

Thursday, March 8.

SECOND DIVISION.

SMITH'S TRUSTEES v. SMITH.

Trust—Apportionment of Estate—Succession.

A testator directed his trustees to divide the residue of his estate into two portions, the first of which was to be of such amount as to be sufficient to yield a free annual income of £1500, to be paid to his wife, and the second was to consist of the remainder of the trust-estate, and directed that the capital of these respective portions should be dealt with each in a certain way, the directions for each portion being in part different. The trustees by minute resolved to set apart, and in fact did set apart, certain investments "of such amount as should be sufficient to yield a free annual income of £1500," but subject to the declaration that the excess of revenue from the investments over £1500 in any year should fall into the income of the remaining estates, and that any deficiency in the revenue below £1500 should be made up out of the remaining estates. The investments set apart always yielded more than the required amount. Held that the trustees had not made any final valid and effectual apportionment of the trust-estate into "first portion" and "second portion," and that they were now bound to do so.

Thomas Smith, merchant in Dundee, died on 7th August 1885, leaving a trust-disposition and settlement and relative codicil dated respectively 22nd March 1883 and 29th February 1884, whereby he gave, granted, assigned, and disposed his whole estates and effects, heritable and moveable, real and personal, to the trustees, and for the trust purposes therein mentioned.

By this trust-disposition and settlement he provided, *inter alia*, as follows:— "(Sixthly) I direct and appoint my trustees to ascertain as nearly as may be the amount of the residue of my trust-estates, . . . and to divide the same into two portions, which portions (hereinafter called first portion and second portion respectively) shall be of the amounts following, that is to say, the first portion shall be of such amount as shall be sufficient to yield a free annual income of £1500 a-year, and the second portion shall consist of the remainder of my trust estates, excepting my said property of Ashwood, and the said two portions, along with my said property of Ashwood, shall be administered and disposed of as follows, viz., the nett revenue of the first portion shall be paid to my said wife during her life as an alimentary fund or provision to her, and that half-yearly as the revenue arises, and she shall also get the use and enjoyment during her life of my said property of Ashwood." With regard to the "second portion," the testator directed that it should be divided into shares equal to the number of his children,

that each of his sons should be paid one of these shares, subject to repayment to the trust estate of whatever debt they might respectively be owing to the testator, and that one of the remaining shares should be held in trust for each of his daughters and their issue, the revenue as an alimentary provision for the daughter, and the capital for her issue. With regard to the "first portion" the testator directed (*seventhly*) that on the predecease or death of his wife it should be divided, administered, and applied for behoof of his children including sons, and the issue of such children, in the manner directed with regard to the shares of the "second portion" destined to and for behoof of daughters and their issue.

The testator was survived by his wife and by eight children, two sons and six daughters. Both the sons married and both had issue. Three of the daughters married and two of them had issue.

By minute dated 19th August 1885 the trustees resolved and directed as follows:— "In terms of the settlement the trustees resolved to set apart a portion of the trust estates of such amount as should be sufficient to yield a free annual income of £1500 a-year to Mrs Smith. They accordingly resolved and directed that the following should be so set apart, viz.— (1) The Panmure Street property. (2) Shares to the par value of £8000 of the First Scottish American Trust Company, Limited. (3) Shares to the par value of £8000 of the Second Scottish American Trust Company, Limited. (4) Shares to the par value of £3000 of the Third Scottish American Trust Company, Limited. But declaring that should the annual income or revenue of said portions of the trust estate exceed in any year the sum of £1500, the excess shall fall into the income of the remaining estates, and that should said annual income or revenue in any year be less than the sum of £1500, the deficiency shall be made up from the income or revenue of the said remaining estates." The trustees passed no further or other resolution as to the division of the estate into two portions than that above recited.

By the trust-disposition and settlement the trustees had power, *inter alia*, "to continue as investments of and under the trust the whole or any of the investments belonging to me at the time of my death." Hence they kept on as investments the shares above mentioned.

In accordance with the trustees' resolution the property and shares mentioned in the minute were set apart in the trust accounts as the "first portion." From the commencement of the trust the annual income from the investments so set apart very considerably exceeded a free annual income of £1500 a-year—indeed the free annual income derived from the said "first portion" had nearly every year exceeded £1900. The surplus was year by year transferred to the income of the "second portion" in terms of the declaration.

