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.

§ 34, the assessment is to be imposed on "the owners and tenants or occupants of all lands and heritages within the parish." It cannot be said the manse and glebe are not lands and heritages, nor that the minister is not an "owner," this word being defined in the interpretation clause so as to include "liferenters as well as fiars, and generally all who are in actual receipt of the rents and profits." A minister is an "owner" within the Reform Act, 2 and 3 Will. IV. c. 65, which is a statute *in pari materia*. A small extent of interest brings one within the definition of "owner" under the present act.—*Hay* v. *Edinr. Water Co.*, 12 D. 1240. If a minister is not an owner, it is plain at least that no other person is owner during his incumbency. But, considering his rights and powers with respect to the glebe, (Dunlop's Par. Law, 163,) he comes most nearly under the class of liferenters, and, as such, is expressly liable. It is said—on the principle *expressio unius est exclusio alterius*—that because § 49 expressly renders stipend assessable, the manse and glebe are not intended to be so; but no express or positive enactment was necessary further than the words of § 34, which are general and absolute. Section 49 was not even necessary in order to make stipend assessable, which would have been liable "as means and substance" without that clause. The true and only intelligible reason why § 49 was introduced at all, was not because § 34 was obscure, but because there had been, since *Cargill* v. *Tasker*, a general impression that ministers were not liable *quoad* stipend. That, however, was a wrong impression; for, under the old acts, the language was quite comprehensive enough to include ministers. No doubt, owing to there being no compulsory assessment, and to the heritors being in the habit of assessing themselves, they generally exempted the minister; but that was out of courtesy, and not because he was not in point of strict law liable. Of course, if the rate-payers agreed to exempt the minister, it was nobody's business to complain. The old law was however clear. The earliest important statute 1579, c. 74, rendered "the haill inhabitants, without exception of person," liable to contribute; and the subsequent statute 1663, c. 16, and the proclamations 11th August 1692 and 29th August 1693, use or imply similar words. The case of *Cargill* v. *Tasker* is exceedingly obscure; but it neither did nor could decide the point in dispute here, which was not indeed necessary, the sole question being there, whether the minister was liable in the circumstances according to his means and substance. There was also an *obiter dictum* that the minister was exempt, being "neither an heritor, tenant, nor possessor." We deny the authority of that *dictum;* but even if it were sound, the word "owner," which is used in the act 8 and 9 Vict., is much more extensive in its meaning than the word "heritor." Even supposing, however, the law was as claimed prior to 8 and 9 Vict., the 91st clause repeals all prior statutes and usages inconsistent with that act, and that was held a most important clause, *per* Lord Truro in *M'William* v. *Adams*, ante p. 24: 1 Macq. Ap. 120; 24 Sc. Jur. 399. If, therefore, all usages inconsistent with § 34 are repealed, a minister is clearly liable for manse and glebe.

Sol.-Gen. Kelly, and *Rolt* Q.C., for respondent.—Not only was it the law before 8 and 9 Vict., that ministers were exempt from all liability to poor's-rates, but it was notoriously so—it was an immemorial usage and understanding. That being so, § 34 merely provides for the assessment being made by the parochial board in a particular manner, and the legislature there uses language well known to the law, but which from time immemorial did not include ministers.

[LORD CHANCELLOR.—But the other side say, whatever may have been the former construction of the words used, the words now used are comprehensive enough to include ministers; thus the word "owners," which is new.]

Though the language is different, the meaning is quite the same, and no new liability is imposed by § 34. If, then, it were notorious that ministers under the old law were exempt, how is it possible to suppose that § 49 would be inserted as to stipend, if it had been intended that the manse and glebe should also be assessable? It was not so much the subjects which the minister possessed, as he himself personally who was formerly exempted. It is not, therefore, enough to say § 34 uses language sufficiently extensive to include the manse and glebe, for the old statutes used words quite as wide, as "the haill inhabitants without exception," "all heritors, possessors, or occupiers," &c. Yet it is plain from *Cargill's case* and the Succoth papers, that ministers were nevertheless not comprehended. Succoth says—and he had a great practice in teind cases, &c.—that he had only known one or two cases where ministers had been included in the assessment. We say, therefore, that it is plain from § 49 that ministers are not intended to be included within § 34, else why should that clause have been inserted? This construction is confirmed by § 50, which relates to the College of Justice, the members of which might in the same way be said to be comprehended within § 34, and yet it is plain they are not. Section 49 therefore shews, that the legislature had the whole subject of a clergyman's exemption (which was notorious) present to the mind at the time; and when stipend alone was selected to be assessable, it is clear nothing else was included. Besides, the exemption having existed from time immemorial, the privilege could not be wiped out by a mere implication—*College of Justice*, Mor. 2418; and a special substantive clause would be necessary to take it away. As to § 91, that only repeals statutes, &c. which are inconsistent; but so far from a minister's exemption being a usage inconsistent, it is, on the contrary, quite in harmony with the act. Lord Truro's view of this

clause in *M'William* v. *Adams*, arose from this, that the statute elsewhere expressly says, "that nothing in this act shall be held to give able-bodied men a claim of relief."

