a good title might be given by having a new conveyance granted by Mr Matthew's trustee, Mr Hunter's executor, and Mr Buchanan's trustee. In these circumstances the former trustee in Mr Buchanan's sequestration, together with two of his creditors, petitioned the Court "to remit to the Lord Ordinary on the Bills to appoint a meeting of the creditors of the said John Buchanan, to be held at such a time and place as his Lordship may fix, to elect a trustee or trustees in succession, and commissioners, on the said sequestrated estate; and to appoint the said meeting to be advertised in the *Edinburgh Gazette;* and to remit to the Sheriff of the county of Lanark to proceed in the said sequestration in terms of the statute."

The Court, taking up the petition in the Single Bills, granted its prayer.

Counsel for Petitioners—Lorimer. Agents—Davidson & Syme, W.S.

HOUSE OF LORDS.

Monday, March 7.

(Before the Lord Chancellor (Selborne), Lords Blackburn and Watson.)

DICK & STEVENSON *v.* MACKAY.

(*Ante*, May 21, 1880, vol. xvii. p. 565, 7 R. 778.)

Contract—Condition Precedent—When Implement of Condition Prevented by the Fault of the Debtor in the Obligation.

Application (in affirmation of a judgment of the Court of Session) of the doctrine *Pro impleta habetur conditio cum per eum stat, qui, si impleta esset, debiturus esset.*

Judicature Act 1825 (6 *Geo. IV. c.* 20), *sec.* 40—*Process — Appeal — Finality of Judgment of Court of Session on Matters of Fact — Remit to Court below.*

In appeals falling within the 40th section of the Judicature Act no remit will be made to the Court of Session to pronounce findings as to matters of fact unless the record has distinctly raised questions relative thereto, and it can be shown from the record that the Court of Session has not exhausted the issue before it, the House of Lords having no concern with the proof led in the Sheriff Court.

This was an appeal taken by the defender against the judgment of the Court of Session, reported *ante*, May 21, 1880, 7 R. 778. The First Division of the Court had pronounced this interlocutor—"Recal the interlocutor of the Sheriff of date 2d December 1879: Find that the pursuers undertook to supply, and the defender undertook to purchase and pay £1115 for, a steam digging machine, in terms of letters dated respectively 21st and 22d September 1876: Find that it was a condition of the said contract that the defender should not be bound to accept and pay for the said machine if it should fall short of digging and filling into waggons 350 cubic yards of the clay or other soft substance, within a day of ten hours, in a certain railway cutting which the defender had to make, called the Carfin cutting, after it was fairly tried on a properly opened-up face: Find that it was impossible that the machine should have the stipulated fair trial unless the defender provided a properly opened-up face at the said Carfin cutting: Find that the defender failed to provide such properly opened-up face, notwithstanding repeated demands on the part of the pursuers, and thus prevented the machine from being tested in the manner provided by the contract: Find that the defender has failed to prove that the pursuers agreed to substitute for the Carfin cutting any other cutting as the place for the trial of the said machine." The Court therefore decerned against the defender for the sum sued for.

In support of his appeal the defender urged, as in the Court of Session, that the Garriongill cutting had by agreement of parties, as appearing on their correspondence, been substituted for the Carfin cutting. In addition he maintained, that although the test provided in the contract had not been applied, it appeared from the evidence led in the Sheriff Court that sufficient trial had been otherwise taken of the machine to show that it was disconform to contract, and therefore might justly be rejected, and asked the House to remit to the Court of Session that they might pronounce findings on this new contention.

At delivering judgment—

Lord Blackburn—My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session pronounced in reviewing the judgment of the Sheriff Court of Lanarkshire, proceeding on proof taken on a record made up in the Sheriff Court.

The Court of Session in reviewing the judgment had full power to find the facts on the proof, and to determine the law also; but the Legislature have, by the Judicature Act of Scotland (6 Geo. IV. chap. 120, sec. 40), provided that "When in causes commenced in any of the Courts of the Sheriff, ... or other Courts, matters of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of facts so found or on matter of law; and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matters of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

The old rules of pleading in force in England at that time were founded on the strictest logic, often carried to an extreme which, when the pleadings were not managed by very skilful hands, worked injustice, but always founded on a principle; and those which regulated special verdicts, to which the Legislature here refers, were no exception. They are very accurately

and fully stated by Chief-Baron Comyns in his Digest, title "Pleader." The following, I think, bear on the question what the Legislature intended—"The jury may find by their verdict all things given in evidence if it be not contrary to the evidence or the admission of the parties"—(sec. 4). "They cannot find a matter contrary to the record, and if they do the verdict is void as to that"—(sec. 16). "So the jury ought not to inquire of a thing which is agreed by the parties to the issue"—(sec. 17). "So the jury cannot find matters out of the issue . . . . though the matter out of the issue destroy the plaintiff's title"—(sec. 18).

