

jury therefore I am prepared to send this case.

LORD MACKENZIE, LORD SKERRINGTON, and LORD CULLEN concurred.

The Court recalled the interlocutor of the Lord Ordinary and remitted to him to proceed as accords.

Counsel for the Pursuer—T. G. Robertson—R. Macgregor Mitchell. Agents—Paterson & Salmon, S.S.C.

Counsel for the Defenders—Sandeman, K.C. — Gentles. Agents — Simpson & Marwick, W.S.

Saturday, June 14.

SECOND DIVISION.

WARRACK'S TRUSTEES v. WARRACK.

Trust—Trust-Disposition and Settlement—Ship—Powers of Trustees—“Wasting Securities”—Division of Returns between Capital and Income—Finality of Appropriation.

A testator died leaving a trust-disposition and settlement whereby he conferred discretionary power on his trustees, in the event of any of his means being invested in “wasting securities,” as to what proportion of the returns therefrom they might treat as income. The trust estate included shares in several steamships, the dividends from which the trustees had allocated annually as between capital and income. On the sale or loss of some of these steamships the trustees, as a result of their greatly enhanced value, received sums amounting to more than the initial value of these shares. The sums which had been set aside to capital out of the returns were more than represented by the physical deterioration of the ships at the time of their loss or sale. The trustee being in doubt as to whether the shares in the ships in question were wasting securities in the sense of the trust-deed, and whether they were entitled to revoke their previous allocations of the returns therefrom as between life-renters and fiars, brought a special case for the opinion of the Court. *Held* (1) that the shares in question were wasting securities in the sense of the trust-deed, (2) that the trustees were therefore entitled to apportion the annual returns therefrom as between capital and income, and (3) (*dis. Lord Salvesen*) that the apportionments being in form final appropriations of the dividends to capital in so far as they were not paid over to the parties entitled to the income, the trustees were not entitled to withdraw therefrom from the capital account and pay over as income any part thereof.

John Warrack, shipowner, 43 Constitution

Street, Leith, and others, the trustees acting under the trust-disposition and settlement of the late John Warrack, shipowner, Leith, who died on 3rd July 1907, *parties of the first part*; Charles Cumming Warrack and others, the surviving life-rent beneficiaries under the said trust-disposition and settlement, *parties of the second part*; and the said John Warrack and others, the fiars or contingent fiars of a share or shares of the residue of the testator's estate, *parties of the third part*, brought a Special Case to determine in what way were to be treated, so far as regarded the life-rent of the second parties and the fee of the third parties, certain 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—“ . . . I empower my trustees in their discretion to allocate and hold (with power to vary) for any beneficiary or prospective beneficiary (whether life-renter or fiar) the whole or any part of any investments for the time being held by them, and I declare that in paying out any residuary beneficiary in whole or in part my trustees shall have the sole right to decide whether such payment out shall be made in cash or by transfer of investments or other unrealised assets, and if wholly or partly by the transfer of investments or other unrealised assets, the values to be put on such investments or other unrealised assets for transfer shall be fixed by my said trustees, and their decision shall be final: Declaring further that the amount of capital to be retained from the income of which to pay any annuity or other payment out of income under these presents shall be a matter solely in the discretion of my trustees: I empower my trustees to delay the realisation of the whole or any part of my estate for such time as they in their discretion (and as to which they shall be the sole judges) shall think fit, and in particular I specially authorise my trustees to hold for the benefit and at the risk of my estate the whole or any part of my shares in steamships or steamship companies so long as the steamships, the share in which are so held, remain under the management of the firm of John Warrack & Company, shipowners and merchants, Leith, and either the said John Warrack junior or the said James Howard Warrack remains a member of that firm. . . . In the event of any part of my said estate being at the date of my decease invested or being thereafter invested by my trustees in wasting securities, the proportion of the return from such wasting investments which shall be treated as income, or whether the whole or any part of such return shall be treated as income for the purposes of these presents, shall be matters entirely in the discretion of my trustees and as to which they shall be the sole judges. . . .”

The *Case* stated—“3. The testator, who had for many years carried on the business of shipowner at Leith, was at the date of his death largely interested as a shareholder in the various steamers managed by his

