no question of servitude. The question is, is this road or not dedicated to the use of the public? If it be dedicated to the use of the public, why (as I have already said) should not the public have a right to sue? That it is necessary to be patrimonial, as it has been argued, is entirely out of the question. That it should be local, we have no authority whatever beyond this, that in most of the cases which have been decided—and if there were 50 more cases to be decided hereafter, or 5000, you would find in all of them, I would venture to say, the same element—namely, that the persons suing would be persons residing in some place or other which would come within the definition here stated. That does not prove it is necessary that they should.

Now, my Lords, the way in which the learned counsel, who are very competent to do it, have stated to your Lordships what they contend for, and for which I am very much obliged to them, is this:—"*First*, that the authorities have not hitherto determined the extent of the locality, or the precise limits within which ownership or residency, &c. will entitle; but they have negatived the right as existing in the subjects of the realm independent of the locality." Now, the latter part is not correct: It is a statement of law which does not exist. The cases have not negatived the right beyond the extent to which, in each case, it was necessary for the Court to decide: Then this proposition admits that the authorities have not hitherto determined the extent of the locality, or the precise limits within which ownership or residency will entitle. Then comes the other part:—"But, *secondly*, if locality is now for the first time to be defined." Upon that I must observe, that it is not required to be defined; but when the appellant tells you that the right is to be confined to the locality, he imposes upon himself the necessity of telling you what are the limits of that locality. It is not required by your Lordships—it is required by the appellant's argument; for he tells your Lordships that there must be either patrimonial right or local. That has been distinctly argued. Then your Lordships ask, If it be local, tell us the limits. They say, "If locality is now for the first time to be defined, it must be limited to the parishes and towns through which the road in question passes, and the parishes and towns situate at, and adjoining to, either terminus of the same road." Those are the terms in which the learned counsel state the way in which they would satisfy what are the limits of the right claimed. It is only necessary to read that second proposition, to shew that this cannot be a rule capable of being adopted. Why should it be adopted? Where is the law? No case has been produced, nor can any case be produced to establish it; and why should it be established? Why is there to be a limit of a particular town at the end of each terminus, for example, as I before stated, when every inhabitant beyond that town has an equal right with the inhabitants of the particular town? Why, therefore, the right existing beyond the town—are you to build a wall round the town, and exclude the persons who happen to reside near it? It is quite clear therefore to me, my Lords, that the attempt which has been made to establish this on local grounds, and to define that locality, (and the necessity for the definition has only arisen from the argument of the appellant himself, and not from any rule of law,) shews clearly that this is a contention on the part of the appellant which cannot be maintained. I do not apprehend that the affirmance of the interlocutor in the Court below will work any prejudice to the appellant. I believe that he will be left precisely as he stood when he first came to your Lordships' bar, and that nothing which has passed in the Court below will prejudice him in requiring the right claimed to be proved according to the law of Scotland, whatever it may turn out to be, and in establishing, if he can, his right to exclude Her Majesty's subjects from Glen-Tilt.

My Lords, I propose therefore to your Lordships to affirm the interlocutor of the Court below, and, of course, necessarily with costs.

Interlocutors affirmed with costs.

First Division.—Lord Ivory, *Ordinary*.—Spottiswoode and Robertson, *Appellant's Solicitors*.—Dodds and Greig, *Respondents' Solicitors*.

JUNE 11, 1852.

DR. HUGH MACPHERSON and another (Macpherson's Executors), *Appellants*, *v.* MISS ANN MACPHERSON, *Respondent*.—*Ex parte* JAMES TYTLER.

Trust Settlement—Testament—Heritable and Moveable—Heir and Executor—Mora.—Accounting.—Personal Bar—*A testator, by an English will and testament, directed his executors, after setting apart a portion of his moveable property for the purpose of paying legacies and annuities, to consolidate his whole heritable and moveable estate into one fund, to be invested in land in Scotland, to be entailed on a series of heirs specified in a tailzie previously executed by him; and there was further a direction to invest, in the same way, the capital sums set apart for yielding the annuities, as they fell in. The executors, who were unable for several years after the testator's death to find an investment of land in Scotland for the fortune, which*

was then existing in point of form as personal estate, paid to the first beneficiary taking under the entail, the proceeds accruing from the fortune during the first year after the testator's death. In an action of count and reckoning brought after the death of the first beneficiary, and long subsequent to that of the testator, in regard to the succession,

HELD (affirming judgment), 1. *That in the circumstances, the action was not barred by lapse of time, or by the acts of the executors and first beneficiary relied on as forming a personal bar.* 2. (reversing judgment), *That the fund so directed to be invested was impressed with the character of heritable estate* a morte testatoris, *and that the first beneficiary was accordingly entitled to the proceeds accruing from it, and that it was rightly paid to him, though there was no direction to accumulate, or add interest to capital, and though the money had not actually been invested in land.*[1]

