have effect or be satisfied out of the personal or moveable estate or effects of such person or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of." It seems to me impossible to say that any moneys which may be received by virtue of the dispositions which have been under consideration, by the persons who are named as beneficiaries in Mr Methven's will who in consequence of Miss Scott's disposition would take certain further benefits, are received as gifts by Mr Methven's will, which by virtue of that will are payable out of any personal estate of his, or any "personal estate" over which he had "power to dispose of."

For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON—My Lords, I also am of opinion that the judgment appealed from ought to be affirmed. I do not wish to suggest that Miss Scott could not have made such a disposition by her will in favour of the beneficiaries under the executory of Robert Methven as would have entitled the Crown to claim payment of duty. She unquestionably could have directed the trustees of Methven, whom she made her executors, to pay these duties to the Crown; and that direction would have been as imperative as any other direction to be found in her bequest. I do not think it is necessary to speculate how far she could have accomplished that object of making the Crown entitled to these duties by an endeavour to give her estate in such terms as would make it an estate which had belonged to the deceased at the time of his death, or would make it so much a part of the estate which he left as to put it in the same position under these statutes as if it had in point of fact belonged to him. I am satisfied that none of these things was either done or attempted here. Miss Scott created, according to my view, a new trust in the persons of Methven's executors, the purpose of the trust being not that the fund which she committed to them should become part and parcel of the deceased's estate—Methven's estate—or to suggest that it had ever belonged to him, but in order that it might be administered by the trustees as a separate estate, separate from his but in the same manner and subject to the same conditions as if it had originally been the property of Methven himself.

LORD ASHBOURNE—My Lords, I entirely concur. The claim of the Crown is practically for the recovery of a double duty, and for the reasons stated by the Lord Chancellor, I think their case has entirely failed.

LORD MORRIS—My Lords, I concur.

Their Lordships affirmed the judgment appealed from, and dismissed the appeal with costs.

Counsel for the Appellant—The Lord Advocate (J. B. Balfour, Q.C.)—The Solicitor-General (Sir John Rigby, Q.C.)—Patten-Macdougall. Agent—Sir W. H. Melville, Solicitor for England of Board of Inland Revenue, for P. J. H. Grierson, Solicitor for Scotland of the Board.

Counsel for the Respondents—Sir Henry James, Q.C.—Lorimer—T. Shaw—James S. Henderson. Agent—D. E. Chandler, for William Black, S.S.C.

COURT OF SESSION.

Tuesday, March 20.

FIRST DIVISION.

[Court of Exchequer.

M'DOUGALL (SURVEYOR OF TAXES) *v.* SUTHERLAND.

Revenue — Income-Tax — Income-Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 167, *Schedules A and E — Customs and Inland Revenue Act* 1876 (39 *and* 40 *Vict. cap.* 16), *sec.* 8 *— Emolument — Abatement on* £120 *on Incomes under* £400.

The minister of a Free Church of Scotland who had an income of £364, 10s., occupied rent free a manse, the annual value of which was £50. He was entered in the valuation roll as proprietor of the manse, although in point of fact the manse was vested in trustees for behoof of the congregation. If the annual value of the manse was added to his income it exceeded £400, but if otherwise, it was only £364, 10s., on which income (less £15 for life insurance) he was assessed under Schedule E. He appealed against this assessment. He maintained that the annual value of the manse was not part of his "income" in the sense of the Income-Tax Acts, that his income was therefore less than £400, and therefore that he was entitled to the abatement on £120 allowed by these Acts on incomes under £400.

Held that the annual value of the manse did not fall to be included in reckoning his income, that therefore it did not exceed £400, and that he was entitled to the abatement.

Tennant v. *Smith*, March 14, 1892, 19 R. (H. of L.) 1, *followed.*

The Customs and Inland Revenue Act 1876 (39 and 40 Vict. cap. 16), sec. 8, provides—"The following relief or abatement shall be given or made to a person whose income is less than four hundred pounds—that is to say, any person who shall be assessed or charged to any of the duties of income-tax granted by this Act, or who shall have paid the same, either by deduction or otherwise, and who shall claim and prove in the

manner prescribed by the Acts relating to income-tax that his total income from all sources, although amounting to one hundred and fifty pounds or upwards is less than four hundred pounds, shall be entitled to be relieved from so much of the said duties assessed or paid by him as an assessment or charge of the said duties upon one hundred and twenty pounds would amount unto."

