I entirely agree with them that the appeal should be dismissed, and for the reasons which they have given; and even if I could succeed in stating those reasons in different, it could not be in better language.

I entertain, in common with my noble friend Lord Watson, some doubt whether the alleged prior use of the Varley machine was such as to avoid the appellants' patent, and if it had been necessary to decide that point I should have wished to have heard the argument on behalf of the respondents, but in the view I take of the case that becomes unnecessary.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellants—Sir R. E. Webster, A.-G.—Moulton, Q.C.—J. C. Graham. Agents—Renshaws, for Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents — Graham Murray, Q.C., Sol.-Gen. for Scotland — Daniell. Agents—Faithfull & Owen, for Davidson & Syme, W.S.

COURT OF SESSION.

Thursday, October 20.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

ELDER AND OTHERS (ELDER'S TRUSTEES) *v.* ELDER AND OTHERS.

(*Ante*, vol. xviii. p. 392, and 8 R. 593.)

Succession—Trust-Settlement—Accumulation—Residue—Intestacy—Thellusson Act (39 *and* 40 *Geo. III. cap.* 98).

A testator directed his trustees to hold the whole rest, residue, and remainder of his estate, with the income arising therefrom, until the death of his wife, and upon that event to set aside out of the residue certain sums for the purpose of educational and ecclesiastical endowment; and lastly, "after all the above purposes shall have been fulfilled," he directed his trustees to apply and pay over the whole residue of his estate, if such there should be, to and for the use and benefit of such four schemes of a Church, and in such proportions, as to his trustees should appear most expedient. The testator's widow survived the period of twenty-one years after his death.

Held that as no residuary legatees had been appointed, or could be appointed until the widow's death, the income of the residue, which, in terms of the Thellusson Act, the trustees could not accumulate, belonged to the testator's heirs *ab intestato*.

Mr Thomas Elder, sometime of Leith, died upon 5th December 1869, survived by his widow Mrs Anne Jardine or Elder. His next-of-kin were his nephews Thomas Jardine Elder, Port Elizabeth, South Africa, and John Dunlop Elder, St Boswells, Roxburghshire. By trust-disposition and settlement dated August 19th 1869 Mr Elder appointed Mrs Elder and others trustees for the following purposes—(1) Payment of debts; (2) payment of an annuity of £300 settled upon Mrs Elder by marriage-contract; (3) investment of £600 in the purchase of an annuity for his nephew John Dunlop Elder; (4) payment of legacies amounting to £3350 among certain schemes of the Free Church of Scotland and certain charitable societies in Edinburgh; and payment of a legacy of £500 to his nephew Thomas Jardine Elder. "(*Fifth*) 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 hereby signed by me expressive of my will, although not formally executed: (*Sixth*) 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 the 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: . . . (*Seventh*) 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 £300 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 amount of residue as at Mr Elder's death, subject to Mrs Elder's annuity, was £27,307.

In the year 1881 the College Committee of the Free Church called upon Mr Elder's

trustees to pay over to them at that date the sum of £10,000 provided by him for the endowment of a Chair of Natural Science in the New College of Edinburgh without waiting for the death of Mrs Elder, and a special case was submitted to the Court of Session (Second Division) on 25th February 1881 on behalf of Mr Elder's trustees on the one part, and the general treasurer and the College Committee of the Church on the other part.

In that case it was stated that the annual income of the residue of Mr Elder's estate—£27,307 as at Mr Elder's death—being much larger than what was necessary to meet Mrs Elder's annuity, the trust-fund had been increased by the accumulations, and then amounted to about £32,400. That Mrs Elder as an individual had stated to the trustees that she would be satisfied if payment of her annuity was secured by the retention in the trustees' hands of a certain capital sum. In the marriage-contract between Mr and Mrs Elder, in terms of which the annuity was payable, there was no declaration to the effect that the annuity was alimentary, nor was there any prohibition against Mrs Elder's anticipating or assigning it.