Mrs Smith, the liferentrix, died on 17th May 1899. During her lifetime no difficulty arose. Payment was made to her of £1500

a-year, and the excess of the income of the "first portion" was, as already stated, treated as part of the income of the "second portion," in terms of the declaration contained in the minute, and divided amongst the children of the late Mr Smith entitled thereto.

Upon Mrs Smith's death it became necessary to ascertain and fix the amount of the "first portion," and questions having arisen, the present special case was presented for the opinion and judgment of the Court.

The estate and effects bearing to be set apart in the minute of the trustees as sufficient to yield a free income of £1500 a-year to the testator's widow were valued at that date at £38,701, and yielded a nett return of £1864, 10s. 4d. The estate the trustees actually held at the date of presenting this case was of the value of £47,280, 15s. 8d., and yielded a nett return of £1852, 7s. 6d. At the date of the trustees' minute the value of the estate bearing to be set apart exceeded what was required for the fore-said purpose to the extent of £7500 or thereby, and the value of such excess as at the date of presenting this case amounted to £8994 or thereby.

The parties to the special case were (1) the trustees, (2) the testator's sons, (3) the sons' children, (4) the testator's daughters, and (5) the daughters' children.

The second and fourth parties maintained (1) that no valid, final, and effectual apportionment of the trust-estate into "first portion" and "second portion" had been made by the first parties; (2) that it was now the duty of the first parties to make a valid and effectual apportionment; (3) that such apportionment should be made on the footing that the portion of the testator's trust-estate set apart or to be set apart as the "first portion," should only be of such amount as would provide a yearly income of £1500, or as near that figure as might be; and *separatim* (4) that the minute of the trustees, so far as it set apart as the "first portion" estate and effects exceeding what were required to provide a yearly income of £1500, or as near that figure as might be, was *ultra vires* and inept, and the capital accounts of the first and second portions should be altered and adjusted accordingly.

The third and fifth parties maintained that the apportionment in the minute of the trustees was valid and effectual to determine conclusively that the four items referred to in the minute constituted the "first portion," while the balance of the estate constituted the "second portion," and that all the above claims of the second parties were untenable and ought to be repelled.

The questions of law for the opinion and judgment of the Court were as follows:—“(1) Has any valid, final, and effectual apportionment of the trust-estate into "first portion" and "second portion" been made by the first parties? (2) In the event of the first question being answered in the negative, is it now the duty of the first parties to make a valid and effectual apportionment of said estate into "first portion" and "second portion"?”

Argued for the second and fourth parties—There was here no final and effectual apportionment. In the case of *Munro's Trustees v. Munro*, June 21, 1899, 1 F. 980, the trustees had no power to invest in anything but trust investments.

Argued for the third and fifth parties—The trustees had by their minute made a final and effectual apportionment. The annuity here was payable out of income only, and what the trustees were bound to set aside was such a sum as would safely and certainly produce £1500. This was what they had done. The grandchildren were entitled to get £50,000, that is to say, the sum which at 3 per cent. would yield £1500—*Munro's Trustees v. Munro, cit.* The provision in the minute as to the surplus or deficit was either superfluous or illegal.

LORD JUSTICE-CLERK—I think here that if the trustees had intended by what they did to make such a division as should finally settle the question of the interest of the widow and the others, then probably the rule maintained by Mr Fleming would be sound, but I do not think they did so intend. I think their minute, taken as a whole, expressly bears that while they are putting aside certain securities for certain purposes, the result is to be that the widow is to get £1500 a-year and no more, but she is certainly to get that. That is what they resolved upon, and that is not a division or an apportionment in the legal sense of apportionment by which when the division has been made the interest of those who are interested in one part of the division must be finally determined by the allocation of that portion, and, on the other hand, that those who are to get the other portion of it are not to suffer by anything that might happen in respect of the apportionment that has been made. That being so, I think the first question should be answered in the negative, and, as a corollary of that, that the second should be answered in the affirmative, and the proper result can be worked out.