firm. . . . At the date of the testator's death he owned twelve 64th shares in the s.s. 'Macduff,' seventeen 64th shares in the s.s. 'Braemar,' fourteen 64th shares in the s.s. 'Lennox,' fourteen 64th shares in the s.s. 'Atholl,' ten 64th shares in the s.s. 'Lothian,' six 64th shares in the s.s. 'Montrose,' and six 64th shares in the s.s. 'Erroll.' The total value of the said ship shares as entered in the inventory of the testator's estate was at the date of his death £31,756, 5s. 4. . . . The first parties having in view the progressive physical deterioration of the steamers, and the discretion conferred on them by the testator in regard to wasting securities, considered from time to time the apportionment of the dividends received between capital and revenue. By minute of the first parties dated 6th April 1908 it was resolved that '4½ per cent. on those values would in present circumstances be a suitable return to the liferenters out of the dividends received on the holding of ship shares, and that the balance of the dividends beyond that rate received to 31st March 1908 should be carried to capital.' By minute of 12th May 1909 the first parties resolved that 'from the dividends received from the ship shares *in cumulo* in each year for each beneficiary, interest at 4½ per cent. on the total value of the ship shares set aside in the scheme of division for such beneficiary should be credited to revenue, and the balance, if any, treated as returned capital.' The first parties also resolved to pay out of capital the call made on the shares of the s.s. 'Macduff.' The matter was next dealt with by the first parties at a meeting held on 15th January 1913, when it was minuted that 'the trustees carefully considered the question of the apportionment of the returns from the ship shares between capital and revenue, and after fully discussing the matter and the principle which had been followed in previous years, they were of opinion that at the present time the liferenters were entitled to a higher return than they were receiving. At the same time, they considered that the return should now be based on actual present valuations, and no longer on the valuation made for division at 31st March 1908. They accordingly resolved that the liferenters should be credited for the current year out of the gross returns with 6 per cent. free of income tax on the *cumulo* value of the ship shares as valued at 31st March 1912. They were further of opinion that the liferenters should in future be credited in each year with a rate of interest based on the actual values given by Messrs John Warrack & Company as at the previous 31st March.' In accordance with this resolution, 6 per cent. on the value of the ship shares was paid to each liferent beneficiary in 1913 on the valuation at 31st March 1912 and in subsequent years. In addition, special payments were made out of the extra profits on 2nd August 1916 and 5th February 1917 of 25 per cent. of the value of said shares. The total payments of income made by the first parties to the second parties in respect of the earnings of the four after-mentioned steamers after 31st March 1908 equal 3718

per cent. per annum on the initial value of the shares of the s.s. 'Macduff'; 5.45 per cent. per annum on the initial value of the shares of the s.s. 'Lothian'; 5.7 per cent. per annum on the initial value of the shares of the s.s. 'Braemar'; and 8.624 per cent. per annum on the initial value of the shares of the s.s. 'Lennox.' . . . 5. The s.s. 'Macduff' was sold on 26th June 1911 at a slight loss. The s.s. 'Braemar' was sold on 18th June 1913 at a profit. The s.s. 'Lothian' was seized in Hamburg by the German Government at the outbreak of the war, and the owners' claim was settled by the underwriters on the basis of a total loss. The s.s. 'Lennox' stranded on the south-east coast of Ireland in December 1916, and became a total loss. The s.s. 'Atholl,' the s.s. 'Montrose,' and the s.s. 'Erroll' are still trading, and no question arises in regard to them in this case. The earnings of the said steamers 'Macduff,' 'Braemar,' 'Lothian,' and 'Lennox' varied considerably during the period between 31st March 1908 and the date of the close of their respective accounts, but in the case of the 'Lennox,' which was trading for two years and a-half subsequent to the outbreak of war, her earnings were high. Further, owing to the great rise in the value of shipping subsequent to the outbreak of the war, the insurances on the 'Lennox' were increased in proportion to the rise in her market value, and in consequence of this the first parties received in respect of her policies of insurance a sum greatly in excess of the value of her shares as at March 31, 1908. The net result on the accounts of the four steamers in question was, treating the shares as a single investment, that the sums received on the sale of the 'Braemar,' and recovered on the loss of the 'Lothian' and 'Lennox,' and after allowing for a slight loss on the 'Macduff,' largely exceeded the initial value of the shares of those steamers as at 31st March 1908; also that the surplus dividends during the period (*i.e.*, the proportion of dividends credited to capital) were not wholly required for the purpose for which they were originally credited to the capital account, because the depreciation on the shares of the four steamers, which represented the progressive physical deterioration suffered by the steamers themselves at the date of sale or loss, even if paid out of the surplus dividends rather than out of the surplus capital (*i.e.*, the capital received by the first parties on account of the sale or loss of the steamers in excess of the initial value of the shares) would leave a large sum at the credit of capital which was derived entirely from revenue, and represented accumulations of income derived from the earnings of the steamers. Questions of difficulty have arisen as to the principles on which the accounting between capital and revenue should be conducted, and as to whether the second parties are entitled to have withdrawn from capital and paid over to them as income the surplus dividends which were credited to capital by the first parties to meet the depreciation of the shares due to the progressive physical deterioration of the steamers and other

contingencies. There is also the further question whether, if the second parties are entitled to receive payment of the surplus dividends as income, such payment should be under deduction of the total depreciation of the shares of the four steamers. The second parties claim return from capital of the whole surplus dividends as earnings of the ship, which they maintain formed income to which they were entitled under the testator's trust-disposition and settlement, and also that those surplus dividends should now be paid to them without deduction of the sums written off for depreciation. The third parties appear on behalf of themselves, and they also represent the interest of persons who may ultimately be found to have a right of fee in the life-ferented shares of capital. The third parties, in respect of their vested or contingent right under the holograph will of Mrs Mary Warrack or Cooper or Milne to the residue of her share of the testator's estate burdened by the life-ferent to her husband Dr Thomas Milne, who is one of the second parties, claim that the surplus dividends in question form capital which the first parties are bound to hold for the third parties and others who are, or may ultimately be, entitled to same in fee, and do not form income which under the said trust-disposition and settlement is payable to the second parties. . . .