The following questions of law were submitted—"Whether Mr Elder's trustees were entitled at that date to set aside the sum of £10,000 provided by Mr Elder's trust-disposition and settlement for the endowment of the Professor of Natural Science in the New College, Edinburgh? Or, Whether the interest or income of the said sum fell to be accumulated therewith during Mrs Elder's life (subject to the provisions of the Thellusson Act) for the purposes specified in the residuary clauses of the testator's settlement?"

On 10th March 1881 the Court found that Mr Elder's trustees were not entitled at that date to set aside the said sum of £10,000, and therefore answered the first question in the negative, and found it inexpedient to answer the second question. The case is reported *ante*, vol. xviii. p. 392, and 8 R. 593.

The trustees accordingly continued to receive and accumulate the surplus income of the estate arising after payment of Mrs Elder's annuity.

The Thellusson Act (39 and 40 Geo. III. cap. 98) provides—"That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer period than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual proceeds so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." By section 3 it was declared that the Act should not apply to dispositions of heritable property in Scotland, but this section was repealed by 11 and 12 Vict. cap. 36, sec. 41.

Mr Elder died on 5th December 1869, and his widow having on 5th December 1890 survived him for twenty-one years, the question arose as to the effect of the Thellusson Act. The funds held by Mr Elder's trustees amounted at 5th December 1890 to £42,170, 15s. 5d., subject to Mrs Elder's annuity. Mrs Elder was born on 5th August 1812.

The trustees accordingly raised this action of multiplepoinding.

Thomas Jardine Elder and John Dunlop Elder maintained that the pursuers were bound to retain undivided the estate of the testator until the death of his widow, and the only estate and effects of the testator which fell to be paid by the trustees was the income of the trust-estate, heritable and moveable, held by the trustees, and received by them from the 5th day of December 1890 down to the present time, and in all time coming while Mrs Elder remained in life. They maintained that the Thellusson Act came into operation in respect of the trust-estate by Mrs Elder surviving 5th December 1890, and that under its provisions all the income of the residue of the trust-estate after that date fell to be paid to the claimants as the testator's next-of-kin.

Alexander Ellison Ross, general treasurer of the Free Church, and others, the general trustees and the conveners and secretaries of the Committees of the Schemes of the Free Church, maintained—(1) That the whole capital of the estate, after providing for Mrs Elder's annuity, should be paid over to them for the purposes specified in the settlement. (2) Failing this, that they were entitled to interest on the legacies specified in purposes six and seven of the settlement, and payment of the surplus to such four of the Schemes of the Free Church as the pursuers might select. (3) Failing this, that the whole surplus income should be paid to such four Schemes as aforesaid.

Upon 11th June 1892 the Lord Ordinary (KYLLACHY) found that the claimants Thomas Jardine Elder and John Dunlop Elder were entitled to the surplus income set free by the operation of the Thellusson

Act, and ranked and preferred them accordingly.

"*Opinion.*—This question arises on the application of the Thellusson Act to the settlement of the late Mr Thomas Elder, sometime merchant in Leith, who died so far back as the year 1869. He left a considerable succession—the residue amounting to about £27,000; and with respect to that residue his direction in substance was that it should be charged with an annuity of £300 a-year to his wife, and that, subject to that annuity, the income should accumulate until his wife's death, and should then be applied to certain purposes connected with the Free Church. The particular purposes are not perhaps important —£10,000 was to be applied towards founding a Chair of Natural Science in the Free Church College; £7000 was to be applied in endowing a territorial church in Edinburgh or Leith; and the balance was to be divided, as the trustees might think fit, amongst the schemes of the Free Church. What is more important is that there is no present gift of any portion of the residue to any person. It is to be held by the trustees until the death of the widow, and then, and then only, to be distributed.

"Now, that being the settlement, it appears that some years ago it was decided under a special case that the trustees were not entitled, even with the widow's consent, and after fully providing for her annuity, to accelerate the division of the estate. It was held that whatever may have been the truster's object in postponing the division, the deed fixed the period of division, and the Court had no right to alter the period of division so fixed.