The judgments of the Court of Session having been appealed, it was maintained by the *appellants* in their *printed case* that they ought to be reversed for the following reasons:—1. Because the demands of the pursuer, as against the executors of Sir John Macpherson, sought to be enforced by the action, are barred by the lapse of time.—*Smith* v. *Clay*, Ambler, 645; *Hicks* v. *Cooke*, 4 Dow, 16; *Whaley* v. *Whaley*, 3 Bligh, 1; *Townsend* v. *Townsend*, 1 Bro. C. C. 550; *Beckford* v. *Wade*, 17 Ves., 97; 2 Story's Equity Jurisprudence, § 1520, p. 985, 4th ed. 2. Because the pursuer's right now to demand from the appellants an accounting for, or repayment of, the proceeds of the executry estate in the first year after the death of James Macpherson senior, is excluded by the settlement and docquet of accounts on 17th February 1798,—more especially because of that settlement and docquet having been recognized, adopted, and acted on for a long period of years. 3. Because the free produce of the trust-estate during the first year after the testator's death, belonged, and was justly and properly paid, to James Macpherson, junior, as the first heir called to the entailed succession, and the first beneficiary under the trust. And *separatim*, even although James Macpherson, junior, had not been entitled to the rents, still, as the payment was made to him by the executors in the *bonâ fide* belief that he was, they would not be personally liable to account a second time for the rents to the pursuer.—*Anstruther* v. *Chalmer*, 2 Sim. 1; 4 Burge, 590; Boull. Stat. Obs. 46, p. 503; Hertius De Colleg. § 6, par. 3; Du Moulin, Ad. Cod. de Stat. vol. iii. p. 554; per *Dicente* Sir Thos. Sewell in *Fletcher* v. *Ashburner*, 1 Bro. C. C. 499, commended by Lord Alvanley in *Wheldale* v. *Partridge*, 5 Ves. 396; *Stair* v. *Stair's Trustees*, 1 W. S. 72; *Howat's Trustees* v. *Howat*, 16 S. 622; *Campbell's Trustees* v. *Campbell*, 14 S. 770; 16 S. 1251; *Angerstein* v. *Martin*, 1 T. & Russ. 232; *Hewitt* v. *Morris*, 1 T. & Russ. 241; *Douglas* v. *Congreve*, 1 Keen, 410; *Dimes* v. *Scott*, 4 Russ. 207; *Taylor* v. *Clark*, 1 Hare, 161; *Wrey* v. *Smith*, 14 Sim. 202; *Sparling* v. *Parker*, 9 Beav. 524; Ersk. 3, 4, 3; *Miller* v. *Miller*, 10 D. 765; *Leslie* v. *Baillie*, 2 Y. & C. 91. 4. Because, even if the claims of the pursuer could, after the lapse of so many years, be still entertained, there are no good grounds for subjecting the appellants in payment of the two sums of £305 2*s.* 8*d.* and £258 6*s.* 8*d.* or either of them.—*Chalmer* v. *Bradley*, 1 J. & W. 65.

The *respondent* in her *printed case* maintained that the judgments were correct, because—1. The interlocutor of the Lord Ordinary (16th July 1842) finding, in conformity with Mr. Pemberton's opinion, that no bar lay, in the statute of limitations or otherwise, against an account being demanded from the appellants, cannot be competently brought under review, it not having been submitted to review of the Inner House, and also being an interlocutory judgment, to appeal which no leave has been given. But besides this, the interlocutor is in itself well founded. 2. It was rightly found in the Court below, that the appellants were not entitled to credit for the sum of £305 2*s.* 8*d.* of expenses claimed by them as disbursed by Sir John Macpherson in connection with the executry estate. 3. It was rightly found in the Court below, that Sir John Macpherson was to be debited with the sum of £258 6*s.* 8*d.* of dividend received from the estate of Messrs. Mure and Company, and was not entitled to have this debt wiped away or neutralized, in respect of any alleged payment of this sum to James Macpherson, junior. 4. It was properly found in the Court below, that the right of James Macpherson, junior, to the annual proceeds of the estate, did not commence till after the expiry of twelve months from the testator's death; and that, therefore, the amount of the first year's proceeds was wrongfully paid to him, and must form a charge against the executors, including Sir John Macpherson. 5. The interlocutor (18th July 1850) decerning for expenses, cannot competently be brought under review, not being included amongst the interlocutors which the appellants obtained leave to appeal. But, at any rate, there is no ground for altering that interlocutor.

Stuart Q.C., and *Anderson* Q.C., for appellant.—1. The important question here is the one as to the construction of the will in reference to the first year's interest. The first thing to be looked to is the intention of the testator as deducible from his language. We say his direction to the executors "to consolidate," was a complete conversion operating from the moment of death, and

[1] See previous report, 12 D. 486; 13 Sc. Jur. 555; 22 Sc. Jur. 103. S. C. 1 Macq. Ap. 243; 24 Sc. Jur. 508.

the character of real estate was impressed on the personalty from that moment—*Wheldale* v. *Partridge*, *supra*—and the interest therefore fell due to James Macpherson the institute. Now, the law of England is the same as that of Scotland on this subject. It was a question in the Court below, whether it was Scotch law that ought to govern the construction, and they held it was not Scotch but English law, without, however, inquiring where the domicile was. But it is a well-known rule, and now quite settled, that in construing a will, we must bring to bear on it the law of the domicile, which we say was Scotch.

[LORD CHANCELLOR.—The testator's will don't shew that he himself considered it so—rather the reverse ; for he directs his remains to be brought from Scotland to Westminster, where he says he spent the best part of his life. He would not even let his bones lie in Scotland. But really this point will not be material here.]

[LORD BROUGHAM.—It's not any one thing, but all the circumstances, including the will, the place of death, expressions of testator, &c., taken together, which go to make up the question of domicile.]

