

Tuesday, March 7.

FIRST DIVISION.

M'LEOD'S TRUSTEES v. M'LEOD.

Liferent and Fiar—Trust—Ship—“Free Income”—Wasting Securities—Profits of Ships and Single-Ship Companies.

A testator bequeathed the “free income” of the residue of his estate to his widow. At the date of his death he held a number of shares in ships and single-ship companies, which he empowered his trustees to retain. *Held* (1) that in so far as the profits were appropriated by the managers or companies to repayment of debenture bonds over the ships the widow had no right to them; (2) that when unappropriated the widow was entitled to the whole of the profits, even though the testator had been in the habit of setting aside a percentage for depreciation or a sinking fund; and (3) that where the testator's interests in the ships or companies were sold when there were accumulated profits, the widow was entitled to the profits, but only so far as they had not been in use to be appropriated to debenture bonds.

Donaldson v. Donaldson's Trustees, 1851, 14 D. 165, followed.

Mrs Helen Morrison Hardy or M'Leod and others, testamentary trustees of the late Norman M'Leod, who died on 7th January 1912, acting under his trust-disposition dated 27th April 1905, and two codicils dated 5th and 6th January 1912, parties of the first part, and the said Mrs Helen Morrison Hardy or M'Leod, the testator's widow, party of the second part, brought a Special Case to settle in what way were to be treated, so far as regarded the liferent of the second party, sums received in respect of shipping shares forming part of the trust estate.

The trust-disposition conveyed to the first parties the testator's whole estate, and, *inter alia*, provided—“5. Whereas I have invested as part of my own estate sums which truly belong to my sister Miss Eliza Coates M'Leod, or of which she is entitled to the liferent, and whereas I have regularly paid her interest on the said sums, and contributed in addition a regularly monthly sum for the more comfortable maintenance of my said sister, I direct my trustees to continue the said monthly payments to my sister during her lifetime at the rate of not less than One hundred pounds a-year, which payment shall include all interest due by my estate on sums held by me on loan which may belong to my said sister, or of which she may have the liferent, and whereas it is my desire that my said sister should continue to be maintained in comfort, I direct my trustees in any year in which the free income of my estate, after making proper provision for depreciation on my shipping investments, exceeds six hundred pounds to increase the allowance to my said sister to such extent as my trustees may think proper, but so that the same may not in any event exceed the sum of

fifteen pounds per month, the said allowance always to include any interest to which my said sister may be entitled from my estate in her own right; and in the event of the said sums held by me on loan being withdrawn from my estate the allowance to my sister hereinbefore directed to be paid to her shall be diminished by the proportion of interest payable on the sums so withdrawn.

“7. I direct my trustees to hold the residue of my estate for behoof of my said wife in the event of her surviving me so long as she shall survive and remain unmarried, and to apply the income thereof and if necessary the capital as hereinafter directed, for her maintenance and support, she being bound to maintain and educate such of our children as may not be in a position to support themselves. And in respect that a large part of my estate consists of investments in ships which are managed by the firm of Donaldson Brothers, of which I am a partner, and that the income from these investments is of a very fluctuating nature, I direct my trustees to pay over to my said wife, so long as she shall survive and remain unmarried, the free income of said residue in such way as may be found to be most convenient as an alimentary provision which shall not be assignable by her nor attachable by the diligence of her creditors, and the said alimentary provision shall be paid to her with a minimum in each year of four hundred and fifty pounds and a maximum of one thousand pounds, free of income tax in each case—that is to say, if in any year the free available income of my estate, after providing for reasonable and proper depreciation on my shipping investments, is less than four hundred and fifty pounds, and there is no balance of accumulated income at the credit of the revenue reserve fund hereinafter directed to be constituted, my trustees shall draw upon the capital of my estate for that year in order to make up my said wife's income to the said sum of four hundred and fifty pounds, and in the event of the capital of my estate being drawn upon in any year in order to make up my said wife's income as aforesaid, my trustees shall replace the sums so withdrawn as soon as they are in a position to do so out of future income of my estate in excess of four hundred and fifty pounds, it being my desire as far as possible to maintain the capital of my estate intact consistently with the comfortable maintenance of my wife and the maintenance and education of my children. And in the event of its appearing to my trustees necessary in any year in which the free available income of my estate shall not exceed four hundred and fifty pounds to increase my said wife's income beyond that sum on account of exceptional expenditure which she may require to incur, my trustees are hereby empowered to increase her income for that year out of capital to such extent as they may consider necessary but not exceeding six hundred pounds, on the footing that the sums so withdrawn from capital shall be replaced as soon as possible out of income as hereinbefore provided; and, subject to the