7. The main question in the present case relates to the surplus dividends which were credited to capital by the first parties to meet the said depreciation and other contingencies. The amount of those dividends as above stated is £14,513, 16s. 8d. If depreciation falls to be deducted from this sum it is reduced to £12,007, 11s. 8d., which is subject to a further deduction of £145, 2s. 9d. for administrative expenses, leaving the net sum of £11,862, 8s. 11d. as the amount by which the capital account has been increased out of the earnings of the four steamers. If it should be held that the reduction in value in respect of depreciation of the shares of the four ships for the period from 31st March 1908 to the date of sale or loss of the steamers, namely, the above-mentioned sum of £2506, 5s., ought not to be deducted from the surplus dividends in view of the fact that the sums received by the first parties upon the sale or loss of the steamers very largely exceeded the initial value of the shares as at 31st March 1908, the above sum—viz., £11,862, 8s. 11d.—will fall to be increased by the said £2506, 5s., and in that case the depreciation would correspondingly reduce the capital account in respect of the shares of those steamers, though still leaving it considerably greater than at the date of the scheme of division. 8. The first parties maintain that the shares of the steamers were wasting securities within the meaning of the said trust-disposition and settlement; that the powers and discretion conferred on the first parties as trustees by the testator with respect to wasting securities were not exhausted when they credited to capital account the surplus dividends of each year; that those surplus dividends were credited to capital account not for the purpose of being vested in the

first parties for behoof of the third parties or the other ultimate fiars, but to meet depreciation of the shares consequent on the progressive physical deterioration of the steamers and other contingencies, and the first parties are entitled at the close of each ship's account to withdraw from capital account the amount which proved not to have been necessary to meet the total depreciation upon the shares of that ship and pay it over to the second parties as income. The sums paid to the second parties as income out of the dividends of the steamers were reasonable in amount so long as each ship's account remained open, and gave to the man adequate proportion of the earnings of each steamer during the whole period, and the sums credited to capital account were not more than were reasonably sufficient to meet the depreciation on the shares which would progressively increase with the age and deterioration of the steamers. Other contingencies also had to be provided for, such as liability for calls for loss in trading, or for overhaul or repair of the steamers. In making the various apportionments prior to the outbreak of the war the first parties apportioned the dividends with a strict regard to the earning power of the steamers at the time and in view of the contingencies that might at any time arise. After the outbreak of the war the only one of the four steamers referred to which was still trading was the s.s. 'Lennox,' and the effect of the war on the value of that old steamer and on her earning capacity could not be anticipated. As matters eventually turned out on the loss of the 'Lennox,' the earnings of that steamer permitted the payment to the second parties of a bonus of 25 per cent. on two occasions in addition to the usual 6 per cent. on the value of the share. The first parties, if legally entitled to do so, are willing to re-state their accounts so as to give the second parties a larger proportion of the total earnings of the steamers, or such sum as the Court may determine that the second parties are entitled to receive. With regard to the question whether the total depreciation of the shares should, in the circumstances that have arisen, be charged to the surplus dividends which have been credited to capital or should be charged to the surplus capital represented by the sums received by the first parties in excess of the initial value of the shares, the first parties adopt the contention of the third parties. 9. The second parties maintain that they are entitled to payment of (a) the full amount of the surplus dividends less administration expenses amounting to £14,368, 13s. 11d., or otherwise (b) the full amount of the surplus dividends less depreciation and administration expenses amounting to £11,862, 8s. 11d., or otherwise (c) such proportion of the surplus dividends as the first parties on a re-statement of their accounts may apportion to income. With regard to the annual apportionments made by the first parties, the second parties submit that these were not final, and had not the effect of appropriating to the fiars of the shares as capital the surplus earnings of the ships which were not in each year paid as income.

But if and in so far as the said apportionments may be construed as having that effect, the second parties maintain that it was beyond the power and discretion of the trustees so to do. Shipping shares are not wasting investments, and the power and discretion conferred upon the trustees by the testator with regard to wasting securities did not apply to the shipping shares now in question. In any case such power and discretion was limited to the object of making provision for replacing the loss or deterioration in a wasting security or investment. It might be, and the second parties do not question that it was, a proper precaution for the trustees to set aside a reasonable amount to provide for the various contingencies to which shipping shares are subject, but it was beyond their power to appropriate to capital anything in view of the wastage which had actually occurred. It cannot be reasonably contended that the actual wastage exceeded the sum of £2506, 5s., which is stated by the first parties to be the total depreciation on the shares. The second parties accordingly maintain that the surplus dividends formed income belonging to the second parties which the first parties held for them in trust subject only to payment therefrom of any sum that might be required to meet depreciation of the shares of the four steamers and other contingencies. In point of fact the surplus dividends were not required to meet the depreciation of the shares, and no other contingencies in fact arose. The said surplus dividends were held by the first parties in trust for the second parties, and were not affected in their legal character by being credited to the capital account, or even by being invested as capital and allocated to the shares of capital held by the first parties for the second parties in trust for their life interest. It is immaterial, in the view which the second parties present, whether at the date of the sale or loss of the steamers the difference between the reduced value and the initial value of the shares was paid out of the surplus dividends or by a payment out of the surplus capital. The result in either case would be to set free from capital a sum equal to the accumulated surplus dividends as income, the amount thereof payable to the second parties depending on whether the total depreciation was properly payable out of the said surplus capital or out of the surplus dividends which were credited to capital, and was a proper charge against the surplus dividends themselves. On this point the second parties maintain that in fact there was no depreciation of the shares of the 'Braemar,' the 'Lothian,' and the 'Lennox,' as the progressive physical deterioration of those steamers was, as the final accounts show, more than compensated by the enhanced value of the steamers at the date of sale or loss. The second parties further submit that no further apportionment by the trustees is necessary to determine the rights of parties. 10. The third parties maintain that the shares of the said steamers were wasting securities within the meaning of the said trust-disposition and settlement,