Yes ; however, if, as we hold, the law of England and Scotland is the same, that point need not be considered. We say, therefore, that according to the law of England, it is quite clear that the institute or tenant for life would be entitled to the interest of the fund from the moment of death. There is a train of authorities.—*Sitwell* v. *Barnard*, 6 Ves. 520; *Angerstein* v. *Martin*, *Hewitt* v. *Morris*, *Douglas* v. *Congreve*, *Dimes* v. *Scott*—*supra*. In *Taylor* v. *Clark*, *supra*, there is no real inconsistency with the rule ; for though the general principle was misapprehended, the sole question there was, *how* the tenant for life was entitled, not whether he was so before or after conversion. The true rule is again illustrated by *Wrey* v. *Smith*, and *Sparling* v. *Parker*—*supra*. The question may now be considered settled in England. As to Scotland, it is said *Stair's Trustees*, *supra*, is against us ; but there the testator's direction to accumulate the "interest and proceeds" was clear on the face of the will, and therefore interest was expressly directed to be included in the capital. But where there is no direction to accumulate interest, but mere general words, the question has been conclusively settled in our favour. *Howat's Trustees* and *Campbell's Trustees*, *supra*. Therefore, by the law of Scotland as well as England, the executors were right in paying the first year's interest to James Macpherson the institute, and they are not accountable in this action. But even if the trustees *bonâ fide* believed he was entitled to it, and paid the amount over to James Macpherson in that belief, that is enough to discharge them, whether in point of law they ought to have done so or not.—Ersk. 3, 4, 3 ; *Miller* v. *Miller*, *supra*. So in England—*Leslie* v. *Baillie*, *supra*. 2. The lapse of time, laches, and acquiescence, are a sufficient bar to the action.—*Smith* v. *Clay*, *Hicks* v. *Cooke*, *Whaley* v. *Whaley*, *Beckford* v. *Wade*—*supra*. All the claims in fact amount to a charge of fraud against us, but fraud is never to be alleged without being proved, which has not been done. The presumptions all tend against fraud, for during all the years Sir J. Macpherson lived, these claims were never set up, when the materials of proof were more abundant. Not only is the pursuer guilty of laches, but she has acquiesced. In the settlement of accounts in 1798, James Macpherson recognized its correctness—and as he was heir of entail, he represented the inheritance, and bound all the subsequent heirs, and that settlement was acquiesced in down to his death in 1833. The same settlement of accounts was recognized by the multiplepoinding and exoneration in 1809 raised by the representatives of John Mackenzie—so also by the Chancery proceedings, ending in an award. The respondent was a party to some of these proceedings, and she was cognizant of them all. Besides, as next heir of entail, she had a distinct *locus standi* to demand an account earlier, and she had no pretext for lying by till 1835.—*Duke of Leeds* v. *Amherst*, 2 Phillip's Ch. C. 117. As to the £305 odds claimed, the letter of Mr. Lowndes the attorney in 1810 is the sole evidence, which after the lapse of time is now quite insufficient. As to the £258 odds, it is quite established that that sum was paid over in 1812 to James Macpherson, whose receipt bound his successors.

[LORD CHANCELLOR.—But you had no right to pay it over to James Macpherson ; if you did, it was at your own risk.]

Sol.-Gen. Kelly, and *Rolt* Q.C., for respondent.—1. As to the question of construction. The rule is clear, that the executor is always to have one year from the testator's death to inquire into the estate committed to his charge, and during which period he is to exercise his discretion as to the time of investing the money as directed. No legatee can force him to do anything until that period shall expire. We admit that the rule fails where there is anything in the will inconsistent with allowing this period—as where the testator expressly directs otherwise. There are thus two classes of cases, viz. where the testator has expressly directed the interest to be capitalized, and where there is no such direction. We admit, in the latter case, wherever an executor, though he is not bound to invest before the end of the year, yet has done so, that the tenant for life is entitled to take the interest. There is, however, no case which recognizes the doctrine, that in the event of his not doing so, and where there is merely a general direction to invest in land, he is bound to invest before the end of the year, until we come to recent times. There is an apparent contradiction among the authorities, and Wigram V. C. said he preferred

the earlier to the modern. In *Sitwell* v. *Barnard*, the facts were not sufficient to furnish an exception to the general rule—though that case shews clearly how strong the rule was; for though there was there a direction to accumulate, yet that was satisfied by giving the tenant for life the interest only from one year after the death. The clearest authority in our favour is *Stott* v. *Hollingsworth*, 3 Madd. 161, which has never been overruled.

[LORD CHANCELLOR.—There was an appeal taken in that case I know, and it was afterwards compromised.]

As to *Angerstein* v. *Martin*,—what Lord Eldon said in it has never been well understood; and K. Bruce V. C. notices it in *Caldecott* v. *Caldecott*, 1 Y. and Coll. 312. The rule laid down by Lord Lyndhurst in *La Terriere* v. *Bulmer*, 2 Sim. 18, as also *Gibson* v. *Bott*, 7 Ves. 89, entirely support our view, and shew, that when an investment, though not particularly directed, has taken place before the end of the year—it may be the day after the death—then the interest must go to the tenant for life, but not otherwise, unless a year has elapsed. As to the rule in *Dimes* v. *Scott*, that would force an inquiry in every case, whether or not particular investments would be more or less advantageous. Upon the whole, though there is perhaps not entire consistency running through the cases, yet it is clear something like a new principle is sought to be established in the present case by the other side. The Courts have always hitherto consulted the convenience of the executor, and have allowed him a year to consider the state of the property in his charge; whereas, to allow, in a case like the present, the tenant to have the interest from the moment of death, would greatly increase litigation, and diminish the security of executors.—*Taylor* v. *Clark*, 1 Hare 161. As to the law of Scotland, though we might rely on *Stair's Trustees*, which was decided on the supposition that the law of England agreed, we stand on the latter alone, and contend that the case of *Howat's Trustees* and *Campbell's Trustees* do not apply, for the domicile was English. 2. Lapse of time is no answer to an accounting like this, nor can a Scotch heir of entail bind his successors by acquiescence.—*Fordyce* v. *Bridges*, 2 Phillip's Ch. C. 497; *Duke of Leeds* v. *Amherst*, *ibid.* 117. Lord Cottenham there said—"Lapse of time is nothing till we ascertain, in reference to the situation of the parties, when it began to run." We hold that it did not begin to run till 1833, when James Macpherson died, and therefore it is not true that we have slept on our rights. There was no reason why we should incur expense, where we might not have reaped any benefit. We did not acquiesce in the settlement of 1798, and Sir J. Macpherson took an indemnity; but, at all events, James Macpherson could not bind us, and the executors well knew this. As to the £305 odds, it has not been accounted for, and we have traced the £258 odds to Sir J. Macpherson's possession; and it is no answer for him to say, that he paid it to a co-executor whom he had no right to trust. We waive a technical objection as to some of the interlocutors appealed against being interlocutory.