The reason of this last rule, which at first glance may seem harsh, is that the defendant ought to have obtained in proper time leave to amend his pleadings, and not to rely on getting the jury to find on the evidence something never alleged by him, and which the plaintiff was not called upon to be prepared to contest.

Whether we take these rules of English pleading as our guide, or the rules of sense and logic on which they are founded, it seems to me clear that the Court of Session need not in their interlocutor notice anything on which the parties are agreed. It may be convenient to do so in order to make the other findings clear, but it cannot be necessary; and they ought not to find anything, even if destructive of the plaintiff's title, if it is not included in the issues joined. If it is necessary for the purposes of justice, they may, I suppose, allow an amendment, and remit the amended issue to the Court below for further proof, or dispose of it on the proof already given, as justice may require; but they ought not to find it in their interlocutor on the record as it stands, and no complaint can be made in this House against them for not doing what they ought not to have done. This view of the statute of George IV. renders it important to see what the record or issue is.

I have had the advantage of perusing in print the opinion of my noble and learned friend who is to follow me (Lord Watson), and as I agree entirely in all he says on this subject I shall not repeat it.

The interlocutor finds that the contract was in terms of the two letters of the 21st and 22d September 1876. It is a question of law what the effect of those letters was. I do not feel much doubt about that. The pursuers were to supply a machine capable of digging and filling into waggons at least 350 cubic yards of clay in a day. It was to be brought to the defender's cutting at Carfin, erected, and tested before February 1877. Both agreed that the event of the testing was to be conclusive. If the machine did not answer the test the pursuer was to remove it before the end of February; if it did answer the test the defender was to keep it and pay the agreed price.

I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing though there may be no express words to that effect. What is the part of each must depend on circumstances. In a very early case in England, in the Year Book of 9th Edward IV., Easter term, 4 A., where the defendant was sued on an obligation, the condition of which was that if the great bell of Mildenhall should be brought, at the cost of the men of Mildenhall, to the house of the defendant in Norwich, and there weighed and put in the fire in the presence of the men of Mildenhall, and the defendant made a tenor of it to agree with the other bells of Mildenhall, the obligation should be void. Choke, then Chief-Justice, and Littleton and Moile, then Judges, held that a plea by the defendant that the bell was not weighed nor put in the fire was bad, for the defendant being a brazier, it was his part to weigh it and put it in the fire. Needham, who was the fourth Judge, thought that the weighing of the bell required no particular skill, and might as well have been done by the men of Mildenhall, or those they employed, as by the defendant. But he said that the putting it into the fire was the part of the artificer. And as I understand it (for the rest of the report is not very clear) a further point was mooted—and the sergeants agreed that if the defendant had put the bell in the fire without seeing it weighed he would have waived that which was but an incident, and been as much bound to fulfil that which was the substance of the contract, viz., to make a proper tenor, as if he had had it weighed. I mention this old case, decided in 1469, because it is on it that the different digests laying down the principle are all founded, and because I think it is obvious good sense and justice.

Now, applying this principle to the present case, both agree that the machine shall be tested at Carfin, and therefore the pursuer agreed that he would bring the machine to the Carfin cutting, and there erect it on the defender's land, and there do his part in working it till there had been a fair test; and the defender agreed that he would do his part, and even if there had been no express mention in the letters of a properly prepared face, the nature of the thing shows that he agreed to let the pursuer have access to a part of the cutting, put by the pursuer in such a condition that the machine could be fairly tested by working at it, and to assist in working it there until there had been a fair test. If, then, the averments on the record had been that before the end of January 1877 the machine had been brought to Carfin cutting and there delivered to the defender, who required the pursuer to remove it, and it was still in his possession there, I think there could be no doubt that the four first findings in the interlocutor put a proper construction on the contract, which, being a matter of law, your Lordships are entitled to inquire into, and that, if they find the facts truly, into which your Lordships have no right to inquire, it would follow in point of law that the defender, having had the machine delivered to him, was bound by his contract to keep it, unless on a fair test, according to the contract, it failed to do the stipulated quantity of work, in which case he would be entitled to call on the pursuers to remove it. As by his own default he can now never be in a position to call upon the pursuers to take back the machine on the ground that the test had not been satisfied, he must, as far as regards that, keep and consequently pay for it.