and that the first parties, as the testator's trustees, having once exercised the discretion conferred on them by the trust-disposition and settlement in the matter of apportionment of steamer dividends, their discretion and their powers in that regard were exhausted. They refer to the testator's trust-disposition and settlement and the provisions therein contained, and also to the minutes of the trustees of 6th April 1908, 12th May 1909, 8th June 1910, 15th January 1913, 26th March 1914, 16th March 1915, 27th July 1916, and 31st January 1917, which clearly set forth the resolutions of the trustees with regard to the apportionment of the steamer dividends. They therefore maintain that the proportion of total dividends payable in respect of the steamer shares during each year when credited to capital became capital which fell thereafter to be held by the first parties in trust for the second parties in life interest and for the third parties and other ultimate fiars in fee. Its legal character was thus irrevocably fixed. In point of fact the surplus dividends on the shares of the four steamers, which amounted at 31st March 1914 before the war to £11,167, 19s. 11d., and surplus dividends from that date to 31st March 1917 amounting to £3345, 16s. 9d., became immixed with the capital of the trust estate and were invested by the first parties as capital without reference to their source of origin. The investments so made were from time to time allocated by the first parties to the second parties in life interest in proportion to the cash balances available for investment at the respective dates, and thereafter the income from said allocated investments was ingathered by the first parties and credited to the revenue account and was ultimately paid to the second parties. The first parties were under no legal obligation to apportion the dividends in any particular way. They might have, if they had thought fit, credited to capital account only the amount of the depreciation of each of the steamer's shares, and might have paid the whole balance of the dividends from time to time to the second parties; but instead of doing so they credited the surplus dividends to capital, invested them as capital, and allocated them as capital, and thereby excluded all right or claim at the instance of the second parties thereafter to have them treated as income. The third parties further maintain that the fact that the sums received by the first parties on the sale of the 'Braemar' and on the loss of the 'Lothian' and 'Lennox' in respect of the shares they held in those steamers for the second parties in life interest and the third parties in fee exceeded the initial value of those shares is not relevant to the legal question submitted to the Court. At the date when the several apportionments of dividends were made it was not possible for the trustees to forecast the contingencies which actually arose, and they made their various apportionments with reference to the position of matters which were within their cognisance at the time. The shares of capital held by the first parties in fee for the third parties and the other ultimate fiars in so far as these consist of

a return of capital in excess of the initial value of the shares of the 'Braemar,' the 'Lennox,' and the 'Lothian,' cannot legally be diminished by charging against such excess the said sum of £2506, 5s. written off for depreciation of the steamer shares. The s.s. 'Braemar' when sold was eighteen years old, the 'Lothian' when lost was twelve years old, and the 'Lennox' when lost was twenty-one years old, and the initial value of these steamers was subject to the deduction of depreciation calculated on the ordinary principles affecting steamers of their class and tonnage for the period to the date of sale or loss, and what was sold or lost was a steamer which had undergone a certain actual amount of physical deterioration, and the first parties recovered on the sale of the 'Braemar' and under their policies on the 'Lothian' and the 'Lennox' proportionately less for each steamer than they would have recovered for similar new ships, the difference being the equivalent of the physical deterioration."

The questions for the judgment of the Court were—"1. Did the annual apportionments made by the first parties of the dividends accruing on the shares of the four steamers in question constitute final appropriations to capital of the said dividends in so far as they were not paid to the second parties? 2. If so, were the said appropriations within the powers of the first parties (a) Generally, and (b) With regard to the amount allowed in the accounts for depreciation? 3. If either the first or second question is answered in the negative (1) Do the surplus dividends on the said shares form revenue of the trust, to payment of which the second parties are entitled under the testator's settlement; or (2) Are they capital which the first parties are bound to hold for the second parties in life, and the third parties and others contingently in fee; or (3) Are they subject to a fresh apportionment by the first parties? 4. If the first alternative of the immediately preceding question is answered in the affirmative (1) Are the second parties entitled to payment of the whole surplus dividends; or (2) Are the first parties entitled to deduct therefrom and to retain as capital the amount allowed in these accounts for depreciation?"

Argued for the first parties—The steamship shares constituted wasting securities in the sense of the trust deed. Power was thereby given to the trustees, in regard to such wasting capital, to apportion sums derived from such shares as between capital and income. So far as the actual apportionment was concerned, if the trustees had in their absolute discretion acted *in bona fide* their actings could not be called in question. The trustees were willing to submit themselves to the views of the Court.