LORD CHANCELLOR ST. LEONARDS.—My Lords, in this case, which has been argued at great length, there are three points which call for your Lordships' decision—two of them are points arising out of an account which was directed to be taken by the Court below, and the third point is a point of law arising on the bill of Mr. James Macpherson. With your Lordship's permission, I will just call your attention to the two first points, which depend on no point of law, but are questions of accounting, depending no doubt on rules of courts of equity, and the evidence and circumstances which appear in the case.

Sir John Macpherson was one of the co-executors of Mr. Macpherson; James Macpherson was another executor, the acting executor, and he had also a beneficial interest as institute in the real property, and the other property which was to be invested. Now, a great many proceedings had taken place between the parties; there was an accounting in 1798, and afterwards proceedings at law and in equity, which ultimately led to an award in 1810, and that award Sir John Macpherson's representatives have been able to found upon as a defence against demands in the Court below to open the whole of the accounts, and the argument has been maintained at your Lordships' bar, according to the opinion of the Court below, that that award following the suit in equity did in point of fact bind all the parties, institute and substitute, as if they had been regularly represented before the Court, and Sir John Macpherson's executors have had the full benefit of that defence. Now, under the Lord Ordinary's interlocutor of 1841, in which he sustained that defence, and which interlocutor has not been appealed against, he expressly sends it to an accountant to take an account subsequent to that award, and it is not possible for Sir John Macpherson's representatives now to say at your Lordships' bar that that account was not properly directed and taken. In one sense, there are questions of appeal before your Lordships on the two items which I shall presently notice; but the account must be taken to have been properly directed, and it was an account properly confined to acts up to the date of the award. Now, my Lords, taking it in that view, the first item which is disputed is a sum of £305 and a fraction, claimed by Sir John Macpherson's representatives for costs incurred by him—it explains how this was generally incurred by him—in the prosecution of his duty as an executor. It is said that it is too late; that time is a bar; that this is a stale demand. It is a misapprehension, I think, to put the case in that way, because this is not a stale demand: Nor

is time a bar; time cannot be a bar to a general account, because it was directed by the interlocutor of 1841, which is not appealed against—therefore that account stands, and cannot be removed—that is, the direction to take the account. Then stale demand it is none, because it is not in point of fact against Sir John Macpherson's executors in a proper sense, but it is a claim by the representatives to discharge themselves from a portion of the assets by setting up this demand—a totally different question. Sir John Macpherson had in his name £2000 stock, admitted to be part of the assets, subsequently to that award of 1810; of course he is responsible for those assets—but, in point of fact, the right of the pursuer in the Court below, the respondent at your Lordships' bar, did not accrue till 1833. This is a case in which you cannot talk of laches in a general sense, because the trust has never yet been executed. If a trust remains unexecuted, and the parties bound to execute that trust (Sir John Macpherson is one of them) will lie by and allow it to remain unexecuted, they cannot complain, when a person entitled in remainder (for that is not the true way to put the case) claims, and there has been no account taken before (and none subsequent to the one in 1810) that they have to answer for the assets.

Now Mr. Lowndes, the solicitor for Sir John Macpherson—for the whole claim rests on that—writes a letter to Mr. James Macpherson, whose character I before described, and he says—there being a demand against Sir John Murray for a certain number of hundreds of pounds due from the estate, he suggests this: He says there is £2000 stock in the name of Sir John Macpherson—he had by the award a balance of £500 and odds due to him—he says, let him take the stock at the present price of the day—and there was a fair value put on it, a little beyond the average—let him take that £2000 at the price of the day, and charge himself with the balance. Then let him discharge himself by so much as is found due to him by the award, and then I interpose this claim immediately after the award is out, £305 2*s.* 8*d.*, evidently stated as a nominal sum simply to make a round sum of the whole; and he says, "I claim that sum as the probable expenses."

Now, in the first place, your Lordships will observe this is not a claim of £305 against Sir John Macpherson's executors, but it is a claim by those executors, to discharge themselves from a portion of the assets which was clearly invested in Sir John's name only, and for the whole of which he was responsible. Now, independently of that, the award made just previously states expressly, that neither party is to have any demand against the other out of the award; and then it regulates and directs the way in which the costs of the award are to be paid. I am clearly of opinion, my Lords, that the moment the award was made, there was an end of any possible claim on the part of Sir John Macpherson for a single shilling of costs up to that day.

It is said, my Lords, that this is not a case in which the accounts were to be taken, and the costs included of the general estate. I am directly opposed to the argument which your Lordships heard at so much length, that this award and this accounting did in point of fact, as it was held in the Court below to the great benefit of the appellant—that that account did bind all the persons entitled, and was a fixed settlement of the accounts of the general administration up to that time. Not only, therefore, is the point concluded against the appellants by the award, but it is perfectly clear that it is a claim which cannot be sustained without evidence. Now, my Lords, in other papers and in other statements, you see what the nature of the claim was—a claim for expenses, evidently incurred in his own private house in arranging books and making out papers, for which he had paid a clerk at his private house considerable sums;—no doubt expenses incurred very properly to enable him to make out his account, and which costs, if he had been entitled to them, ought to have been brought forward and included in the award. Without going, therefore, further into that point, I am very clearly of opinion, and suggest to your Lordships, that there is no doubt that the Court below has come to a right decision with regard to that sum, and that, therefore, the appeal on that subject must be dismissed.