foregoing provision as to the minimum income of my said wife, my trustees shall pay over to her the free available income of my estate, but not exceeding one thousand pounds in any year; and if in any year the said free available income after providing for depreciation as aforesaid exceeds one thousand pounds, any balance of income in excess of said sum of one thousand pounds shall for a period of twenty-one years from the date of my decease, provided my said wife shall so long survive and remain unmarried, be placed to a revenue reserve fund which shall be formed for the purpose of equalising my said wife's income, and so long as any balance remains at the credit of the said reserve fund my trustees shall draw on the said fund in order to make up my said wife's income to one thousand pounds in any year in which the free available income of my estate payable to her shall fall short of that sum, and on the expiry of twenty-one years from the date of my death, in the event of my said wife being then alive and in the enjoyment of the alimentary provision hereinbefore conferred upon her, I direct my trustees to divide the surplus revenue of my said estate over one thousand pounds amongst my children and their issue in the same way as is hereinafter provided with regard to the fee of the residue of my estate, and the balance at the credit of the said revenue reserve fund, in so far as the same may not be required to make up my said wife's income as hereinbefore provided, shall form part of the residue of my estate. And in the event of my said wife entering into a second marriage the said alimentary provision in her favour shall immediately cease and determine, and in place of the said provision I direct my trustees to pay my said wife as and from the date of such second marriage an annuity of £250, and that half-yearly at Whitsunday and Martinmas by equal portions, which annuity shall be payable to my said wife on her own receipt alone, and shall be enjoyed by her as an alimentary provision not assignable by her nor attachable by the diligence of her creditors, and the same shall be exclusive of the *jus mariti*

or right of administration of any husband whom she may marry. . . .

"I particularly authorise and empower my trustees to retain my shipping investments and to dispose of these in such way and manner as my trustees in their absolute discretion may consider most for the benefit of my estate, declaring that my trustees shall be in no way responsible for any loss which may arise to my estate in consequence of their continuing to hold my shipping or other investments after my decease."

The *codicil* dated January 6, 1912, provided—"I revoke and recal the whole provisions in the seventh place contained in the said trust-disposition and settlement, and in place of the said provisions I direct my trustees to hold the residue of my estate for behoof of my wife Mrs Helen Morrison Hardy or M'Leod in the event of her surviving me, and to pay her the free income thereof so long as she shall survive and remain unmarried, in such way as may be found to be most convenient, as an alimentary provision which shall not be assignable by her nor attachable by the diligence of her creditors, and in the event of my said wife entering into a second marriage the said alimentary provision in her favour shall immediately cease and determine, and in place of the said provision I direct my trustees to pay my said wife as and from the date of such second marriage an annuity of two hundred and fifty pounds. . . ."

The Case stated—" . . . 2. The testator by his settlement conveyed his whole estate to the first parties, the main purposes of the trust consisting of certain life interest provisions to his widow and the distribution of the residue of the estate among his children. His estate was valued for Inland Revenue purposes at £29,929, 7s. 11d., and of this a large proportion, valued at £9378, consisted of interests in ships and shipping companies. . . .

"5. The details of the shipping interests which belonged to the testator and passed to the first parties are set forth in the following table:—

Ship.	Holding at Date of Death.	Original Value and subsequent additions.	Reduced Value in the Testator's Books as at 31st Dec. 1911 by writing off depreciation.
"Indrani"	2/64	£1482 6 3	£399 0 0
"Kastalia"	2/64	1480 12 8	324 0 0
"Lakonia"	2/64	2002 8 3	567 0 0
"Marina"	2/64	2724 17 7	858 0 0
"Orthia"	2/64	1350 1 9	260 0 0
"Tritonia"	2/64	1935 0 6	468 0 0
"Salacia"	2/64	1406 5 0	370 0 0
"Parthenia"	28 Shares of £100 each	2800 0 0	1955 0 0
	Debenture Bond originally £2800 but reduced at the date of the testator's death by payments to account to £1023, 8s.	2800 0 0	
"Arthenia"	15 Shares of £100 each	1500 0 0	1326 0 0
	Debenture Bond originally £1500 but similarly reduced to £315	1500 0 0	
"Cassandra"	25 Shares of £100 each	2500 0 0	2880 0 0
	Debenture Bond originally £2500 but similarly reduced to £987, 10s.	2500 0 0	
"Almora"	1 Share of £100	100 0 0	100 0 0
"Saturnia"	44 Shares of £100 each	4400 0 0	4400 0 0

These Steamers were incorporated as single ship companies.

"6. . . . In terms of the power conferred upon them, the first parties held the whole of before-mentioned shipping investments until 30th September 1913, other than the interest in the 'Salacia,' which ship was sold in February 1912.