"What has now happened, however, is this—Mrs Elder is still alive, and more than twenty-one years have now elapsed since Mr Elder's death. In these circumstances the Thellusson Act comes into operation, and the result is that it is no longer lawful for the trustees to go on accumulating the income of the estate. The present multiplepoinding has accordingly been brought to determine what is to become of the income between the expiry of the twenty-one years and Mrs Elder's death. The income must be paid away as it accrues. It cannot be retained by the trustees, for that would be accumulation; and that being so, there are competing claims, maintained by the Free Church on the one hand, and the heirs *ab intestato* of Mr Elder on the other. The Free Church claim, in the first place, that the stoppage of the accumulation entitles them to have an immediate division of the capital; but they claim alternatively that they are in any view entitled to immediate payment of the undisposed-of income—or rather, I should say, the illegal accumulation. The next-of-kin, on the other hand, say that the undisposed of income—the income accruing between the expiry of the twenty-one years and the death of Mrs Elder—falls to them.

"Now, the rule which governs the application of the Thellusson Act to cases of this description is well settled, and may be stated in a word. The deed is to be read as if it had expressly declared that the accumulation directed should stop at the end of twenty-one years; and for the rest the deed is to be read and receive effect exactly as it stands. Now, applying that principle to the claim of the Free Church, I ask is there anything in the deed which authorises, on the cessation of the accumulation, an immediate division of the capital? It is, I think, quite obvious that there is not. The direction is express that there shall be no division until the death of the widow, and that direction stands. The Thellusson Act does not provide that when twenty-one years elapse the accumulation shall cease and the capital be divided. What it provides is that the accumulation shall cease, and that the income thereby set free shall go to the person who would have received it if the illegal accumulation had not been directed. But is the alternative claim of the Free Church in any better position? Can they claim the income as it accrues on the footing that it falls into residue? It appears to me that the same reasoning excludes this claim also. There is no authority in the settlement to pay anything to anybody until the widow's death; and what is then to be paid is what is then lawfully in the trustees' hands. The income in question is not and cannot be in that position. The trustees cannot retain it, and if there is nobody who under the settlement can claim it as it accrues, the result, I think, plainly is that it falls into intestacy and goes to the heirs *in mobilibus ab intestato*.

"I shall therefore repel the claim of the Free Church, and sustain the claim of the heirs *ab intestato*."

The Free Church trustees, the claimants Alexander Ellison Ross and others, reclaimed and argued—(1) It was admitted that the judgment of the Second Division of March 10, 1881, was *res judicata* of their claim for immediate fulfilment of the provisions of the trust-deed. (2) They were entitled to interest on the legacies, for these were only postponed to an event certain; they vested *a morte testatoris* and *accessorium principale sequitur*. (3) At least the surplus income must be paid to such four of the schemes as the pursuers should select. Whatever was not specifically given to other objects was to be given to them so that they were in reality the residuary legatees. It had been decided in England that undisposed of income fell into residue—*O'Neill* v. *Lucas*, March 30, 1838, 2 King's Reps. 313. There was a proper gift of residue; the direction to accumulate was a burden on the gift, the burden flew off and the illegal accumulations fell into residue—*Storie's Trustees* v. *Gray and Others*, May 29, 1874, 1 R. 953. The trustees could now select the four schemes of the Free Church. The accumulation ordered was for the benefit of these schemes. Accumulation was now no longer legal; the testator's benefaction to them could never be larger. It was reasonable and according to the testator's intention that it should be at once paid. The words

"after all the above purposes shall have been fulfilled" did not necessarily mean after all the legacies shall have been paid. The purpose of the whole deed was to benefit the Free Church and give to it everything that was not specifically given to some other purpose. If, then, the various sums specified in the settlement were fully provided for, everything else in the way of income must go to the schemes to be selected. Whenever the residuary legatees appeared the surplus income must fall to them. The trustees were therefore now bound to select four schemes as provided for in the deed; that would provide a residuary legatee, and the undisposed of income would fall under the residue clause —*Ogilvie's Trustee* v. *Dundee Kirk-Session*, July 18, 1846, 8 D. 1229; *Mackenzie* v. *Mackenzie's Trustees*, June 29, 1877, 4 R. 962; *Campbell's Trustees* v. *Campbell*, June 30, 1891, 18 R. 992; *O'Neill* v. *Lucas*, March 31, 1838, 2 King's Reps. 313; *Storie's Trustees* v. *Gray and Others*, May 29, 1874, 1 R. 953.