Now, there is another sum, viz. £258 and a fraction, of a different sort; there Sir John Macpherson's executors are sought to be charged, but they are sought to be discharged upon the result of the account which is directed to be taken. It is said there was no charge of this particular sum. It was not necessary to make a charge of that particular sum; there was a general account directed at the foot of the award. In the course of taking that account, there came out receipts signed by James Macpherson himself, by which it appeared that he had himself personally received this money as a dividend from some estate, and that money formed part of the assets of Mr. Macpherson. Then, how does he discharge himself? He must discharge himself, or there will be an end of all accounting; he is called upon for the first time to discharge himself—he has not been asked to account before; he is called upon, and he ought to have had some defence. It is not a very small sum, and how does he discharge himself? He discharges himself, my Lords, by saying, or his representatives do, that he handed it over to his co-executor. It was attempted to be maintained at your Lordships' bar, that the representative Mr. Tytler admitted in point of fact, that James Macpherson had received that money, but Mr. Tytler withdrew from that; and they say there was no entry of any sum from

one day to the other, which must have been found if this money had been paid. Then, my Lords, it comes to a simple naked case, did Sir John Macpherson, having received this money, part of the assets for which he was clearly responsible, account for it? He has now at your Lordships' bar not a shadow of defence as to the application of that money, from which he seeks to discharge himself. It is much to be regretted, from the circumstances of Sir John Macpherson's advanced age and other circumstances, that there is no sufficient explanation; but I cannot have any doubt that, morally speaking, he thought he had properly dealt with that money. But Courts of Justice do not go on presumptions in cases of this sort—there must be evidence. Some slight evidence might have been admissible, but there is no evidence on which any Court could rely; and, therefore, I submit to your Lordships that that finding of the Court below is also perfectly correct, and that the appeal in that respect also must be dismissed.

My Lords, that brings me to the point of law, and a very important point it is, that has been agitated at your Lordships' bar; and I must say, for myself, I have for a good many years thought it a concluded point, but it seems not to be so; and therefore it will be necessary now to consider what the construction of the authorities is, and what the law is, in this respect.

The point turns on the will of Mr. Macpherson and on a very few words of that will. He first of all had executed an entailing deed of his Scotch estates, under which James Macpherson was the first taker, and he then goes on in these words—"I request and direct the executors of my will hereafter mentioned, to consolidate into one fund the whole of my fortune and moveables, which fund they are to lay out in purchasing lands in Scotland to be entailed upon the series of heirs specified in the bond and deed of entail already mentioned, according to the strict forms of the law of Scotland." And immediately after that, this passage follows—"The principal of the annuities specified on the first page of this will, as they respectively fall, shall be applied to the purchase of lands in Scotland, to be entailed as already directed."

Then, my Lords, if you refer to the passage to which the testator is referring, you find this provision—"That out of the first and readiest of my money and effects, the above annuities be secured in the public funds, and that, as they respectively fall, the principal shall be added to the residue of my fortune, and be disposed of, as after directed, by the executors of this my will, for the benefit of the heirs appointed by the above-mentioned bond or deed of entail."

Now, my Lords, independently of authority, let us look at what ought to guide Courts. They are not bound by authority in the construction of a will of this sort; and, indeed, in the construction of any will, the great object of Courts of Justice must be, within settled rules of law, to give effect to the intention of the testator. Now, what was the intention of this testator? Clearly, as far as it could be effected by law, to place his personal property upon the same ground as the real estate. Did he mean the measure of enjoyment of the one, to be equal to the measure of enjoyment of the other? Did he intend them to go together, or did he intend them at any time to be separate? Had he in his contemplation any rule, or any intention, which, although he has not directed it, would compel his executors to take the interest for any given portion of time of the whole of his large personal property, and turn that into capital, and make that, and that only, capital, to be added to the capital he already possessed? He has not said so—it is not attempted to be contended; nor has it been decided in the Court below, that this gift directs the investment of interest, the accumulation of interest for the purposes of investment; on the contrary, after the first year, it has been held that the institute, the person entitled, had all the profits of both—the personalty to be invested, and the real estate as it stood; and taking it in that view, there cannot be, I think, the possibility of a doubt that that meets the intention of the testator, who tells you as plainly as language can describe it, his meaning:—"I mean my personal property at my death to be considered as real property, and to go with my Scotch estates, and, with the additions and accumulations of my Scotch estates, to the heir of entail, according to the deed I have executed." Suppose the heir has left at interest the whole of his property, could there be any doubt that he would take the new additional property in the same way as he disposed of the whole? Is it disputed that, if the executor had the next hour met with a convenient and proper estate, and bought it, the heir would not have been entitled? Clearly he would;—and, therefore, when we come to consider, independently of intention, the rule of law, it will be seen whether there is something which will prevent that which, I apprehend, is the real and clear intention of the testator.

Now, this may be spelling of words; but the truth is, when one is about to effect an intention which is said to be so obscure that the Court is said to imply something, you are entitled to spell words; but there is something to be gathered from the words which follow—"The principal of the annuities specified on the first page shall be applied in the purchase of lands." An annuitant would clearly be entitled at the death of the testator. Suppose that annuitant had died in three months, are you to accumulate that annuity for the remaining nine months? You could not do it; the words exclude it. It says, "the principal," therefore you would not take that which is not principal. If you look at the direction as to the payment of annuitants generally, you will find the same thing; it is the principal that is to be applied; and it is not necessary to press

this, because it is admitted that the true construction of the clause is to give capital only to be invested.

Look, my Lords, at what would be the consequence. Here we are now, at this very moment, arguing in respect of a fund which has never, except by imagination or intendment of law, changed its character. What remains is still personal estate, and yet we are asked, contrary to all the rules of equity guiding us on the subject, to consider that at this moment as if nothing was accomplished. Now, the rule on which the Court proceeds is, that this property was impressed by the will itself with a character of real estate, and being impressed with that character, it became real estate at the moment of his death, in my apprehension, and must be treated as such.

The question remains, my Lords, Are you bound by the authorities to decide against the view, and in favour of the decision of the Court below? I apprehend you are bound to do no such thing. The cases admit of very easy regulation.