But the time when the machine was brought

to Carfin, and the defender refused a further trial, was long after February 1877; it was in September and October 1878. Unless both parties had agreed to enlarge the time, the original bargain would have come to an end by efflux of time in 1877.

But it is agreed on the record that the time was enlarged, and the bargain in all other respects still in force at least as late as July 1877, and the Court of Session was not called upon to repeat in the interlocutor what was agreed on the record by both parties.

There is a controversy on the record as to the terms on which the time was enlarged; and the question raised on that, which is a question of fact, is disposed of by the last finding in the interlocutor, into the accuracy of which, it being a finding of fact, your Lordships are not entitled to inquire.

It was, however, argued at your Lordships' bar that there was another ground of defence appearing on the evidence. I think I state fairly, and as favourably to the pursuers as I can, the argument thus—It was said that the repeated failures of the machine between July 1877 and October 1878, though not being on the stipulated place and in the stipulated manner they were not the test, nevertheless, coupled with the other evidence, showed that the machine was not such as could possibly in substance satisfy the contract, and that therefore the defender was justified, or at least excused, in refusing to incur further expense and trouble in putting in force a test which could not possibly turn out favourably to the pursuers, and that he was entitled to throw the machine back on the pursuers' hands, not on account of the terms of the bargain, but on the general ground that a purchaser is entitled to return a thing which has been delivered to him in fulfilment of a contract, and to demand back the price if paid, or refuse payment if not yet paid, if the thing delivered is not in substance the thing contracted for, on the principle of the civil law expressed in the Digest, lib. 18, tit. 4—"*Si aes pro auro veneat non valet.*"

I do not think it desirable to express an opinion on a point which it is not necessary now to discuss. I will therefore only say that the view I took of the law on this point in 1867 is expressed in a judgment of the Queen's Bench which I delivered in *Kennedy* v. *Panama Mail Company*, L.R. 2 Q.B. 580–586. The other Judges of that Court adopted that exposition of the law, and I have not yet seen any reason to change my opinion. But I agree that if such a defence had been raised on the record in this case, the Court of Session ought in their interlocutor to have found how much, if any, of the allegations were proved in fact. It is because, having carefully read the record, and having had the advantage of reading my noble and learned friend Lord Watson's observations on the record, I am clearly of opinion that no such defence was raised by the issue, that I think the Court of Session were not bound in their interlocutor to deal with it, even if it was made on the argument before them, which I think it was not.

I am therefore of opinion that the appeal should be dismissed with costs.

Lord Watson—My Lords, this appeal is brought against a judgment of the First Division of the Court of Session, by which the appellant John Mackay, railway contractor, Wishaw, has been decerned to make payment to the respondents, who are a firm of engineers in Airdrie, of the sum of £1115 sterling, being the price of a patent steam excavating machine, manufactured and supplied by them to the appellant as in implement of a written contract of sale entered into between the parties in the month of September 1876.

The action was raised and a proof was allowed and taken in the Sheriff Court, and it became the duty of the Court of Session, in reviewing the judgments of the Sheriffs proceeding on that proof, to specify in their interlocutor, as required by section 40 of the Scotch Judicature Act (6 Geo. IV. cap. 120), the several facts material to the case which they found to be established by the proof, and to express how far their judgment proceeded on the matter of fact so found, or on matter of law, and the several points of law which they meant to decide.

The specific findings upon which the decerniture against the appellant is rested in the judgment under appeal are as follows:—"1st, That the pursuers (respondents) undertook to supply, and the defender (appellant) undertook to purchase and pay £1115 for, a steam digging machine, in terms of the letters dated respectively 21st and 22d September 1876. 2d, That it was a condition of the said contract that the defender should not be bound to accept and pay for the said machine if it should fall short of digging and filling into waggons 350 cubic yards of the clay, or other soft substances, within a day of ten hours, in a certain railway cutting which the defender was about to make, called the Carfin cutting, after it is fairly tried on a properly opened face. 3d, That it was impossible that the machine should have the stipulated fair trial unless the defender provided a properly opened-up face at the said Carfin cutting. 4th, That the defender failed to provide such properly opened face, notwithstanding repeated demands on the part of the pursuers, and thus prevented the machine from being tested in the manner provided by the contract. 5th, That the defender has failed to prove that the pursuers agreed to substitute for the Carfin cutting any other cutting as the place for the trial of the said machine."