"7. Prior to the testator's death the earnings arising from the employment of the ships referred to in the foregoing table were distributed as follows:—In the case of the ships which were individually owned the net earnings were distributed by the managers among the owners as profits without any provision for depreciation. In the case of the ships 'Parthenia,' 'Athenia,' and 'Cassandra,' which were owned by single-ship companies, the original cost was provided one-half from subscriptions on shares and one-half from the issue of debenture bonds which carried no interest, each shareholder taking bonds to an amount equal to his share subscriptions. In each of these companies, as there was cash available from accumulated earnings the managers distributed this amongst the holders of debenture bonds *pro rata*, and the debentures were cancelled to the extent of the payments made. An annual balance-sheet and profit and loss account was prepared, and any profit shown therein, in so far as it was not carried forward to the following year, was shown as applied in payment and cancellation of debenture bonds held by the shareholders. In the following year's accounts the amount so applied was shown as written off the value of the ship. In the case of the ship 'Saturnia,' which was also owned by a single-ship company, the original cost was provided one-half from subscriptions on shares and one-half from a loan advanced by a third party. This loan was made on the footing that the earnings of the ship were to be applied in repayment of the advance before any distribution was made to the shareholders. An annual balance-sheet and profit and loss account was prepared, and any profit shown therein was written off the value of the ship as 'depreciation,' the cash available being applied in reduction of the loan. In the case of the ship 'Almora,' which was owned by a single-ship company called the Glasgow and Newport News Steamship Company, Limited, there was no debt to be provided for. An annual balance-sheet and profit and loss account was prepared, and any profit shown therein was applied by resolution of the company partly in forming a depreciation and reserve fund and partly in payment of a dividend on the shares. The investments representing the depreciation and reserve fund appear on the credit side of the balance-sheet. . . .

"8. The testator during his lifetime dealt in his books with the sums received by him in respect of his interests in the various ships in the following way:—(1) As regards the ships in which he held 2/64th shares he wrote off depreciation at the rate of 10 per cent. annually on the value of the investments in each individual ship as standing in his investment book at the end of the previous year, and treated the balance of the sums received as income. (2) As regards the

three steamers the 'Parthenia,' 'Athenia,' and 'Cassandra,' in which the testator's holding was represented by shares and debentures originally of the same amount, although the sums received by him were paid by the companies in redemption of debenture debt they were treated by the testator in the same way as in the case of the ships in which he held 2/64th shares—that is to say, he wrote off depreciation at the rate of 10 per cent. annually on the sum at which the investment stood in his books and treated the balance of the sums received as revenue. (3) In the case of the 'Saturnia' no sums were received by the testator, the whole profits having been applied as above explained in payment of the loan over the ship. Accordingly the testator wrote no depreciation off his investment in this ship, the investment standing in his books at the date of his death at its original amount of £4400. (4) In the case of the 'Almora' the investment also remained standing at the original amount of £100.

"9 From the date of death of the testator to 31st December 1912 the first parties received several payments on account of his interests in the above-mentioned ships detailed as follows:—

	Sums Received.
'S.S. 'Indrani'	£177 10 11
'Kastalia'	130 17 11
'Lakonia'	299 10 10
'Marina'	261 1 7
'Orthia'	202 5 10
'Tritonia'	115 16 3
	£1187 3 4
'Parthenia' S.S. Co., Ltd.	£252 0 0
'Athenia' S.S. Co. Ltd.	675 0 0
'Cassandra' S.S. Co. Ltd.	912 10 0
'Saturnia' S.S. Co. Ltd.
Glasgow & Newport News S.S. Co. Ltd.
	1839 10 0
	£3026 13 4

The payments received by the first parties from the 'Parthenia' S.S. Company, Limited, and the 'Cassandra' S.S. Company, Limited, were made by the respective companies in reduction of the debenture debt affecting these ships, and accordingly in the books of the companies the debentures held by the testator stood reduced by the amounts of the payments so made. Of the sum received from the 'Athenia' S.S. Company, Limited, £315 was paid by that company towards extinguishing the debenture debt affecting that ship, the debenture debt being then fully paid off. During the same period no profits were received from the 'Saturnia' S.S. Company, Limited, these being usually applied in reduction of the loan to that company. The proportion of the profits so applied effecting to the trustees' interest in this ship was £2532, 9s. 4d.

"10. From 1st January to 30th September 1913 the first parties received no payments in respect of any of the ships though the vessels had been continuously trading, voyages had been completed, accounts had been

made up, and the profits of the voyages ascertained. The reason for this was the contemplated transference of the ships to a company called the Donaldson Line, Limited, which transference was duly carried out as at 1st January 1913. That company subsequently paid a dividend of 5 per cent. in respect of the year 1913. As part of the above arrangement the loan over the ship 'Saturnia' was paid off as at 31st December 1912, and a new loan to the Donaldson Line, Limited, was substituted.