Argued for the second parties—A steamship was not a wasting substance in the sense of the trust deed. It was often more permanent in its nature than many subjects which were certainly not looked on as wasting ones, e.g., houses. A distinction could be drawn between investments which wasted by the use of them and securities

the substance of which was consumed by their use. In common phraseology a wasting security was confined to the second class. The trustees were not entitled to set large sums aside indefinitely in order to meet contingencies which might never arise, although they could set aside something to provide for possible repairs and cover deterioration. They could not in their discretion appropriate sums received to capital; it was *ultra vires* of them to do so when the risk which they apprehended might never have materialised. As this was now the case, the surviving life rent beneficiaries had a right to claim the money which had been so set apart. The testator did not intend the shipping shares which formed part of his estate to be included in the term "wasting investments," otherwise he would have expressly said so. The appropriation of sums by the trustees from year to year was not final, and they were not barred from reconsidering the matter. The following authorities were cited—*Leighton v. Leighton*, 1867, 5 Macph. 561, 3 S.L.R. 291; *Adam and Forsyth v. Forsyth's Trustees*, 1867, 6 M. 31, 5 S.L.R. 26; *M'Farlane's Trustees v. M'Farlane*, 1903, 6 F. 201, per Lord Kyllachy at p. 205, 41 S.L.R. 164; *M'Leod's Trustees v. M'Leod*, 1916 S.C. 604, 53 S.L.R. 422; *Mills v. Northern Railway of Buenos Ayres Company*, (1870) L.R., 5 Ch. App. 621; *Bishop v. Smyrna and Cassaba Railway Company*, [1895] 2 Ch. 596; *Wentworth v. Wentworth*, [1900] A.C. 163.

Argued for the third parties—Steamships were wasting subjects. The Inland Revenue authorities looked upon them as being so in fixing the period of twenty-two years as their life, and in permitting deduction to be made by way of allowance for wear and tear. All that the trustees' discretion amounted to was to consider what proportion of the income was to be apportioned to the life rent beneficiaries and what proportion was to be set aside as capital to cover wastage of the subject. Unless a certain amount of a ship's earnings was annually appropriated to capital there would after about twenty-two years be no more ships, and therefore nothing for either life renters or fiars. The testator had conferred on the trustees great discretionary powers. The life renters were not to get the whole life rent, but only what the trustees thought right after the appropriation of a certain portion of the income to capital in order thereby to provide against depreciation. The whole matter rested on the trustees' discretion, but once they had acted they had to abide by what they had done; their discretion was not sufficiently wide to allow them to revoke their actings. Counsel referred to the following cases—*The Leith, Hull, and Hamburg Steam Packet Company v. Inland Revenue*, 1899, 1 F. 1117, per Lord Trayner, at p. 1125, 36 S.L.R. 745; *Brown v. Gellatly*, (1867) 2 Ch. App. 751.

At advising—

LORD JUSTICE-CLERK—Two points were argued before us in this Special Case, viz., (first) Were the ships in question "wasting

securities" in the sense of the trust-deed? and (second) If so, are the trustees entitled to revoke what they have already done in allocating the returns from the ships as between liferenters and fiars?

As to the first of these questions, there is, I think, no authoritative decision on the subject, but on principle I am of opinion that a ship is a wasting subject in the sense of the trust-deed. Ships undoubtedly are subject to very constant and considerable deterioration even if complete disaster does not overtake them, and are recognised by the law as having a limited life. In income-tax cases that has been fixed at twenty-two years. Having regard to the particular clause which we are here dealing with, I think that we are giving fair effect to the expressed intention of the trustor by holding that ships were "wasting subjects" in the sense in which that term was used by him. So far as cases go I think they support this view. I refer especially to Lord Sker-rington's opinion in the case of *M'Leod*, 1916 S.C. 604, at p. 613, Mr Justice Kekewich's judgment in the case of *in re Bates*, [1907] 1 Ch. 22, and the case of *Brown v. Gellatly*, L.R., 2 Ch. Ap. 751.

As to the second question, I am of opinion that the trustees under the clause in question were entitled, and indeed bound, to divide the returns as they accrued; though it may be that their action in certain circumstances in putting part of the returns to suspense or reserve, if they had thought proper to do so, might not have been open to objection; but this was not done.

As matters now stand I think the trustees are not entitled to go back on the allocation they have already made. This seems to me the proper result to be derived from the cases which Mr Constance cited to us—*Leighton*, 5 Maeph. 561; *Adam*, 6 Maeph. 31; *Macfarlane*, 6 F. 201. In *Leighton's* case the trustees' resolution seems to have been communicated, and Lord Kyllachy in *Macfarlane's* case makes communication one of the conditions of finality under the particular deed he was then considering. I am not clear that this is necessary under the deed we have here to deal with, but even if it were I think there was enough to satisfy even such a condition. If the liferenters had in the ultimate view of the trustees been overpaid I do not think they could have been asked to repay either directly or indirectly any sum which they might appear to have been overpaid on a re-statement of the accounts. The conclusion I have reached appears to me to be in accordance with what is laid down in Farwell on Powers, p. 306, and the cases there referred to, and in the cases of *Evans v. Saunders*, (1855) 6 D. M. & G. 654, (1861) 8 H.L.C. 721, and *Fraser v. Murdoch*, 6 A.C. 855. What the trustees did in apportioning the returns from the ships each year between liferenters and capital was, as was said by Lord Watson at p. 879, "an act of administration which the trustees of themselves had no power to undo." When the trustees adjusted their accounts at each period and paid so much to the liferenters and placed so much to capital they made an

appropriation which in my opinion was final and conclusive and binding upon everybody. I do not think the trustees' resolutions in such a matter can be treated as in certain events final and in others revocable. When the trustees paid to the liferenters the sum set apart for them at any period of division, in my opinion they paid to them the full amount of the legacy to which these liferenters were entitled for or in respect of the particular period then dealt with.*

I am therefore of opinion that we should answer the first and second questions in the affirmative. In that case the third and fourth questions do not arise.