Sitwell v. *Barnard* was exactly, in effect, like Lord Stair's case in Scotland—in each case there was a direction for investing the interest; if, therefore, there be a direction to invest the interest, the direction must be obeyed. But see what Lord Eldon did in *Sitwell* v. *Barnard:* He doubted himself at a later time, whether he had not taken a greater liberty with that will, in putting on it the construction he did, than he ought. But what did he do? There was a direction in *Sitwell* v. *Barnard* that the interest and dividends of the fund should be accumulated, and that the accumulated fund should be laid out; when, therefore, Lord Eldon took this view of the accumulation —which he could not strike out of the will, for he had no power to do so—when he decided that that accumulation should by construction terminate at the end of the first year—what did he do? He arrived at one of the most violent conclusions at which it is possible for a judicial mind to arrive,—but for what object? To let property and enjoyment go hand in hand. He saw an intention not to exclude, although the words did exclude, the persons to take successively, from each having, in his own time, the full measure of enjoyment which every other owner has, and therefore he did put a violent construction on that will, not from any fanciful rule to give a twelvemonth's consideration, but because he must give some effect to the words—and then, looking to the analogy of the common case of administration, he saw that to be a reasonable time within which that trust should be executed.

Now your Lordships are asked, on that foundation, to decide here that there must be a twelvemonth given within which there is to be no enjoyment of the tenant for life—that is, because, in a case where there was a direction for accumulation generally, and the Court restrained that in favour of enjoyment—in favour of the gift taking effect as early as might be, so that the tenants for life should be put on an equal footing,—you are asked to apply that to this case in order to introduce what you do not find on the face of the will,—a direction to accumulate for a whole year from the death of the testator. Why not three months? There is no strict or proper analogy between getting in an estate to pay legacies and debts,—and the case before you, of investing a large sum of money in the purchase of real estate in Scotland. He was forced to allow that accumulation to go on at the expense of the tenant for life, and he strained the law to meet the justice of the case; but your Lordships are asked to strain the rule of law in order to do injustice,—to do precisely the opposite of that which Lord Eldon strained the rules of law to effect. It is perfectly manifest, that if this case had come before Lord Eldon, he would, without hesitation, have decided that the tenant for life was entitled as from the death of the testator.

Now, *Sitwell* v. *Barnard*, as I well know, was for a long while misunderstood; Lord Eldon himself complained of it, that it had been misunderstood. Somehow or other, it was generally supposed that Lord Eldon had laid down some general rule. No other case ever came before him in which he did not take very great pains to explain to the bar that what he had decided was what I have stated, and he always took care to disclaim any intention of laying down a general rule applicable to the case before your Lordships.

Then came that case before Sir John Leach. It is not possible to say, with all the respect one feels for that learned Judge, but that he miscarried in that case. I have already stated there was an appeal against it, and it was compromised. Lord Eldon himself said as to that case, in the later case of *Angerstein* v. *Martin*, that if that case had been brought before him he should have required elaborate arguments before he came to that conclusion. The whole of the suit was nothing about the gift of a residue to persons for life with gifts over, and the whole of the estate was actually converted,—a great part of the property was actually in a state in which they were capable of receiving the income, and the other part had been converted long before the year. Sir John Leach thought fit to deny the tenant for life that to which he was entitled; your Lordships may safely be advised that that is not the law.

Then came *Angerstein* v. *Martin*, and *Hewitt* v. *Morris*. Now, as far as they go, they are not exactly this case; but, as far as they go, they are both clearly authorities on this case. In each case, Lord Eldon gave the tenant for life the fund as from the death; whereas, if the rule is to prevail which has been contended for at your Lordships' bar, they would not have been

entitled, but there ought to have been a time allowed,—there should have been a period. Clearly they do not adopt the rule which is contended for at your Lordships' bar, and it is not worth while again to read to you the passages; but Lord Eldon does shew the clearest opinion, that the true view in these cases is to give the interest on the rents to the tenant for life as from the death. He observes in *Hewitt* v. *Morris*, speaking of *Angerstein* v. *Martin*, "What could I have done if there had been a purchase in February, the testator having died in January?"—meaning to say, if there had been a purchase in February, the tenant for life must have taken the receipts. He was arguing evidently in his own mind, "How can I refuse to this tenant for life, from the death of the testator, the interest of the fund, if, being converted three or four weeks after the death, he would have been entitled to the property?" and he observes what is very important in *Hewitt* v. *Morris*, and *Angerstein* v. *Martin*—"I understand observations have been made that this is an exceptional case. My answer to that is," he says, "that it has nothing to do with the general law." That is the real truth of the case; it is a case that stands by itself, and is not governed by the general law under which it has been attempted to bring it.

Then, my Lords, how stand subsequent authorities? I agree as to the case before Sir Anthony Hart; but, without going into an examination of that, he went two-thirds on the way, and then stopped a little short on his road, but he certainly did not give the unconverted part; and there is no reported case that follows that. In the case before Lord Langdale, his Lordship went through all the authorities, and he clearly followed what I have stated to be the opinion of Lord Eldon in *Angerstein* v. *Martin* and *Hewitt* v. *Morris;* and it is singular enough that Sir Anthony Hart, in the case before him, professed to follow *Hewitt* v. *Morris*. So that, although he did not go to the extent to which he ought to have gone, in my opinion, according to *Hewitt* v. *Morris*, yet he approved of the authority; so that it is not a decision in opposition to what has been decided, but it is a decision by a Judge not following out a rule laid down by a former Judge, but miscarrying by not carrying it to the extent to which he ought to have gone.