"11. In September 1913 the first parties disposed of their interest in the ships as from 30th September 1913 for the sum of £17,250. This sale included the profits earned by the respective ships and not distributed. The following table shows the proportion of profits earned but not distributed by the respective vessels which would have fallen to the first parties had a distribution of profits been made for that period:—

	Proportion of Undistributed Profits.	
'S.S. 'Indrani'	£184 8 3	
'Kastalia'	69 16 3	
'Lakonia'	108 8 0	
'Marina'	133 11 2	
'Orthia'		
'Tritonia'	102 4 8	
	£598 8 4	
Less—loss on 'Orthia'	26 4 2	
	£572 4 2	
'Parthenia' S.S. Co. Ltd.	687 11 5	
'Athenia' S.S. Co. Ltd.	565 0 6	
'Cassandra' S.S. Co. Ltd.	244 16 6	
'Saturnia' S.S. Co. Ltd.	906 17 9	
Glasgow & Newport News S.S. Co. Ltd.	9 0 7	
	£2985 10 11	

These undistributed profits were at the date of sale standing at the credit of a steamer's revenue account in the books of the managing owners.

"12. The parties hereto are not agreed (1) as to the extent of the interest of the second party in the sums received by the first parties on account of or applied in reduction of debt out of the earnings of the ships for the period from the date of death, 7th January 1912, to 31st December 1912; (2) as to whether or not the sum received by the first parties from the sale of the ships, which includes profits from 1st January 1913 to 30th September 1913, must be treated as capital or should be apportioned between capital and revenue; and (3) in the event of apportionment of the sum received by the first parties for their interest in the ships being necessary, on what principle it must be made.

"13. The first parties maintain (1) that the sum received by them on account of debentures over ships are payments of capital, and fall to be treated as such; (2) that shares in ships being of the nature of wasting securities the earnings derived therefrom are not income, but consist partly of income and partly of capital, and that they are entitled to deduct therefrom such a sum as will in their discretion safeguard the capital from depreciation, and to pay only the balance to the life interest; and (3)

that the whole price received by them in respect of the sale of the ships falls to be treated as capital, or alternatively, in the event of its being decided that the price falls to be apportioned between capital and revenue, no apportionment falls to be made in respect of the earnings of vessels which are burdened with debentures, or for loans which are repayable prior to a division of profits.

"14. The second party maintains—I. With regard to the sums received by the first parties for the period to 31st December 1912—1. That the whole of the said sums being paid out of profits earned by working the ships in which the trust estate was interested are free income of the trust estate within the meaning of the settlement and fall to be paid to the second party. 2. Alternatively, and on the footing that some apportionment falls to be made between capital and income—(1) That no allowance should be made for depreciation out of sums paid to the first parties as profits or dividends; (2) that the sums received by the first parties in payment of debentures cannot be treated exclusively as capital in respect that they represent the return on an investment which consisted partly of share capital and partly of a loan, and that the value of the share capital was increased by the precise amount by which debt was paid off; (3) in any case, that the rule of apportionment followed by the testator should not be exceeded. II. With regard to the price received by the first parties in respect of the sale of the ships—1. That the whole of the undistributed profits referred to in article 11 of this case fall to be paid to the second party as income. 2. That in any event there should be some apportionment to income of the profits earned, including profits earned by ships burdened with debenture debts or loans. 3. Further, that in the case of the ship 'Saturnia' the price received was enhanced not only by the profit earned from 1st January to 30th September 1913, but also by the profit of £2532, 9s. 4d. which had been earned for the period up to 31st December 1912, and which had been applied in reduction of debt over the vessel. The second party is entitled to an apportionment in respect of the last mentioned profit. . . ."

The questions for the judgment of the Court were—"1. Is the second party entitled, in virtue of the provisions in her favour in the testator's trust-disposition and settlement, to payment in full of the whole sums received by the first parties in respect of said shipping investments for the period to 31st December 1912? 2. If question 1 is answered in the negative, (a) Is the second party entitled to payment of all sums paid to the first parties for the said period as profits or dividends, or (b) must part of the said sums be apportioned to capital in respect of depreciation? 3. If question 1 is answered in the negative, (a) Are the first parties entitled to treat exclusively as capital the sums received by them for the said period in repayment of debenture debt, or (b) must part of the said sums be apportioned to income? 4. If either