LORD DUNDAS—The late John Warrack, shipowner, Leith, was at his death a large holder of shares in steamers managed by his firm. By his settlement he specially authorised his trustees to hold for the benefit and at the risk of his estate the whole or any part of such shares. We heard argument as to whether or not the testator's shares in the ships mentioned in the special case fall within his further provision that "in the event of any part of my said estate being at the date of my decease invested or being thereafter invested by my trustees in wasting securities, the proportion of the return from such wasting investments which shall be treated as income, or whether the whole or any part of such return shall be treated as income for the purposes of these presents, shall be matters entirely in the discretion of my trustees and as to which they shall be the sole judges." I have little hesitation in holding that the shares in question do fall within the provision quoted. It is unnecessary, and might be difficult even with such aid as the reported cases afford, to lay down a complete and exhaustive definition of "wasting securities;" but I am of opinion that, looking to the language of the settlement before us, and to the character of the estate as set forth in the case, this testator intended that the shares in question should be treated by his trustees as wasting securities in the manner indicated by him.

The substantial questions put to us are "1. Did the annual apportionments made by the first parties of the dividends accruing on the shares of the four steamers in question constitute final appropriations to capital of the said dividends in so far as they were not paid to the second parties? 2. If so, were the said appropriations within the powers of the first parties (a) generally, and (b) with regard to the amount allowed in the accounts for depreciation?" In my judgment the first question and both branches of the second question should be answered in the affirmative. It was urged that this result would be inequitable from the point of view of the liferenters. We are not, however, concerned as to what might be the fairest and most equitable method of dealing with shares of this sort as between liferenters and fiars, but with the legal question whether or not the apportionments actually made by these trustees—to whom absolute discretion was given as to what

proportion of the return should be treated as income—can now be gone back upon. In my judgment they cannot. The position might have been different if the trustees had, at the request of the liferenters or otherwise, carried the surplus balance in each year, after making such payment as they thought right to the liferenters, to a suspense account; or if they had qualified their resolutions by some indication that they were intended to be provisional only, and a reservation to themselves of power to make subsequent and final readjustment. Neither of these courses, however, was either requested or adopted. What was in fact done is fully explained in the case. The minutes are before us. The balance in each year, after the liferenters had been paid what the trustees in their discretion judged to be right, was carried to the credit of the capital account and invested, the investments being allocated in the accounts for that year to the respective shares of capital held for the behoof of the ultimate fiars. It is not suggested that the trust accounts were not open to inspection by all the beneficiaries; and it is admitted that the actings of the trustees were conducted *in bona fide*, and in accordance with what they decided to be the proper administration of that part of the estate in each year. It seems to me that the appropriations as between income and capital which the trustees made from time to time, in *bona fide* exercise of their absolute discretion under the trust-deed, without any reservation, in the knowledge of and without objection by the beneficiaries, were acts of administration which the trustees themselves have no power to undo. I do not think there was need for any more formal intimation, still less for the execution of deeds of any sort; the resolutions arrived at, minuted, and put in effect by the trustees were, in the circumstances to which I have alluded, final and irrevocable. This view appears to me to be in accordance with the general rules laid down in the reported cases and in the text-books, to some of which we were referred, upon a just application of these rules to the admitted facts of this case.

If the first and second questions are answered, as I think they should be, in the affirmative, the remaining questions, which proceed upon the contrary hypothesis, are superseded and do not require to be answered.

LORD SALVESEN — The late Mr John Warrack, who carried on business as a ship-owner, executed a general trust-disposition and settlement prior to his death by which he conveyed his estate to trustees. The main purpose of this trust-disposition was that the trustees should convey the residue of his estate in equal shares among his children, subject to the limitation in the case of his daughters and one son that they should only enjoy the liferent. A considerable part of his estate consisted of shares in steamers of which the firm to which the testator belonged were managing owners. It is with regard to this portion of his estate that questions have arisen which the parties ask us to determine.

One of the provisions of the settlement is

thus expressed—“In the event of any part of my said estate being at the date of my decease invested or being thereafter invested by my trustees in wasting securities, the proportion of the return from such wasting investments which shall be treated as income, or whether the whole or any part of such return shall be treated as income for the purposes of these presents, shall be matters entirely in the discretion of my trustees, and as to which they shall be the sole judges.” The first question which demands consideration is whether the shares in ships which belonged to the testator can be regarded as wasting securities or investments. I have no doubt that the answer must be in the affirmative. A ship is a source of revenue which is obviously of a wasting type; and every prudent ship-owner before appropriating profits provides for annual depreciation at the rate at least of 5 per cent per annum. In the course of twenty or twenty-two years, under normal conditions, the vessel if it survives will in most cases have only a break-up value, and accordingly provision must be made for the replacement of the capital by gradually writing down the value of the ship and accumulating a depreciation fund. Of course a good many ships even after twenty years' service are still useful and seaworthy, but if so this result is generally secured by extensive repairs and replacements which must be paid for out of revenue, and may appreciably affect the rate of depreciation which the owners think it prudent to provide for.