Now, as to the case before Lord Langdale, it was said in argument at the bar about that case, that Lord Langdale introduced the difficulty, that there was no contest or controversy until he introduced it. Now, my Lords, it is not just to say so, because of the decision in *Sitwell* v. *Barnard*, and *Stott* v. *Hollingsworth*, there was a considerable misunderstanding,—and Lord Langdale makes this observation—"It is embarrassing to find the rule in cases of this nature so little settled. Lord Eldon seems to have considered the tenant for life entitled to the whole interest for the first year. Sir John Leach thought him entitled to no part of such interest. Lord Lyndhurst thought him entitled to such a sum by way of interest as would have accrued as dividends upon so much three per cents. as the residue would have purchased at the end of the year; and Sir Anthony Hart thought him entitled to the interest from the death of that part of the residue which, at the testator's death, was invested in the securities pointed out by his will; but that the interest on such part of the residue as was not so invested, was to be added to the capital." Then he makes this observation, which applies to the case before your Lordships—"In a case where there is no direction to accumulate, and therefore no direction to add interest to capital, it appears to me more likely to have been the intention of the testator, that until the lapse of such convenient time as may be allowed to the executor to make the conversion directed by the will, the tenant for life should enjoy the interest actually accrued; and if it should be held, as in *Dimes* v. *Scott*, that the conversion ought to be made in a year, I think that no inconvenience can follow from allowing the tenant for life the interest of the residue, making interest as it stood at the time of the testator's death until the end of one year, or so much of that year as shall elapse before the conversion of the residue according to the direction of the will." That is clearly a dictum in favour of the rule as I am submitting it to your Lordships. Lord Lyndhurst came to the same conclusion. I readily admit he came to that conclusion at the end of an argument on another point, and therefore I do not give to it all the weight to which his decisions are so justly entitled; but he must have considered this to be the rule, and he acted on it.

In the case before Vice-Chancellor Wigram, his honour went into a considerable comment on the cases; he was a little embarrassed with it, but he admitted the rule. Therefore, my Lords, I have no difficulty on the rule of law upon the authorities, as I think it is now settled. The difficulty which has arisen in the late cases is of a different nature; it is not a difficulty, whether the tenant for life is entitled at the death of the testator or not,—that is not the difficulty, and I have long considered that a perfectly settled question; but the difficulty is this, In what manner is he to have the benefit of that rule as between himself and the person entitled in remainder? In a case like this before your Lordships, it is a case of three per cents., and therefore he would clearly take the interest without making any call on the capital, according to the rules of equity; but where, as in the case of *Angerstein* v. *Martin*, it was Russia stock bearing a large interest, there a difficulty may arise—and there are other cases of the same sort. Lord Eldon gave to the tenant for life even that. Judges have since supposed that his attention was not drawn to it.

I do not think his attention was drawn to it, that is, the difficulty was not then suggested,—if you do give to the tenant for life the first year's income, yet give it him in that way which will be consistent with the rules of the Court in dealing with a tenant for life in remainder. I think Lord Eldon's attention was not called to that; but subsequent decisions have taken a fair course in that respect, and there will be no difficulty in dealing with a case of that sort when it arises. In this case, we are relieved from all such difficulty; and, therefore, without going further into a point which I have myself for many years considered to be decided—the rule in question—I submit to your Lordships, that so far as this point was decided against the appellants in the Court below, that interlocutor must be reversed, and it must be declared that that sum, the first year's dividends, was properly paid in the way it was; therefore the representatives of Sir John Macpherson are not liable in respect of that.

LORD BROUGHAM.—My Lords, on the whole, I agree with my noble and learned friend. The doubts I have had in this case have chiefly been in the course of the argument, with respect to the sums of £305 and £258 odds; but never so much doubt as to incline me to differ from the Court below, who have decided on these matters in the respondent's favour.

On the question of construction, I have had no doubt from the beginning, that the Court below had miscarried; and without going into the argument upon which my noble and learned friend has already addressed your Lordships, at great, though by no means unnecessary, length—without going into that argument, I wish to profess my opinion to be entirely the same with his on that subject.

With respect to his comments on the different cases, of course it is unnecessary that I should follow him in these comments. I agree with my noble and learned friend in the conclusion at which he has arrived, and in his comments also on the cases. With respect to the case of *Stott* v. *Hollingsworth*, tried before Sir John Leach, then Vice-Chancellor, I take it to be quite clear that that can no longer be law. With respect to the other case, before Sir Anthony Hart, reported in 2 Simons—so far as that case goes, I also am inclined to differ from that. I think the case of *Douglas* v. *Congreve*, before Lord Langdale, and *Taylor* v. *Clark*, before Vice-Chancellor Wigram, take a right view of the law. *Dimes* v. *Scott*, before Lord Lyndhurst, may be subject to some doubt—I mean with respect to the manner in which that case was decided, which really was not argued before my noble and learned friend who decided it;—therefore, I say nothing on that case, leaving the subject for that and other reasons.

On the whole, my Lords, I am quite satisfied that we do well in reversing the judgment of the Court below on the point of construction, and in declaring our opinion that that is the law.

LORD CHANCELLOR.—There will be no costs.

Mr. Stuart.—The costs below, we understand, follow your Lordships' decision—the expenses of the discussion as to the payment of the first year.

Mr. Rolt.—Your Lordship will not alter the interlocutor below as to expenses. My learned friend did not open it.

Mr. Stuart.—It could not be opened until the question was decided.

LORD CHANCELLOR.—If we gave you costs as to the one, we should be bound to give the costs of two-thirds of the case against you.

Mr. Stuart.—No, my Lord; it is the larger portion.

LORD CHANCELLOR.—No costs will be given in this House on either side.

Judgment of affirmance and reversal accordingly.