question 2 (b) or question 3 (b) is answered in the affirmative, (a) Are the first parties entitled and bound to exercise their own discretion as to the rule of apportionment, or (b) are they bound to follow and continue the practice of the testator in regard to depreciation? 5. (a) Does the price received by the first parties from the sale of the shipping investments fall to be treated wholly as capital, or (b) should the price be apportioned between capital and income? 6. In the event of question 5 (b) being answered in the affirmative, (a) Should the basis of apportionment be to credit revenue with a percentage arrived at on the past average earnings of the respective ships, or (b) should the earnings actually made by the respective ships form the basis of apportionment? 7. Do the earnings of the 'Cassandra,' 'Parthenia,' and 'Saturnia,' standing at the steamers' revenue account in 1913, fall to be treated as income, or are the said earnings to be considered as capital in respect of their liability to be attributed to the repayment of debt due on capital account."

Argued for the first parties—If a testator left his estate invested in trust securities his trustees could continue to hold the funds in that form, and a bequest of the income of the trust funds was a bequest of the income *in specie*; but if a testator left his estate invested in other securities, there was necessarily an implied power in his trustees to convert his estate into trust securities, and consequently a bequest of the income was not a bequest *in specie*. But in the case of wasting securities, as the investments were in this case, the rule in *Hove v. Lord Dartmouth*, 1802, 7 Ves. 137, applied to the effect that the trustor was not to be presumed to have meant the rights of the beneficiaries to be affected by the nature of the investments, and that unless a contrary intention appeared the bequest of a life interest was not until conversion took place to be regarded as a bequest *in specie*, but was to be regarded as subject to deduction in respect of the annual wastage of the capital. Here there was no such contrary intention, for the trust was a trust for conversion, for the trustees were to hold and dispose of the shipping investments, not to hold or dispose of them. Further, the testator had supplied his own interpretation of the "free income" which was given to the second party, for the fifth purpose of his settlement showed that free income meant income minus a sum to cover depreciation, and the testator himself had so treated the income. The case was therefore on all fours with *Brown v. Gellatly*, 1867 L.R., 2 Ch. App. 751; *Strain's Trustees v. Strain*, 1893, 20 R. 1025, 30 S.L.R. 906; *Ferguson v. Ferguson's Trustees*, 1877, 4 R. 532, 14 S.L.R. 377. Where and in so far as the profits were treated by the shipowners as capital, the above did not apply, and the profits as between the life interest and fiars were capital or interest according as they were so treated by the owners—*In re Barton's Trust*, 1898, L.R., 5 Eq. 238; *Bouch v. Sproule*, 1887, 12 A.C. 385; *Cunliff's Trustees v. Cunliff*, 1900, 3 F. 202, 38 S.L.R. 134;

Gunnis's Trustees v. Gunnis, 1903, 6 F. 104, 41 S.L.R. 69; *Howard's Trustees v. Howard*, 1907 S.C. 1274, 44 S.L.R. 952. But when there was no such earmarking the income was to be actuarially treated and allowance made in favour of the fiars in respect of depreciation, and the testator's own practice should be followed. *Eade v. Nicholson*, [1909] 2 Ch. 111, was distinguished, for there there were both power to retain and power to convert. *Mein's Trustees v. Mein*, 1901, 3 F. 994, 38 S.L.R. 714, was not in point, for there there was power to delay conversion and a special destination to a beneficiary pending conversion—*Green v. Britten*, 1863, 1 De Gex, Jones, & Smith, 649. *Hay's Trustees v. Hay*, 1903, 11 S.L.T. 306, was distinguished, because the trustees had power to hold *in specie*, and the Court inferred therefrom that payment was to be *in specie*. As regards the proceeds of the sale, *Donaldson v. Donaldson's Trustees*, 1851, 14 D. 165; *Cameron's Factor v. Cameron*, 1873, 1 R. 21, 11 S.L.R. 1; *Gardiner Baird*, 1907, 15 S.L.T. 25; and *MacDougall's Factor v. Watson*, 1909 S.C. 215, 46 S.L.R. 172, were decided without a citation and consideration of the English authorities, which were to the contrary—*Bulkeley v. Stephens*, [1896] 2 Ch. 241. The life interest should not get a share in the proceeds of the sale for she would have profited by a purchase, and to so treat her avoided all the difficulties involved in apportioning. Further, the life interest could only share in the profits after capital charges had been deducted from them.