LORD CHANCELLOR ST. LEONARDS.—My Lords, the question in this case lies in a very narrow compass, although one of great importance to the law of Scotland. The question is, whether a minister is liable to be rated for his manse and glebe in aid of the poor. Now, this depends on the statute 8 and 9 Vict. c. 83, which has been referred to—and before that statute we must take it to be quite clear, as a matter of fact, that clergymen in Scotland were not liable to be rated to the poor, either in respect of their manse and glebe, or of stipend. *Cargill's case* is a very clear authority for that proposition. There a minister was a party equally to the action and proceedings, and it was decided, and I think clearly, by the Court, that *quoad* minister he was not liable in any character. Whether that depended simply on the construction of the act of parliament, or on usage, may not be so clear; but I think this perfectly clear, that although under the first act, for example, in Scotland, it does not distinctly in word say "ministers," yet it does use expressions which beyond all doubt, in my mind, would include ministers. If you give the words their natural import, "all the inhabitants," without any omission with respect to any person—nobody is to be omitted—what can be more express than that those terms include everybody. Notwithstanding those terms, it has been held in Scotland, and was considered to be still law in Scotland at the time of this act of parliament, that ministers were not liable to be rated to the poor in respect of their stipend, or their manse or glebe.

Then comes the act of parliament. Now, upon that act, I myself should have been clearly of opinion, if it had not been for the clause to which I shall refer your Lordships, that the first clause was quite sufficient to include ministers in respect of their glebe or manse. I could have had no doubt of that, for the words are express. It speaks of "owners," and clergymen are in a sense "owners." But the section describes owners as persons who are entitled to "rents and profits." I should be of opinion now, on the whole construction of § 1 in connection with § 34, that "owners" did include clergymen in respect of their manse or glebe. I should be of opinion, under the description, or in the clear words of § 34, which both describes the manner in which the assessment is to be made, and the persons upon whom it is to be made, "and the other half upon the whole inhabitants according to their means and substance," that those words would clearly include ministers in Scotland in respect of their "means and substance." So that, taking the two provisions together, if the act of parliament had stopped there, I should have considered it perfectly clear that ministers were included. Then comes § 91, which makes it still more clear, and which repeals all former laws at variance with this act. If the words of the act would have included ministers both in respect of their manse and stipend, then the act of parliament must have had its full operation.

Now, my Lords, the grounds, upon which I think your Lordships will agree with the Court below, do not depend entirely on those words. I think the enactment does include ministers—that is, would have included ministers if it stood unexplained with respect to both properties; but when I find an express provision in § 49 "that clergymen shall be liable to be assessed for the poor in respect of their stipends," as an actual, substantive, definite provision, introduced by itself, of so much importance as to form a separate section, I say at once, that the words which would *primâ facie*, and upon their standing alone in the former part of the act, include ministers in respect of their stipends, were not intended or considered to be operative for that purpose, because an express provision is afterwards inserted in order to make stipends liable. Now, as stipends would have been liable under the former words if they had remained unexplained, when I find an express enactment making stipends alone liable, not including the manse or glebe—it must necessarily, if it becomes at all in that respect glebe to be charged—it must be charged as stipend. This shews they were not introduced in the sense contended for, otherwise the intention would not have been subsequently explained. If the words, "all the inhabitants according to their substance," did not include "stipend," as they clearly would if unexplained, then the preceding words, "other persons entitled to rents and profits," would not include "manse and glebe." They stand on precisely the same footing. If one was intended to embrace one case, the other must be equally intended to embrace the other—the one to embrace the manse and glebe, and the other to embrace the means and substance. And then, when I find the act of parliament tells me that the one which implies means and substance on the face of it, does not mean manse and glebe, but the stipend, I think it is quite clear that the words, in the first part, are not used—although they bear, and would seem to have that meaning—by the legislature in a sense which would authorize your Lordships to say, that the contrary usage was intended to be abolished, which existed up to that time, which usage must be taken to be the law; but they were intended to be exempt so far as provision was not made for their charge.