LORD YOUNG—The trustees here have no interest or desire to do anything except what is just and reasonable, upon a just interpretation of the testator's meaning and deed. Now, I think we have indicated by observations in the course of the argument what we think the true meaning to be, which was, that the trustees should not act arbitrarily at all, but in the exercise of their honest judgment should state the true portions—one sufficient to produce £1500 a year, and the other consisting of the residue. Now, they have acted properly enough hitherto and have given the widow an income of £1500. I do not know whether a question might not have been raised as to her right to get the income of what was set aside as the first portion where that income exceeded £1500 a-year. My own impression is that upon a true construction of the deed the trustees took a right view in thinking that her interest was limited to

£1500, but also that it extended to £1500, and they acted upon that view. So they express it in their minute, that she should be secured in £1500 a-year, and not less than that, but on the other hand she should not have the chance of any more, for if in any year the income was less than £1500 it was to be made up out of what they had set aside beyond what they thought necessary to yield the £1500, and if it yielded more than what was in excess was to go into the other division—the “second part.”

Upon the whole matter I think the trustees acted with great propriety in acting as they did, but I do not think that what they did was of any consequence beyond giving the £1500 a-year to the widow during her survivorship, and after that £1500 to the sons in liferent and to their children in fee. I quite agree with your Lordship that what they did with a view to the actual conduct of the trust business hitherto was not a final division, and that therefore the first question should be answered in the negative, and it is for them now to make such a division as they think reasonable and proper. Our answer to the second question will be in the affirmative.

LORD TRAYNER—I am of the same opinion. I think the trustees by their minute of the 19th August 1885 did not make a division of the estate such as the truster directed his trustees to make. The truster's direction was that the trustees should ascertain as nearly as possible the amount of the residue of his estate, and divide that when ascertained into two parts. Now, from this minute I have referred to it does not appear that the trustees had taken any means whatever for ascertaining what was the amount of the estate which was to be divided. What they did was simply this: Considering that the truster's settlement conferred on his widow right to an allowance of £1500 a-year, they put aside a sum of money or put aside investments the income from which they regarded as sufficient to meet that claim. I think they did nothing more. I am of opinion with your Lordships that the first question should be answered in the negative and the second question in the affirmative.

LORD MONCREIFF was absent.

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

Counsel for the Second and Fourth Parties—W. Campbell, Q.C. Agents—J. & D. Smith Clark, W.S.

Counsel for the First, Third, and Fifth Parties—Solicitor-General (Dickson, Q.C.)—J. A. Fleming. Agents—Morton, Smart, & Macdonald, W.S.

Thursday, March 8.

FIRST DIVISION.

BRUCE v. HENRY & COMPANY.

Reparation—Workmen's Compensation Act 1897—Factory—Dock.

The Workmen's Compensation Act 1897 includes in the definition of factory “any dock . . . to which any provision of the Factory Act is applied by the Factory and Workshop Act 1895.” The latter Act by section 23 declares that, *inter alia*, the provision of section 18 thereof as regards notice of accidents shall apply “as if every dock . . . were a factory.” Section 18 provides that “when there occurs in a factory . . . any accident . . . written notice shall forthwith be given to the inspector of the district.”

Question whether the provision of section 18 applies prospectively so as to render a dock a factory before an accident has actually occurred in the dock.

Hall v. Snowden, Hubbard, & Company, [1899], 2 Q.B. 136, commented on and doubted.

Reparation—Workmen's Compensation Act 1897—Factory—Dock—Occupier.

By section 7 (1) of the Workmen's Compensation Act 1897 liability to pay compensation under the Act is limited to employment by the undertakers as thereinafter defined, on or in or about, *inter alia*, a factory. The undertaker in the case of a factory is declared by section 7 (2) to be the occupier thereof “within the meaning of the Factory and Workshop Acts of 1878 and 1895.” In the case of a dock which is a factory the occupier thereof is by the Factory Act 1895, section 23 (1) (v) (b), defined to mean “the person having the actual use or occupation of a dock . . . or of any premises within the same or forming part thereof.”

Held that a shipping agent undertaking the loading of a vessel and using a public dock for this purpose is not an occupier of the dock within the meaning of the Act of 1895, and therefore not the undertaker of a factory within the meaning of the Workmen's Compensation Act 1897.

By section 7, sub-section 1, of the Workmen's Compensation Act 1897 it is provided—“This Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work.”

By section 7, sub-section 2, “‘undertaker’ in the case of a factory, laundry, or quarry means the occupier thereof within the meaning of the Factory and Workshop Acts 1878 to 1895.”

By the Workmen's Compensation Act 1897 it is provided, section 7, sub-section 2—“‘Factory’ has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any dock, wharf, quay