Argued for the second party—It was the plain intention of the testator that his trustees should continue to hold his shipping investments; he gave them power to do so expressly, and he chose men of the shipping business as his trustees. Further, it was plain that if the trustees continued to hold the shipping investments the widow was to get so much of the profits as were not earmarked for capital charges by the shipping companies, free of all deductions for depreciation. The testator gave her the free income; if he had meant a deduction to be made therefrom for depreciation he would have so expressed himself, as he did in the fifth purpose and also in the provision which he revoked by the codicil in question—*Campbell v. Wardlaw*, 1883, 10 R. (H.L.) 65, 20 S.L.R. 748; *Davidson's Trustees v. Ogilvie*, 1910 S.C. 294, 47 S.L.R. 248; *Robinson v. Fraser's Trustees*, 1880, 7 R. 694, 17 S.L.R. 524, 1881, 8 R. (H.L.) 127, 18 S.L.R. 740. Consequently there was no trust for conversion, and the cases quoted for the first parties were distinguished. This case came within the *ratio decidendi* of the cases of *Hay's Trustees (cit.)*, *Nicholson (cit.)*, and *Lean v. Lean*, 1875, 32 L.T. 305. *Brown v. Gellatly (cit.)* was distinguished, for in it there was a trust for conversion and delay in executing it, and the Court dealt with the funds as if conversion had taken place *ab initio*. As regards the ships upon which there were debenture bonds, the payments received were revenue—*Blyth's Trustees v. Milne*, 1905, 7 F. 799, 42 S.L.R. 676.

LORD PRESIDENT—It is common ground that the case *In re Barton's Trust*, 5 Eq. 238, and the case of *Donaldson v. Donaldson's Trustees*, 1851, 14 D. 165, disclose the principles which afford a solution of the questions before us in this Special Case. Controversy only arises when you come to the application of these principles to the deeds and to the dealings of the trustees.

The testator, a shipowner in Glasgow, died on 7th January 1912, and the day before his death he executed a codicil to his trust-disposition and settlement by which he directed his trustees to hold the residue of his estate for behoof of his wife, and to pay her the free income thereof so long as she survived and remained unmarried. His estate at the date of his death, we are told, amounted to some £30,000, of which £9378 consisted of interests in ships and shipping companies; and by the terms of his trust-disposition and settlement—by which, I may say in passing, he conveyed his whole estate to his wife and other trustees, who were all shipowners save one, his law agent—he expressly empowered his trustees to hold and retain as long as they might deem expedient the investments which he might happen to hold at the time of his death, and particularly he authorised and empowered his trustees to retain his shipping investments and to dispose of them in such a way and manner as his trustees in their absolute discretion might consider most for the benefit of his estate.

Now the only difficulty I have had in this case was to distinguish that clause from the clause in the case of *Brown v. Galletly*, 1887, L.R. 2 Ch. 751. I think the second party has succeeded in showing that there is a material difference between the clause in the present case and the clause which was the subject of construction in *Brown v. Galletly*, because there the testator, who left ships, directed his trustees to realise the ships when and in such manner as they might see fit, and meantime not to sell his ships for the benefit of his estate until they could be satisfactorily sold. And I observe Lord Cairns said that he interpreted that clause as meaning that the testator put his ships in the position of property which was “to be converted cautiously and in proper time and as to which there was no breach of trust in the executors delaying to convert it.” Here, on the other hand, I think the testator expressly contemplated the retention of his shipping interests for, it might be, a very considerable time, purposely, as I think, selecting shipowners as his trustees that they might be able to apply their minds intelligently to the question whether or no the time had come for selling, or whether it was better to trade with the ships and earn a profit. Accordingly I do not read the clause in this will as directing the trustees to work and trade with the ships with a view to realisation, but as a power, if the trustees thought fit, to retain the ships and to trade with them as long as they thought it was desirable so to do for the benefit of his estate.

Now the testator had interests in twelve ships at the date of his death. In each of seven of these ships he held 2-64th shares. Each of the remaining five was owned by a single-ship company. And we are expressly told that in the case of the seven ships in each of which he held 2-64th shares the nett earnings were distributed among the owners as profits without any provision for depreciation. With regard to three of the five single-ship companies we are told “the original cost was provided one-half from subscriptions on shares and one-half from the issue of debenture bonds which carried no interest, each shareholder taking bonds to an amount equal to his share subscriptions. In each of these companies, as there was cash available from accumulated earnings, the managers distributed this amongst the holders of debenture bonds *pro rata*, and the debentures were cancelled to the extent of the payments made.” With regard to the fourth of the five ships we are told that the original cost was provided one-half from subscriptions on shares and one-half from a loan advanced by a third party, and that this loan was made on the footing that the earnings of the ship were to be applied in repayment of the advance before any distribution was made to the shareholders. And, finally, with regard to the fifth of the five single-ship companies, no debt was to be provided for, but an annual balance-sheet and profit and loss account was prepared, “and any profit shown therein was applied by resolution of the company partly in forming a depreciation and reserve fund and partly in payment of a dividend on the shares.”