At a meeting of the General Commissioners of Income-Tax held at Rothesay on 30th October 1893, the Rev. Andrew Neil Sutherland, minister of the Free Church, Rothesay, appealed against an assessment made on him under Schedule E of the Income-Tax Acts for the year 1893-94 on £349, 10s., on the ground that he was entitled to an abatement from his income of £120 allowed on incomes under £400.

After hearing parties, the Commissioners sustained the appeal and allowed the abatement of £120.

The Surveyor took a case for the opinion of the Court of Exchequer in accordance with the Taxes Management Act 1880 (43 and 44 Vict. cap. 19), sec. 59.

The first rule under Schedule E of the Income-Tax Act 1842, under which the assessment was imposed, provides that "The duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Schedule E, or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions."

The employments of profit mentioned in Schedule E include "any office or employment of profit held under any ecclesiastical body."

The fourth rule under Schedule E provides that "The perquisites to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments, and payable either by the Crown or the subject in the course of executing such offices or employments."

The duties to be paid under Schedule A are in respect of "all lands," &c., "in respect of the property thereof," and under Schedule B "all lands," &c., "in respect of the occupation thereof."

Section 167 of the same statute enacts "That the annual value of lands, hereditaments, or heritages belonging to or in the occupation of any person claiming the said exemption, shall be estimated for the purpose of ascertaining his title to such exemption according to the rules and directions contained in the said several Schedules (A) and (B) respectively." . . .

The facts stated in the case were:—"1. The appellant is minister of the Free Church at Rothesay, and his whole income is derived from that office, and, exclusive of the annual value of the manse, amounts to £374, 10s., or after deducting £10 allowed for expenses, £364, 10s.

"2. He is entered in the valuation roll for the burgh of Rothesay as owner and occupier of the Free Church Manse of Rothesay, the annual value of which is £50, and is assessed under Schedule A of the Income Tax Acts for the said manse thus:—

No.	Occupier.	Property.		Proprietor.	Rent or Annual Value in Valuation Roll.	Gross Rent or Annual Value assessed.	Deductions, Rates and Land Tax.	Net Annual Value assessed.	Duty.
		Name or Situation.	Description.						
1944	Proprietor.	Serpentine Road,	House.	Rev. A. N. Sutherland.	£ 50	£ 50	£ s. 3 10	£ s. 46 10	£ s. d. 1 7 1

"3. He is also assessed to Inhabited House Duty as occupier of the said house on the sum of £50.

"4. The manse, in terms of a disposition dated 17th June 1859, and which disposition, and the model trust-deed referred to in it, it is agreed may be referred to as part of this case, is vested in trustees for behoof of the Free Church congregation of Rothesay, and it is thereby declared that the manse is to be 'for the use of the minister for the time being of the said congregation during his life, and so long, but so long only, as he shall remain minister thereof, and shall not be debarred from the use, occupation, and enjoyment of the same by or in virtue of a sentence judicially pronounced' by a competent Judicatory of the Church.

"5. The whole manse is in the possession of the appellant, and is used by him as his residence as minister of the congregation.

"6. The appellant stated that no use is made by him of the house except in direct connection with the duties of his office, and that he is bound to remove from the said manse in the following circumstances:—1. If he were transferred by the Church Courts from the ministry of the said congregation to the ministry of another congregation of the Free Church; and 2. If, on the appointment of a colleague minister in the said congregation, the manse were made a residence for the colleague minister."

Mr Sutherland's contention against the annual value of the manse being reckoned as part of his income, was thus stated in the case:—"That the advantage of free residence which he derived from the discharge of his duty of residing in the manse for the purposes of the said congregation, was not a subject of assessment in any of the schedules of the Income Tax Act, and therefore was not to be taken into account in calculating his total income under section 8 of the Income Tax Act 1876."

Although the respondent paid the property tax assessment, it was not disputed by the appellant at the bar that it had always been repaid to him by the Deacon's Court.

It was argued for the Commissioners—The annual value of the manse formed part of the respondent's income under Schedule E. This case differed from *Tennant* v. *Smith*, January 21, 1891, 18 R. 428—*rev.* March 14, 1892, 19 R. (H. of L.) 1, in respect—(1) The bank there was assessed as proprietor of the premises, whereas here the occupier was entered as proprietor. (2) The respondent was a liferent proprietor, and was entered in the valuation roll and assessed as proprietor. Ministers in similar positions to the respondent have been found entitled to vote as owners or proprietors in liferent of their manses—*Rutherford* v. *Young*, December 2, 1863, 2 Macph. 180; *Robbie* v. *Meiklejohn*, December 19, 1868, 7 Macph. 296. He was therefore liable to assessment under Schedule A. The 167th section of the Income-Tax Act of 1842 showed how income arising from lands is to be estimated with reference to claims of exemption.