The heirs *ab intestato* argued—(1) No interest was payable on the legacies. These were *legata quantitatis*, and interest was only due after the legacy became due. (2) Had there been a present gift of residue the surplus would have gone to the residuary legatee. There was none. The truster had selected no one. The trustees could select no one till Mrs Elder's death. Then the trustees would make their choice, and the residuary legatees would appear. Meantime the trustees could not hold the surplus income; there was no one to claim it; it must flow into intestacy.

At advising—

LORD JUSTICE-CLERK—We are now relieved of any question except that which relates to the claim of the trustees of the Free Church to have the income which is the subject of the multiplepoinding paid over to them, as being entitled to it under the residuary clause. The question is one of construction, and we must look at the whole deed. Now, giving to it the best consideration I can, I think there is no present right on the part of these claimants to payment of the income which can no longer be accumulated in consequence of the Thellusson Act. There are some cases in which the residuary legatee is so distinctly described in the will that he is held entitled to the sum which falls under the residue clause, and cannot be longer accumulated in consequence of the Thellusson Act. But this is certainly not such a case. I think that in this case the residuary legatee is not at present ascertainable. No legatee is so pointed out that we can say that we are certain who the legatee is who must take. The legatee is to be such four of the schemes of the Free Church, and in such proportions, as to the testator's trustees "may appear most expedient." If the claim is to succeed, it must only be upon the footing that the present trustees of the testator are now, although the widow is till alive, to consider what are the four schemes which are to share the bequest. If that came to be done now as to this available income, it would settle what are the schemes which at a future date will divide the capital. But that might lead to anomalous results. The date at which the testator intended his trustees to consider the division was that of the widow's death, and after certain other purposes dealt with in articles 6 and 7, which are part of the residue clause, "shall have been fulfilled." Mrs Elder may live for some years, and at her death the same schemes might not exist, and the decision might in consequence be nugatory. I think that the deed does not call upon or entitle the present trustees to exercise the duty of election. It is to be done by those who are trustees after the widow is dead, and all the other purposes are fulfilled.

The income in question is in my opinion undisposed of and falls to the next-of-kin.

LORD YOUNG—It has been decided that nothing can be paid under the directions in the sixth and seventh clauses of the settlement until after the death of the widow. It was not maintained in this case which regards undisposed of income, that any capital could be paid under the residuary clause. It was maintained that this income should go to the Free Church generally or as residuary legatee. Well, it turns out on inquiry that the trustees of the Free Church do not represent a residuary legatee and the proposition on the part of the Free Church is that Mr Elder's trustees are entitled and bound to name a residuary legatee now. That raises the question whether the Free Church are entitled to call upon the trustees now to nominate four schemes of the church to be the residuary legatees under the clause in the settlement. If the trustees were entitled and bound to do so now, a residuary legatee would appear who according to our law would take anything that was not specifically disposed of, including this income if it be not disposed of.

I do not think that there is a residuary legatee at all. I pointed out in the course of the discussion that I thought there was only one residue clause, although it contains several divisions, and it has a provision at the end to catch anything that had been left out. It directs certain things to be done by the trustees, and then if there are any funds still remaining he says, "You, my trustees, are to select what four schemes of the Free Church you like, and give them the money in what proportion you like." Does that enable the Free Church to say that the trustees are now entitled and bound to name four schemes? I do not think so. What the testator meant was that when the period of division came, the trustees then in office should select the four schemes they chose, and that the trustees of no former period could relieve them of their right and duty. The testator pointed out the time at which the nomination of the schemes should take place, viz., the death of his wife, and I do not think any reason has been stated for departing from it. I agree that there is no proper

residuary clause which meets the present state of things, and that therefore the will makes no provision for this income, so that it must go to the heir in intestacy.