Now, following and giving effect to the powers conferred by the trust-disposition and settlement, the trustees traded with these ships for the period of about one year after the testator's death—from 7th January 1912 to 31st December of that year. During that period the success of the seven ships in each of which the testator held 2-64th shares realised profits of which his share amounted to £1187. That sum was paid to the trustees, and the first question we have to consider is, what were they to do with it? I answer—As it was free income in their hands they had no option but to pay it over to the lifeentrix. It may be quite true that as these were highly speculative investments a cautious and prudent receiver of profits would, before he spent them, set aside a certain proportion of profit against possible loss in the future. The testator himself, it appears, did so and called it depreciation, and his widow may well, for aught that I know, follow his example. The trustees indeed were directed by the fifth purpose of the settlement in the bequest to the testator's sister to make a provision of that kind before paying over any money to the sister. And the managers of the shipping companies themselves—in the cases where companies were formed—might very well before distributing dividends deduct so much for depreciation. But I am very clearly of opinion that the trustees have no power to make any such deduction. Their marching

orders were plain—when they received the free income they were to hand it over to the widow.

During the period I have just mentioned the five ships which were held by single-ship companies also traded, and the share of their earnings falling to the trustees amounted to £1839. But in accordance with the arrangement to which I have adverted by far the greater part of that money was appropriated by the companies and devoted to the repayment of the debentures on the ships. In so far as that course was followed I think the money was capital, and the widow has no part or share in it; but in so far as the £1839 was not devoted to repayment of debentures or loan the widow is entitled to it as part of the free income of the estate. It seems to me that to decide otherwise would be to violate the sound principle laid down in the case of *in re Barton*, which has been approved in the House of Lords and followed, I think, without question ever since.

But there came a time when apparently the trustees in the exercise of their discretion thought fit to sell the ships. In September 1913 they effected a sale of the whole of the testator's shipping investments at a price of some £17,250, and we are told that the sale included the profits which had been earned by the respective ships during the period from the 1st January 1913 until 30th September 1913, but which had not been distributed. We are told further that these undistributed profits were at the date of sale standing at the credit of the steamers' revenue account in the books of the managing owners. What is to be done with that money? Is the second party to have it?

I say No; she is not to have any part of these undistributed profits which were applied in repayment of debenture or loan in accordance with the arrangement to which I have referred. But in so far as the money was not appropriated or devoted to the repayment of the loan or debenture, then I am of opinion that the widow is entitled to have it all as free income of the estate.

It seems to me that this is a very clear case for the application of the rule laid down in *Donaldson v. Donaldson's Trustees*, which was followed in the case of *Cameron's Factor v. Cameron*, 1873, 1 R. 21, with a variation appropriate to the circumstances—a case which has never yet been questioned, and which I do not think Mr Moncrieff seriously asked us to reconsider in the present instance.

LORD MACKENZIE—I am of the same opinion. What the widow in the present case is entitled to receive is the free income of the residue of the trustor's estate, and it is with regard to the shipping investments which the trustor held that the present questions arise.

As regards the sums which came into the trustor's hands by way of repayment of debentures or loans on the ships, I do not think that that can be described as of the nature of free income, because those payments were made not to a shareholder as

dividends but to creditors as repayment of debt.

As regards the next question, it really turned upon the construction of a single clause in the will, and upon that clause it was maintained that the widow was not entitled to receive the whole balance which was paid over in name of dividend in consequence of there being what, it was contended, was equivalent to a trust for conversion in the sense in which that phrase has been used in the English cases. I am unable to read the clause as being of the nature of a trust for conversion at all. I think it was a clause which gave a proper alternative to the trustees either to hold the shipping investments or to realise, and that so long as they continued to hold, that which was received by them as earnings was of the nature of dividend, and therefore formed free income which they are bound to hand over to the widow.

As regards the sums which were realised on the sale of the interests in the shipping investments, it appears to me that as regards Scotland that question is ruled by the cases of *Donaldson* and *Cameron*. And, as I read the statements in the case, there are materials here for dealing with what properly represents income included in what was sold, for we have the materials for the application of the principle laid down in the intervention in the case of *Donaldson*.

LORD SKERRINGTON—Three groups of questions are submitted to us in this Special Case. I begin with that which relates to the profits which were applied by the shipping companies towards the extinction of capital debt. It is settled by authority that *prima facie* such receipts must be treated as capital in the hands of the trustees, although, of course, a testator may direct otherwise in his will. There is nothing here to overcome the *prima facie* presumption. It is true that the testator during his lifetime treated as income a portion of similar receipts, as appears from his books, but if he wished that his trustees should continue that practice he ought to have given them a direction to that effect.