Then the next section is also material. There was an exemption that was repealed. There was an exemption which was not to continue any longer—"That the privileges of exemption from payment of assessments in the city of Edinburgh, possessed and enjoyed by members of the College of Justice and officers of the Queen's household, shall not be applicable to assessments imposed and levied for the relief of the poor under the authority of this act." So that, in

the one case, where there was an exemption in the case of clergymen, the exemption is actually changed—and, in the other case, the privilege of exemption is made to cease, and in that case the language is different.

Then § 91, in this sense, does not bear against the construction, because those acts are only repealed so far as they are inconsistent with the provisions of this act. Then they are not inconsistent with the provisions of the act, because the true construction of the act, taking the whole of the context, is that which was put on it by the Court below—namely, that it does not charge the minister, but his stipend. My own impression is, that it was meant to be a courtesy and kindness towards the church in Scotland when that construction was adopted. The act of parliament seems to me in accordance with what was the general usage in Scotland; and while it makes the stipend liable, it did not intend that the minister should be assessed in respect of the small bit of ground round his dwelling. I apprehend, therefore, that the Court below was quite right in the decision it came to; and I therefore move your Lordships that the appeal be dismissed.

LORD BROUGHAM.—My Lords, I quite agree with my noble and learned friend, that the Court below came to a right conclusion in this case. It is very true, as has been contended, that we are here on the construction of an act of parliament—an act of parliament alone; but that does not exclude from our consideration, in arguing on the construction of this statute, the usage, any more than it does decide on the exemption claimed prior to that act in 1845; because we cannot well construe this act, confining this case to the construction of this act, as we no doubt must do, without having regard to the previous usage. Now, I agree with the case of *Cargill* v. *Tasker*, and I think it rightly decided. It has, at all events, been decided now about thirty years, and has been acted on, and may be taken to make the law on this point. Be that as it may, I think the usage in practice and fact, independent of the construction of the law in that case, to be most material. Now of that fact there can be no doubt whatever; we have it not only in that case, but we have it in the opinions of the learned Judges in this case, whose construction of the law is now under review, of whose statement of facts there can be no doubt, and to whose statement of facts, so much within their own knowledge, the greatest deference is due. Now, Lord Cuninghame states it most clearly in words, as strong as it is possible to put it, that there has been time out of mind, in fact for ever, an exemption on the part of the church of the glebe and manse. My Lord Succoth, a very high authority on these matters, says in a note read from his manuscript, that he has known instances, or that cases of exemption in point of law have not been so absolute as is contended, and that in some cases he has known ministers charged. But, observe, there are nine hundred or a thousand cases of ministers in the Church of Scotland, and for two centuries and a-half the exemption has existed; and all his Lordship can say is, that in some few instances he has known them charged. I therefore take it to be perfectly clear, as a fact, that there had been exemption in this case.

Now comes the legislature dealing with this case,—and it was before and within the knowledge of the legislature at the time, because the 50th section, with respect to the College of Justice, shews that those exceptions were peculiarly within their consideration at the time they passed the 49th section. They enact, "that clergymen shall be liable to be assessed for the poor in respect of their stipends," and they say no more. They, knowing the exemption that had existed of the means and substance of the clergymen, namely, the glebe and manse, confine the legal exemption to the stipend. I need hardly remind your Lordships that the manse and glebe come within means and substance just as much as the stipend. If any doubt could exist as to that, the 48th section will shew it, by which it is enacted, "That no person shall be liable to be assessed in any parish or combination, on his means and substance, unless the estimated value thereof in whole shall exceed £30." It is clear that if he had a house or land, and it had exceeded the value of £30, that would be taken into the account. Therefore, it is perfectly clear that the first expression, means and substance, includes land—manse and house being exempt in respect of those means and substance, which were of two kinds—house and manse, and stipend. The legislature is dealing with the subject of the exemption, and it confines its repeal of that exemption to the stipend, leaving the manse and glebe where it stood before.

I do not see that it is necessary to go further into the case. My noble and learned friend has stated his opinion on the 91st section, in which I entirely coincide. I threw out while the argument was going on, that any variance or inconsistency with the provisions of this act must be taken as altogether repealed. Now, what are the previous provisions of this Act? If we are right in affirming the judgment of the Court below, one of the grounds of that judgment was, that the words "the provisions of this act," referred to in the 91st section, are a general saving of the provisions in this act, and that the clergy are exempt in respect of their glebe and lands, although not in respect of their stipends. That is the effect of the previous provisions; and the 91st section says, that whatever is inconsistent with those provisions, is not to be regarded. Therefore, I am of opinion that the Court below came to the right conclusion, and that their judgment must be affirmed.