It was accordingly the duty of the trustees every year to consider the proportion of the return on their investments in shipping which should be treated as income, and the minutes of the trustees show that they more or less regularly considered this question. In 1908 they were of opinion “that 4½ per cent. . . would in present circumstances be a suitable return to the liferenters out of the dividends, and that the balance of dividends beyond this rate received to 31st March 1908 should be carried to capital, and they resolved accordingly.” In 1909 and 1910 they passed similar resolutions, which are duly recorded in their minutes. There are no minutes printed applicable to 1911 or 1912, but it may be assumed that the distribution was on similar lines. In 1913, 1914, and 1915 they increased the allowance to the liferenters to 6 per cent free of income-tax on the cumulo value of the ship shares as valued at the 31st day of March preceding each distribution. In 1916, owing to the high returns obtained from shipping property, an additional dividend of 25 per cent was paid, and a like distribution was made in 1917.

We are only concerned with the shares of the trust estate in four vessels, one of which, the “Macduff,” was sold in 1911. Two others were lost in 1913 and 1914 respectively, and one the s.s. “Lennox,” survived the period of the war for over two years and was lost in December 1916.

At the date when the trust came into existence the returns on shipping were small, and the trustees acted with com-

mendable caution in making so small a distribution as $4\frac{1}{2}$ per cent. to the liferenters. Had there been no revival in shipping property the amount carried to capital would just about have sufficed to meet the loss by depreciation, as can be seen from the case of the "Macduff." In the years preceding the war, however, and still more markedly after the outbreak of hostilities, the shipping industry became very prosperous, and the shares that were originally valued at £11,225 actually realised on sale or loss £19,018, 15s.. Adding the amount of dividends credited to capital, the total amount now standing at capital account is £33,532, 11s. 8d., or nearly three times the initial capital value. So far as this sum includes provision for depreciation, or was derived from realisation of the trust investments on sale or loss, it obviously falls to be credited to capital, having arisen from the appreciation of the capital value of the property of the trust. The balance of £11,000 consists of sums which might properly have been divided amongst the liferenters, and it is with regard to this that the only serious question in the case has arisen.

The state which is appended to the special case shows that only 22.562 per cent. of the revenue received from the commencement of the trust until realisation of the steamers was actually paid to the liferenters. The remainder was credited to capital in terms of the resolutions of the trustees, and to the extent of the £11,000 already referred to has proved to be in excess of what was required for depreciation, whether due to wear and tear or to any other cause. This sum is claimed by the liferenters, and the trustees recognise the justice of the claim, but they feel themselves faced with the difficulty occasioned by their own allocations from time to time, and the question for our decision is whether these allocations must be treated as final and incapable of equitable correction.

Now if the trustees had maintained the position that they were unwilling to reconsider the allocations between income and capital which they had made, I apprehend that the Court would not have intervened to control a discretion which was solely vested in them, and which there is no question that they exercised in good faith. But the trustees themselves take up the position that they are willing to reconsider the matter if the Court decides that they are free to do so. The fiars on the other hand maintain that the allocations once made cannot be reconsidered, and while they admit that the trustees might have distributed the £11,000 amongst the liferenters, they maintain that they cannot now readjust matters so as to give effect to the obvious equities of the situation.

In considering the matter I think regard must be had, first, to the fact that the testator directed that the whole income from his trust estate should be paid over to his children. In the case, however, of a wasting security it was proper that he should leave in the hands of the trustees as sole judges what amount should year by year be distributed as income. But for such a provision

there might have been constant disputes as to what amount should be provided to meet possible depreciation in value. Accordingly it was the duty of the trustees to apply their minds to this matter every year, and their natural leaning would be to make such ample provision for the restoration of the capital value on the sale or loss of a ship as would leave the capital of the trust intact. When it has turned out after an interval of time that too full provision had been made, I cannot see why they should not reconsider the matter so as to give effect to the general intention of the testator. If they had expressed their minutes in different terms, as for instance if they had carried the balance of income not divided to a suspense account for depreciation, I can see no reason why they should not at the end of the day, when all the ships had been realised, have allocated the gross amount standing in suspense account so as to ensure that any revenue which had been left to provide for depreciation that did not really arise should be paid to the liferenters. Now I think that that was what in substance the trustees intended to do, and, at all events, that they did nothing which should bar them from reconsidering the matter, and, if they so resolved, paying over to the liferenters the amount of revenue which they have in hand, and which as matters have turned out is not required to meet the depreciation of the steamers. There will be no legal obstacle to their reconsidering the matter on this basis nor do I see any risk as to the effect of their being held free to do so on the future actings of trustees in a similar position. On the contrary, the fact that they must ultimately pay over to the liferenters revenue which is not needed to restore the capital of the trust will tend to make them less likely to overpay the liferenters. Profits of a public company, which have not been distributed amongst the shareholders, but placed to a reserve capital account, may admittedly be distributed amongst the shareholders when the directors think it unnecessary to maintain a reserve. In the same way, I think the trustees here are entitled, now that the revenue producing investments have been realised, to distribute the capital reserve which they have accumulated out of the revenue amongst those who are entitled to it. I should therefore have been disposed to answer the first question of law in the negative and to allow the trustees to exercise their discretion in the knowledge of the facts which have now emerged. No injustice will be done to the fiars, who will be entitled to the benefit arising from the appreciation of the capital value of the shipping shares. As, however, your Lordships are of a different opinion, it appears to me that in future the trustees ought so to deal with the allocations of capital and income as not to preclude them from subsequently distributing any surplus that may ultimately accrue between the various beneficiaries according to the general directions of the testator.