In so far as these findings consist of matters of fact the review of this House is excluded by the clause of the Judicature Act already referred to, which enacts that the judgment of the Court of Session "shall be subject to appeal to the House of Lords only in so far as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

The first two findings relate exclusively to the constitution and construction of the written contract upon which the action is laid, and are therefore matters of law. No appeal has been taken against these findings, and the appellant must be held to admit that they are sound. But the appellant is not thereby precluded from founding upon other conditions of the contract, or upon other views of the contract, so long as these do not involve the negation of what is affirmed by the findings in question.

In my opinion, the third and fourth findings involve law as well as fact, in so far as they assume or imply that the appellant was by the conditions of the contract bound to provide the "properly opened face" on which the machine was to be tried. So far as it is thereby found that of the two contracting parties the appellant alone had it in his power to provide a properly opened face in the Carfin cutting, and that the appellant did not provide such face, notwithstanding repeated demands on the part of the respondents, nothing appears to me to be involved except matter of fact.

The fifth finding appears to me to be one of fact only.

The appellant challenges the interlocutor under appeal upon two grounds. First of all, he maintains that in respect there is no finding to the effect that the digging machine was conform to contract, the facts as found are insufficient to sustain a decree for the contract price. Alternatively he asserts that there were important issues of fact raised by him in the Court below, to which his proof was directed, but which the Court has not disposed of, and he contends, that assuming the facts already found to warrant the decree appealed against, he will, upon these issues being decided in his favour, be entitled to decree of absolvitor. And it was contended that the House ought, with a view to the final disposal of the case, to remit to the First Division of the Court to pronounce findings upon these matters of fact.

In order to a due understanding of the interlocutor under appeal, and of the appellant's contention, it is necessary to refer to the closed record, which is the issue to which the proof of the parties was directed, and to which the findings of the Court apply.

The respondents in their condescendence set forth the two letters of 21st and 22d September 1876 which have been held to constitute the contract. The first in date bears to be a confirmation by the respondents of a verbal arrangement between one of their partners and the appellant "in regard to supplying a patent steam excavating machine for your cutting at Carfin," which is as follows:—"Machine to be as per accompanying specification, and capable of digging and filling into waggons at least 350 cubic yards of the clay or other soft substance in said cutting, you supplying waggons as fast as they can be filled, and should it fall short of digging and filling this quantity after it is fairly tried on a properly opened-up face, you are not to be bound to keep the machine, but may return it at any time within two months. We to uphold the machine for twelve months after delivery, inasmuch as we will repair or replace, free of cost to you, all parts that may prove defective during that time, excepting the steam-boilers and lifting-ropes. The machine to be delivered, erected, and tested in the cutting before February next. Price to be £1115," &c. The letter of 22d September, which is a confirmation of the preceding by the appellant, recapitulates the terms of the agreement in language somewhat different, but having for all practical purposes the same meaning.

The parties are agreed upon the record as to the following facts—(1) That the machine was not ready, and was not sent to Carfin cutting before or during February 1877; (2) That it was afterwards sent to Garriongill cutting, and remained there from July 1877 till May 1878; and (3) That thereafter certain repairs and alterations having been made upon it, the machine was sent to Carfin cutting about the middle of the month of September 1878, where it still remained at the time the action was raised. They are also agreed that from July 1877 to August 1878 the appellant was unable to proceed with his work at the Carfin cutting owing to a change of the plans of the railway company.

The parties join issue, however, upon the points following:—(1) The appellant alleges, but the respondents deny, that he was in a position to give a proper working face for testing the machine at Carfin cutting in February 1877; (2) The respondents state that the machine was sent to and kept at Garriongill cutting merely for the purpose of experiment, with a view to its being improved and strengthened before it was tested at Carfin, whereas the appellant avers that the parties agreed that the machine instead of being tested at the Carfin cutting should be tried at the Garriongill cutting.

The respondents aver in substance that the machine was sent to Carfin in order to its being subjected to the contract test, that a proper working face was not provided by the appellant whilst the machine was at work there, that the machine could not in consequence be fairly tried, and that "the machine was fit for the contemplated work." The appellant admits that "on request of the respondents" he "permitted them to make a further trial of the machine—a suitable face was then ready for trial—on 3d August 1878." In consenting to a further trial at Carfin the defender informed the pursuers that if the machine again broke down it would have to be removed, so as not to interfere with the progress of the cutting, which had to be proceeded with with the utmost despatch. The appellant meets the respondents' allegations as to his failure to provide a suitable working face and the fitness of the machine with a direct negative, thereby asserting that he did provide a proper face whilst the machine was working at Carfin, and that the machine was not capable of performing the amount of work required by the conditions of the contract.