The second group of questions relates to the returns from the shipping companies and shipping investments which were not appropriated to repayment of debt. The question is whether the trustees are entitled, in respect of the wasting character of the investments, to set aside a portion of these returns in order to create a depreciation fund. Here again the question is *prima facie* answered by the consideration that the testator empowered his trustees to retain his shipping investments if they thought fit to do so, and that by his codicil he gave them a general direction that they were to pay the income, which I read as meaning the whole income, of his estate to his widow. He might very well have repeated in his codicil what he originally directed in his will but afterwards revoked, namely, that before paying the free income to his widow the trustees should keep de-

preciation in view. And there is still in force in the will a direction that in making certain payments to his sister they should make due provision for depreciation. But in a question between the trustees and the widow her rights fall to be regulated by the codicil, and any direction as to setting aside part of the income to meet depreciation is conspicuous by its absence. Accordingly I have no doubt that the widow is entitled to the whole income from the ship investments so far as received by the trustees as income.

There remains a group of questions arising out of the widow's claim that the price received by the trustees from the purchaser of the shipping investments ought to be divided as between capital and revenue. It is settled by decision and by long-continued practice in Scotland that such an appropriation falls to be made. I do not think that it is possible to lay down any universal rule as to how such an appropriation should be effected; but in view of the statements in article 10 of the case I have no doubt that the second party is entitled to have treated as income all the profits set forth in the 11th article of the case, except those arising from the "Parthenia," the "Cassandra," and the "Saturnia," in regard to which the parties were agreed that if there had been no sale to a new company the old shipping companies would have been bound to appropriate these profits as capital. There remains the small return from the Glasgow and Newport News Shipping Company, which counsel for the first parties conceded to the widow.

LORD JOHNSTON, who had not heard the case, delivered no opinion.

The Court answered the questions as follows:—Question 1 in the negative; 2 (a) in the affirmative; 2 (b) in the negative; 3 (a) in the affirmative; 3 (b) in the negative; 4 (a) and (b) were superseded; 5 (a) in the negative; 5 (b) in the affirmative; 6 (a) in the negative; 6 (b) in the affirmative; 7 first alternative in the negative, second alternative in the affirmative.

Counsel for the First Parties—Moncrieff, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Second Party—Chree, K.C.—R. C. Henderson. Agents—Wishart & Sanderson, W.S.

Friday, February 25.

SECOND DIVISION.

[Lord Anderson, Ordinary.]

HOOD v. ANCHOR LINE (HENDERSON BROTHERS) LIMITED.

(See *Williamson v. Orkney and Shetland Steam Navigation Company, Limited*, ante, vol. lii, p. 241, and *infra*, following case.)

Process — Ship — Carriage — Contract — Carriage of Passengers — Conditions on Ticket Limiting Liability of Carrier — Notice of Conditions.

In an action at the instance of a passenger on an Atlantic steamer against the shipping company for damages for injuries sustained by him on the voyage the pursuer averred that his attention had not been drawn to conditions on the ticket limiting the liability of the shipowner to £10 in the case of accident, and that he was not aware of the same. The Court *allowed* a proof before answer as to the terms and conditions of the contract of carriage between the parties.

John Hood, linen importer, Belfast, *pursuer*, brought an action against the Anchor Line (Henderson Brothers) Limited, Glasgow, *defenders*, for payment of £10,000 damages for personal injuries sustained by him while a passenger on one of the *defenders'* steamers on the voyage between New York and Glasgow.

The *contract* between the parties was expressed on the ticket received by the pursuer on booking his passage, and was in the following terms:—

"ANCHOR LINE.

TRANSATLANTIC STEAM PACKET SHIPS

Sailing Regularly between

NEW YORK and GLASGOW via Moville

(Londonderry) and

NEW YORK and MEDITERRANEAN PORTS.

Agency at June 16th, 1914.

"We hereby engage that the persons undernoted (equal to 2 adults) shall be provided with Saloon Passage from New York to Glasgow in the British steamship 'California' to sail from New York on the 20th day of June 1914 at noon (unless prevented by unforeseen circumstances), and we have received the sum of One hundred and fifty 2/100 dollars in payment of same.

Room D.

Berth.

Name. Age.

Mr John Hood.

Mrs

"*Notice.*—*This ticket is issued to and accepted by the passenger subject to the following conditions:—*

"Neither the shipowner nor the passage broker or agent is responsible for loss of or injury to the passenger, or his luggage or personal effects, or delay on the voyage, arising from steam, latent defects in the steamer, her machinery, gear, or fittings, or from