LORD GUTHRIE—The first question argued before us may be taken under two heads—

first, are shipping shares in their nature wasting securities, and second, whether they are or are not wasting securities in the general case, did the testator so regard and treat them in his will? I answer both these questions in the affirmative. No doubt there is a sense in which every possible subject of security is wasting. The sea encroaches on the land, and the surface of the earth in non-volcanic countries is gradually being worn down. But in the sense of a subject with an ascertainable and well-recognised length of life, which is never indefinitely prolonged, and which could only be indefinitely prolonged for repair sooner or later amounting to replacement and rebuilding, a ship is a wasting security in a reasonable sense and land is not. As to the testator's intention, taking the terms of his will, and the fact that except shipping shares he possessed no securities which could reasonably be called wasting, I cannot doubt that he intended to treat, and did treat, his shipping shares as wasting securities.

If, then, the testator's shipping shares must be treated as wasting securities, were his trustees entitled to make final appropriations of the amounts annually yielded by them as between capital and income? This matter is expressly regulated by the terms of the concluding part of the settlement, under which they were not only entitled but bound every year to settle the amount payable to the liferenters, the balance going to capital. The result may be hard, as the circumstances have turned out. But there is nothing improbable in the idea that the testator desired the liferenters to know year by year how they stood, and did not wish any questions to arise at an indefinite distance of time either as to under-payment or over-payment. The duty of the trustees to settle year by year "the proportion of the return which shall be treated as income" seems to me to involve that no sums which they did not so treat at the time when they applied their minds to the subject can afterwards be treated as income when it happens, from unexpected and unforeseeable circumstances, that the liferenters might have got as income more in any one or more years than was actually appropriated to them.

The last question assumes, contrary to my opinion, that the trustees had power either to make a final or an interim appropriation. On that assumption I think it clear that the appropriation they made was a final one. Had it been intended to be interim, that would have been easily expressed by putting the amount not appropriated to income to suspense account.

The Court answered the first and second questions of law in the affirmative, finding it unnecessary to answer the remaining questions.

Counsel for the First Parties—Watson, K.C.—MacRobert. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Second Parties—Constable, K.C.—Gentles. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Third Parties—Sandeman, K.C.—Black. Agents—Gillespie & Paterson, W.S.

Tuesday, April 15.

OUTER HOUSE.

[Lord Mackenzie, Ordinary
on the Bills.]

ABERDEEN CORPORATION v. RAILWAY AND CANAL ASSESSOR.

Valuation Cases—Annual Value—Water-works—Non-Profit-Earning Subject—Revenue Principle—Cost of Construction—Cost of Act of Parliament—Sinking Fund—Reserve Fund.

The Railway and Canal Assessor in arriving at the annual value to appear in the valuation roll of the statutory water undertaking of a city, from which undertaking no profit could be derived, departing from his previous practice, proposed to add to the amount raised by assessment a percentage on the cost of construction of the works, and to deduct the amount put to a sinking fund and to a reserve fund and the cost of a recent Act of Parliament, charges against revenue made under the statutory powers, before deducting therefrom the cost of management and maintenance. The cost of construction of the works had been paid off. *Held* that the assessor was wrong.

The Lord Provost, Magistrates, and Town Council of the Royal Burgh of Aberdeen appealed to the Lord Ordinary on the Bills under the Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), secs. 23 and 24, against the value sought to be set against the city's water undertaking by the Assessor for Railways and Canals.

The Case stated—“(2) The valuation put by the assessor upon the said undertaking for the year from Whitsunday 1919 to Whitsunday 1920 is £16,108, 10s. 5d. (3) The valuation for the year ending Whitsunday 1920, made up on the same basis as for the year ending Whitsunday 1919 and previous years, would be £9224, 12s. 5d. (4) The principal difference between these two valuations is due to a change in the mode of valuation which the assessor proposes to apply to the undertaking. Hitherto the undertaking has been valued upon the revenue principle. The assessor has not in the proposed valuation now under appeal departed from that principle, but he has made an innovation which is inconsistent therewith, in that for the first time he has made an addition to the revenue side of the account of the undertaking of £12,797, 18s. 7d. in respect of 'interest on structural cost of the works and pipes,' viz., £355,498 at a rate of 3·6 per cent. No such interest charge is in fact received by the appellants, nor does it correspond with any entry or entries in their books, accounts, or estimates. The appellants submit that this innovation is contrary to all