LORD RUTHERFURD CLARK—I am of the same opinion. I understand there is now no question with respect to the claim made as to the interest upon the particular sums, and that the only matter upon which our judgment is sought is in respect of the residuary legatees to have the interest freed by the Act paid to them. Now, as I read the deed, there are at present no residuary legatees and there can be none until after the death of the widow.

LORD TRAYNER — I concur, and have nothing to add.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the claimants Alexander Ellison Ross and others against Lord Kyllachy's interlocutor of 11th June 1892, Refuse the reclaiming-note and adhere to the interlocutor reclaimed against: Find the claimants Thomas Jardine Elder and John Dunlop Elder entitled to additional expenses as against the claimants the said Alexander Ellison Ross and others," &c.

Counsel for the Free Church Trustees—Guthrie—Ferguson. Agents — Cowan & Dalmahoy, W.S.

Counsel for Elder's Trustees — Hope—Lorimer. Agents—H. & H. Tod, W.S.

Counsel for the Heirs *ab intestato*—Sol.-Gen. Asher, Q.C.—Boyd. Agent—Thomas Dalgleish, S.S.C.

Saturday, October 22.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

A. & G. V. MANN AND OTHERS *v.* TAIT.

Sequestration — Meeting of Creditors for Election of Trustee—Preses — Sheriff — Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 68.

Held that the Sheriff is entitled to attend and preside at the meeting of creditors for the election of the trustee in a sequestration without having received a notice requiring his attendance.

Sequestration — Meeting of Creditors for Election of Trustee—Preses — Honorary Sheriff-Substitute—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 4 *and* 68.

Held that the duty of presiding at the meeting of creditors for the election of the trustee in a sequestration may be performed by an Honorary Sheriff-Substitute.

Sequestration — Meeting of Creditors for Election of Trustee — Adjournment — Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 68.

Held that the adjournment of the meeting of creditors for the election of the trustee in a sequestration to a different place from that originally appointed by the Sheriff is not contrary to the 68th section of the Bankruptcy Act.

Sequestration — Meeting of Creditors — Minute.

Held that the proceedings at a meeting of creditors in a sequestration are not rendered invalid by the preses failing to sign the minute.

By deliverance dated 15th September 1892, Mr Sym, then acting as Honorary Sheriff-Substitute of the Lothians, sequestrated the estates of John Dobbie, and appointed a meeting of creditors to be held in Dowell's Rooms, George Street, Edinburgh, on 27th September for the election of a trustee.

On 26th September a notice signed by two creditors was sent to the Honorary Sheriff-Substitute requiring his attendance at the said meeting, and in conformity with this notice the Honorary Sheriff-Substitute attended and presided. After the creditors present had produced oaths and vouchers, the meeting proceeded to the election of a trustee, when creditors to the amount of £8016, 19s. 4d. voted for Mr John Scott Tait, C.A., and creditors to the amount of £7796, 1s. 7d. for Mr James Craig, C.A. At this stage it was unanimously resolved by the creditors present to adjourn the meeting until the next day, the meeting then to be held within the Sheriff Court-House.

At the adjourned meeting notes of objections to the validity of votes *hinc inde* were made and put in process, and parties were appointed to be heard on a subsequent day.

The minutes of both meetings were initialled on each page by the Honorary Sheriff-Substitute, who also signed at the end of the minute of the adjourned meeting.

On 1st October the Honorary Sheriff-Substitute having heard counsel on the notes of objections, and disallowed votes to a certain amount on both sides, found and declared John Scott Tait to have been duly elected trustee on the sequestrated estates.

Section 68 of the Bankruptcy Act 1856 provides, *inter alia*, as follows—"Creditors or their mandatories, qualified as aforesaid, shall assemble at the time and place fixed for the election of trustee, with power to adjourn for such reasonable time as may seem fit, provided such adjournment do not postpone the meeting for the election of trustee beyond the limit of the period within which that meeting is by this Act appointed to be held; and if two or more creditors shall give notice to the sheriff of the county, such sheriff shall attend the meeting and adjourned meetings and preside; and the sheriff-clerk or his depute shall also attend . . . and write the minutes