfere with so clear and distinct directions.

I think we must answer the first question in the negative.

The Court therefore answered the first question in the negative, and found it inexpedient to answer the second.

Counsel for First Parties—Mackintosh—J. C. Lorimer. Agents—H. & H. Tod, W.S.

Counsel for Second Parties—Trayner—Jameson. Agents—Cowan & Dalmahoy, W.S.

Thursday, March 10.

SECOND DIVISION.

BEYNON & COMPANY v. KENNETH.

Shipping Law—Freight.

B. & Co. agreed by charter-party to carry a cargo of coals belonging to K. from Greenock to Monte Video, part of the freight for the same to be payable in cash on sailing, and bills of lading for the balance, payable abroad, to be taken by the captain, "on receipt of which documents all responsibility of the charterer to cease." The coals were loaded, and bills of lading were granted by the captain which contained an acknowledgment of 453½ tons of coal. On arrival at Monte Video, K.'s agent, having presented the bills of lading, proceeded to weigh the cargo, and thereafter instructed their principal that only 398 tons had been delivered. In an action raised against K. for balance of freight retained by him on the short-shipped coal—held that looking to the uncertainty of the evidence as to the quantity of coals loaded at Greenock and delivered at Monte Video, K. was not entitled to retain the said balance.

Opinion (per Lord Young) to the effect that even when the bills of lading were admittedly inaccurate, the effect of the cesser clause was to release the charterer from liability under the charter-party.

On 9th July 1878 James Spiers Kenneth chartered the ship "Alice," Newport, Monmouthshire, which belonged to Thomas Beynon & Co., to carry a cargo of coal from Greenock to Monte Video. The freight stipulated for in the charter-party was a lump sum of £550, "being payable as follows—say at least £150 sterling on clearing at custom-house, less 6 per cent. for all charges. Bills of lading for the balance, payable abroad, to be taken by the captain, on receipt of which documents all responsibility of charterer to cease." The vessel was sent to a loading-berth at Greenock in the ordinary way, and there loaded a cargo of coal, for which the captain delivered the following bill of lading:—

"Shipped in good order and well conditioned by James Spiers Kenneth in and upon the good ship called the 'Alice,' whereof Jenkins is master for the present voyage, and now lying in Greenock and bound for Monte Video, to say four hundred and fifty-three tons, ten cwt. best Glasgow splint coal, being marked and numbered as in the margin, and are to be delivered in the like good order

"Loose—453½ tons
coal at 22s. 6d.
£510 3 9

and well-conditioned at the aforesaid port of Monte Video (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted) unto order or

"To be taken from alongside at con- goods to be paid by the con-