The 8th article of the condescendence for the respondents is in these terms:—"The defender (appellant) called on the pursuers (respondents) to remove the machine from Carfin, as he alleged it had not excavated and filled the stipulated quantity. The pursuers refused to do so, and the machine is still at Carfin. The machine was delivered to the defender at Carfin, and is still in his possession there." The appellant's answer is "admitted."

The foregoing answer appears to me necessarily to imply an admission on the part of the appellant that the machine was delivered to him at Carfin cutting by the respondents, as in implement of the contract, and that he rejected it because of its incapacity to perform the amount of work stipulated in the contract. And that must be read in connection with his previous assertion, that the further trial at Carfin was made on a proper face. Taking all his averments together, they appear to me to disclose no ground of defence to the action except one—that the machine was disconform to contract, as was

evidenced by the fact that it had been subjected to the contract test by working at a suitable face, and had failed to perform the stipulated amount of work. And it is a notable circumstance that neither in the opinion of Lord Shand, who carefully states the respective contentions of the parties, nor in the judgment delivered by Lord Mure, is there to be found the least indication of any other controversy having been raised before the Court of Session by the appellant.

This view of the appellant's record is borne out by his pleas-in-law. The only pleas which indicate any substantive defence to the respondents' claim for the contract price are these:—"2. The machine having failed on trial, the defender is not bound to accept it." "3. The sale of the machine having been conditional on the trial, which has failed, the defender is not liable in the price thereof." Such being the shape of the record or issue to which the findings of the Court of Session are applicable, I am of opinion that the findings in the interlocutor appealed against are in themselves sufficient to entitle the respondents to decree for the price of the machine. The terms of the contract seem to me to imply very plainly that it was incumbent on the appellant, and not upon the respondents, to provide "a properly opened-up face" for the trial of the machine. Then the Court negatives the existence of the agreement alleged by the appellant to substitute Garriongill for Carfin cutting as the place of trial, and finds in substance that the appellant failed to provide a proper face at Carfin cutting, "notwithstanding repeated demands" on the part of the respondents. The respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test, and their failure being due to his fault, I am of opinion that as in a question with him they must be taken to have fulfilled the condition. The passage cited by Lord Shand from Bell's Principles (section 50), to the effect that "If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished: If the creditor have done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement"—expresses a doctrine borrowed from the civil law which has long been recognised in the law of Scotland, and I think it ought to be applied to the present case.

It was argued for the appellant that the condition was only intended to operate in his favour, and that he might therefore dispense with it and defend himself upon the ground that the machine was in point of fact disconform to contract. But I cannot regard the stipulation in that light; it was so obviously for the interest of the manufacturers of this new patent machine to have the question whether it was or was not conform to contract determined by reference to a simple and definite test, instead of being left to the uncertainty of speculative opinion, aggravated by the risk of litigation.

I now proceed to consider whether before disposing of this case any remit should be made to the Court below. As I understood the appellant's argument, he desired to have an opportunity of asking findings from the Court of Session to the effect that (1) the machine was disconform to contract, and (2) that the trials of the machine, though not to be regarded as equivalent to the test provided by the contract, made its disconformity to contract apparent to all concerned. Various other points were suggested for remit, but these appeared to me to be mere afterthoughts, and being unable to find any trace of their having been made grounds of defence in the record I take no further notice of them.

In the case lodged for the appellant, his pleading upon the facts, which include a great deal of unnecessary observation upon the proof led in the cause, is thus summed up:—"The only fact found by the interlocutor is that the appellant failed to provide a properly opened-up face at the Carfin cutting. It is submitted that this finding does not in point of law warrant the finding that the appellant is liable to pay the sum of £1115 and expenses. It is consistent with the facts found that the machine was not in fact according to contract, and that such trials as there had been afforded ample evidence of this. If this be so, it is submitted that the appellant would not be liable to pay for the machine, and it is contended that the evidence establishes these facts, or, at all events, that the machine did not comply with the contract."

In the view which I have taken of the judgment under appeal, any general allegation by the appellant to the effect that the machine was not conform to contract is irrelevant, because according to that view the machine must be held to have satisfied the contract test, which was not applied owing to the default of the appellant.