LORD CHANCELLOR.—My Lords, I omitted to state, when I last addressed your Lordships, that in reference to the point upon which a reversal of the judgment of the Court below has just taken place, I consider it to be quite clear, that the law of Scotland is, and ought to be, the same as that of England, on the subject in question; and though I addressed my observations chiefly to the law of England, still they will of course equally apply to the law of Scotland. That the rule was quite settled in Scotland, was sufficiently apparent from the case of *Campbell's Trustees*, where, in fact, the very point had occurred, and had been rightly decided, which we have now been dealing with, and which, if it had occurred in this country, would no doubt have been disposed of similarly. The only reason why the Judges in Scotland came to a different conclusion in the present instance, I conceive to be, that they had considered the law of this country to be different from their own, and from what it is found to be,—which was scarcely to be wondered at, from the state of the authorities to which I have already adverted, but which hereafter, I hope, will no longer be misunderstood.

LORD BROUGHAM.—My Lords, I entirely agree with what my noble and learned friend has stated. The learned Judges in Scotland had no doubt misconceived the state of the law of England on the point in question. They had begun with assuming that that law was settled, whereas it had not been so, and, in fact, the very case had arisen in Scotland under circumstances which much more clearly defined the law than any case which had occurred here; and I think your Lordships do well in now declaring the opinions already given to be the law, and as conclusive of the point in dispute, so that there may be no misunderstanding in future.

The following declaration was inserted in the order of the House:

"Ordered, &c., that it is hereby declared, that the late James Macpherson the younger was entitled to the first year's free annual proceeds of the executry estate of the said James Macpherson the elder, and that the executors of the late James Macpherson and the representatives of such executors are not liable to repay the same, and the cause with this declaration be remitted back to the Court of Session."

Second Division.—Lords Jeffrey and Wood, *Ordinaries.*—Hore and Sons, *Appellants' Solicitors.*—T. W. Webster, *Respondent's Solicitor.*

JUNE 14, 1852.

LAURENCE GIBSON, *Appellant, v.* The Rev. JOHN FORBES, *Respondent.*

Poor-Law Amendment Act, 8 and 9 Vict. c. 83—Church—Manse and Glebe.

HELD (affirming judgment), *that a parish minister is not assessable, under the Poor-Law Amendment Act* (1845), *in respect of ownership or occupancy of his manse and glebe.*[1]

This appeal was taken against the interlocutor of 10th December 1850, sustaining the reasons of suspension and granting the interdict, and the *appellant* in his *printed case* maintained that the same ought to be reversed, because—1. The manse and glebe of a parish minister in Scotland are assessable for relief of the poor, because the act 8 and 9 Vict. c. 83, directs the assessment to be imposed on the owners and occupants "of all lands and heritages within the parish," and contains no exemption in favour of the manse and glebe. 2. The minister of a parish is included under the term "owner;" and that term, as defined in the statute, purposely precludes the doubt which formerly existed in regard to the term "heritor," used in the act 1663, c. 16. 3. The same term "owner" is used in the Reform Act, 2 and 3 Will. IV. c. 65; and, in virtue of their character as "owners," ministers of a parish enjoy the privilege of being enrolled as voters. 4. A claim of exemption from general taxation cannot be presumed by a Court of law, and a party claiming such must shew that the legislature has enacted in his favour the privilege claimed. 5. No exemption from the assessment for the poor was conferred upon ministers of parishes by acts passed prior to 8 and 9 Vict. c. 83, and the intention of the legislature was, that all persons should contribute according to their means.—Act 1579, c. 74; Act 1663, c. 16. 6. The judgment of the Court of Session in The Heritors and Kirk-Session of *Cargill* v. *Tasker*, Feb. 29, 1816, F. C., related to the construction of the act 1663, c. 16, in which the term "heritors" is used; and assuming that judgment to be well founded, it has no bearing on the construction of the act 8 and 9 Vict. c. 83, in which the different term "owner" has been purposely employed. 7. The said judgment also related to the liability of ministers to be assessed "according to their means and substance," as directed by the said act; and to prevent a similar claim of exemption being again sustained, it was expressly enacted by 8 and 9 Vict. c. 83, "That clergymen shall be liable to be assessed for the poor in respect of their stipends."

The *respondent* in his *printed case* supported the judgment on the following grounds:—1. The decree now sought to be suspended is inept, in respect that, by the act 8 and 9 Vict. c. 83, it is the collector, and not the inspector of the poor who is entitled to sue for payment of poor-rates —*Leys* v. *Riddell*, 13 D. 630; 23 Sc. Jur. 281. 2. Prior to the passing of the Poor-Law Amendment Act, 8 and 9 Vict. c. 83, the ministers of the Church of Scotland were not assessable for poor-rate in respect of their manses and glebes; and that statute did not create any change in the law in this particular.—*Heritors of Cargill* v. *Tasker*, Feb. 29, 1816, F.C.; 43d Eliz. c. 2; 1579, c. 74; 1663, c. 16; 1672, c. 18; *Scott* v. *Fraser*, 1773, M. 10,577; *Parish of Inveresk*, 28th May 1794, M. 10,585; Stair, 2, 3, 37; *Minister of Little Dunkeld* v. *The Heritors*, M. 5153; *Ramsay* v. *Heritors of Madderty*, M. 5153; *Minister of Newton* v. *The Heritors*, Mor. App. *voce* Glebe, No. 6; *Lord Reay* v. *Falconer*, M. 5151, and Hailes, p. 890; *MacCallum* v. *Grant*, March 4, 1816, F.C., and 4 S. 527; Hunter on Landlord and Tenant, vol. i. p. 105, and authorities there referred to; Dunlop's Parochial Law, p. 402. 3. The exemption from liability under the old law has not been taken away by 8 and 9 Vict. c. 83, and, at present, ministers are exempt from assessment for their manse and glebe.—*College of Justice in Edinburgh*, M. 2418, H. of L. March 25, 1790.

Bethell Q.C., and *Anderson* Q.C., for appellant.—The question depends on the construction of 8 and 9 Vict. c. 83, and we have only to inquire, if the manse and glebe are assessable. By

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[1] See previous report 13 D. 341; 23 Sc. Jur. 120. S. C. 1 Macq. Ap. 106; 24 Sc. Jur. 524.