Mr. Rolt.—My Lords, this is a minister suing alone against the public purse. It will be two years' stipend to him.

LORD CHANCELLOR.—We dismiss the appeal without costs. I should much doubt what you are stating; it looks very like a proceeding on behalf of the church generally.

Mr. Rolt.—I am told not, my Lord; I am told that numerous boards of parishes have subscribed for this matter, but that fact could be ascertained.

Interlocutor affirmed.

Second Division.—Lord Dundrennan, *Ordinary.*—Connell and Hope, *Appellant's Solicitors.*—Robertson and Simson, *Respondent's Solicitors.*

JUNE 15, 1852.

MRS. LUCY THOMSON or DAVIDSON and Husband, *Appellants*, *v.* MRS. ANN CHRISTIE or THOMSON and Husband, and (D. J. MACBRAIR) Mandatory, *Respondents.*

Trustee, Liability of—Culpa—Factor—Law-Agent—*A trustee, T., under a trust deed which authorized investment in securities (not defining these), lent trust monies on security of two houses (a second mortgage), and on selling under the power of sale gave up possession, and allowed the purchase-money to remain long unpaid, whereby the whole was lost.*

HELD (affirming judgment), *that T. was liable to repay the trust money so lost, as he ought to have pursued the transaction to its end promptly.*[1]

The *appellants*, in their *printed case*, contended that no loss to the trust estate had arisen by any fault of Mr. Thomson, the trustee whom they represented; and if it were so, he was protected by the trust-deed:—Authorities Cited—*Dalrymple*, M. 3534; *Campbell and Clason* v. *Campbell*, in H. of L. May 30, 1845; 17 Sc. Jur. 500.

The *respondents*, in their *printed case*, contended that the judgments were well founded, because "the sums, for which Thomson has been made personally answerable, were lost to Haldane's trust estate through Thomson's negligence and breach of duty as trustee and law-agent of the trust." *Morrison* v. *Miller*, 5 S. 322; *Anderson* v. *Small*, 11 S. 382; *Mayne* v. *M'Keand*, 13 S. 870; *Sym* v. *Charles*, 8 S. 741; *Fowler* v. *Reynal*, 3 Mac. & G. 500; *Rowland* v. *Witherden*, *ib.* 586.

B. Andrews Q.C., and *Bethell* Q.C., for appellants.—The discretion allowed to the trustees by Haldane's trust-disposition is so ample and almost unlimited, that it covers any defect in Thomson's discretion as trustee and factor—1 Bell's Com. 459; *Dalrymple* v. *Murray*, and *Campbell* v. *Campbell*, *supra.* We admit, if the words of a trust are not express, the ordinary relation of truster and trustee will still create a liability; but when a specific clause of indemnity is introduced, it is different. It cannot at least be said, in the present case, that Thomson was wrong in lending the £600 by the bond, for the security was then ample. It is usual in Scotland for trustees so to deal with trust-monies, and there is no severe rule as to investing in the funds, such as prevails in England. As to the sale, it is true that the articles of roup contained one condition to the effect that the purchaser should, within 20 days, grant a bond with caution for the price. But it has never yet been held, that a trustee may not dispense with or waive a condition of sale which he may find to operate to the prejudice of the estate to be sold. All that a court of equity here would have done, would be to direct an inquiry, whether, at the date of Thomson's death, the property was of less value than it was at the time of sale. The sole negligence of which Thomson was guilty, if any, was in his not putting up the subjects again for sale after he had discovered that Tasker and Scott had purchased, not for themselves, but for Alison—though, perhaps, he would in that case have obtained a less price. As to the deeds, they were prepared, not by Thomson but by Thomson Paul his agent, and a trustee cannot be liable under this trust for the acts of his agent.

[LORD CHANCELLOR.—Surely you can't say a trustee is not liable for a breach of trust because he has an agent. Does that not make the matter worse?]

A trustee may competently say, I shall be answerable for my own acts, but not for any agent; and it would be a hard thing if a trustee were to be prevented from having an agent. In *Moffat* v. *Robertson*, 12 S. 369, it was not sought to make the trustee liable for the act of his agent, but for an act of his own. Then it is said the deeds bore that the purchase-money had been paid—

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[1] See previous report 12 D. 179; 22 Sc. Jur. 21. S. C. 1 Macq. Ap. 236; 24 Sc. Jur. 526.