As to his other allegation, that "such trials as there had been" made it clear that the machine was disconform to contract, I doubt whether it is to be found on the record, and even if it be, I have no doubt of its irrelevancy. No such statement would, in my opinion, afford a relevant answer to the case disclosed by the interlocutor under appeal, unless it amounted to this, that the machine was so disconform to the specification, or so palpably deficient in working power, that the respondents were not in *bona fide* to tender it to the appellant as in implement of the contract. I need only add that I have not heard it suggested in argument that any such case as that has been made by the appellant—on record or elsewhere.

In appeals falling within the scope of the 40th section of the Judicature Act of 1825 I humbly conceive that this House has no concern with the proof which has been led in the Sheriff Court. When it can be shown that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but that can only be shown by a reference to the record, and not to the proof. It would, in my opinion, be productive of great inconvenience if the House were to make remits upon matters of fact which are not very plainly set forth upon record as substantive grounds either of pursuit or of defence.

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

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

Interlocutors appealed from affirmed and appeal dismissed with costs.

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

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

COURT OF SESSION.

Thursday, March 10.

SECOND DIVISION.

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

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

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

Thomas Elder, wine merchant in Leith, died on 5th December 1869 leaving a trust-disposition and settlement in which he conveyed to his trustees his whole means and estate, heritable and moveable, real and personal, then belonging or which should pertain and belong to him at the time of his death, for the following uses, ends, and purposes:—1st, Payment of debts, &c.; 2d, Payment of a provision settled on his widow Mrs Elder by their marriage-contract; 3d and 4th, Payment of various legacies to relations and charities, amounting to £5050. The fifth, sixth, seventh, and last purposes were as follows:—"5th, That my trustees shall hold the whole rest, residue, and remainder of my estate remaining after fulfilment of the above-written provisions, with the income arising therefrom, until the death of my wife, and shall, out of such residue and income, make payment of any other legacies or provisions I may leave by any writing to be hereafter signed by me expressive of my will, although not formally executed." "6th, That my trustees shall, upon the death of my wife, set aside out of the residue of my estate the sum of £10,000, and shall either hold the same themselves or invest the same in name of the general trustees for the time being of the Free Church of Scotland and their successors in office, or in the name of any other persons, as my trustees shall think best, in trust, to apply the free interests and profits accruing annually from the said sum, after deduction of all expenses, as a provision or endowment of a Professor of Natural Science in the said New College of Edinburgh in connection with the Free Church of Scotland, and subject to such burdens, conditions, rules, and regulations as to my trustees may seem best: Declaring that my trustees shall have power to make all such rules and regulations as appear to them requisite for effecting the object above mentioned; and in the event of my trustees not making such rules and regulations, then and in that case the said general trustees for the time being of the said Free Church shall be entitled, and they are hereby authorised, to make such rules and regulations, which shall be as effectual as if prescribed by myself; And I declare that I have made this provision for the endowment of a Professor of Natural Science in said College in the expectation that the trustees of said College will continue to the Professor, for the purpose of purchasing objects of Natural History, and of otherwise contributing to the sufficiency of the Professorship, the sum of £100 annually now paid to Dr Duns as salary." "7th, That my trustees shall, upon the death of my wife, apply £7000 of my remaining property to and for the erection of a territorial church on the principle of the late Dr Chalmers, and in connection with the Free Church of Scotland, and that in some destitute part of the city of Edinburgh or of Leith, and shall apply the further sum of £3000 for a partial endowment for the minister of said church; and they shall also apply such further sum as they shall see proper for the purchase or erection of a manse for said minister, in or as near to the district as possible; and I commit to the sole discretion of my trustees all the details, regulations and provisions requisite in their opinion for carrying out the purposes specified under this seventh head. And lastly, after all the above purposes shall have been fulfilled, I appoint and direct my trustees to apply and pay over the whole residue and remainder of my estate, if such there shall be, to and for the use and benefit of such four of the schemes of the Free Church of Scotland, and in such proportions, as to my trustees shall appear most expedient." The gross amount of his estate amounted to £34,839, from which fell to be deducted for debts, inventory-duty, furniture bequeathed to Mrs Elder, and pecuniary legacies, &c., the sum of £7532, leaving as the amount of residue at Mr Elder's death, subject to Mrs Elder's annuity, a sum of £27,307. In terms of Mr Elder's settlement the residue was held by the trustees for the following purposes:—(1) Payment to Mrs Elder of her annuity of £300 a-year: (2) Payment of the following sums:—(1st) Endowment of Natural