Argued for the respondent—The annual value of the manse ought not to be included in estimating his income. The mere fact that his name appeared as proprietor in the valuation roll was nothing to the purpose in reference to the present question if in point of fact he was not proprietor. The trustees were vested in the manse, and not the respondent. *Tennant* v. *Smith* was exactly in point, and the same principle should be applied here. The respondent was not proprietor, nor was he in the enjoyment of what might yield him £50 annually.

At advising—

LORD ADAM—The question in this case is whether the respondent, who is the Free Church minister at Rothesay, is entitled to an abatement of income-tax, under the 8th section of the Customs and Inland Revenue Act 1876, in respect that his total income from all sources is under £400 per annum.

It is stated in the case that his whole income is derived from his office of minister of the Free Church, and amounts, after deducting £10 allowed for expenses, to £364, 10s.

The appellant, however, proposes to add to that sum the value of the manse which the respondent occupies, which he estimates at £46, 10s.—thus making the total income amount to £411.

The question therefore is, whether the value of the manse ought to be added to the respondent's income from other sources in considering whether he is entitled to the abatement claimed or not?

In this case the respondent is assessed under Schedule E of the Income-Tax Act 1842 (5 and 6 Vict. cap. 35) as holding an office or employment of profit under an ecclesiastical body, viz., the Free Church of Scotland.

It was held in the case of *Tennant* v. *Smith* in the House of Lords, 19 R. (H. of L.) 1, that the duties chargeable under Schedule E on persons holding such offices or employments, for "all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices and employments," did not include the annual value of a house occupied rent free by the agent of a bank, and forming part of the bank premises, and that such value ought not to be taken into consideration in estimating the amount of his income. In that case the bank agent was bound to occupy the house personally, and could not let it, so that he could not convert his right to occupy it into money; and it was said by Lord Hannen that different considerations would apply to the case of an agent who as part of his remuneration has a house provided for him which he might let. That, he says, which could be converted into money might reasonably be regarded as money.

That leads to the consideration of the terms on which the respondent occupies his manse.

It is stated in the case that the manse is vested in trustees for behoof of the Free Church congregation in terms of a disposition dated 17th June 1859 and the model trust-deed therein referred to, which are held to be parts of the case, but I do not find any statement of the terms on which the respondent holds the manse under them, but I presume the terms are the same as those under which the trustees are vested in the building.

Now, I find that there is appended to the model deed the form of a simple disposition for a manse which seems to be appropriate to this case. From this form it appears that the subjects conveyed to the trustees are held by them in trust, that the manse shall in all time coming be used, occupied, and enjoyed as and for a manse in connection with the Free Church of Scotland, and that by and for the use of the minister for the time being of the congregation during his life, and so long, but so long only, as he shall remain minister thereof, but always under the conditions, provisions, and declarations contained from tertio to duodecimo, both inclusive, in the model trust-deed there referred to.

That model trust-deed is very lengthy, and seems adapted to the case of a church rather than to that of a manse. The only provision I can find in it which seems to have a bearing on the present question is contained in article 3, which declares that the building shall be under the immediate charge and management of the elders and deacons, or elders acting as deacons for the time being, of the congregation in the use, occupation, and enjoyment at the time of such building.

It appears, accordingly, that this dwelling-house is provided to the respondent as the minister of the congregation, and is in all time coming to be used, occupied, and enjoyed by him as and for a manse in connection with the Free Church. It does not appear to me that the right to occupy a dwelling-house on these terms is one which was intended to be convertible into money. I think, therefore, that the principle of the case of *Tennant* v. *Smith* ap-

plies to this case, and that the value of the manse ought not to be added to the respondent's income. It may possibly be that such manses are occasionally let without objection by the trustees, and if so, the income so obtained will be assessable. But that cannot affect the present question.

But the appellant further maintained, as I understood his argument, that in estimating a person's "total income from all sources" there fell to be included the annual value of all property for which he was chargeable under Schedule A, and that the 167th section of the Act of 1842 contained directions for estimating these values for the purpose of ascertaining the title to abatement when abatement was claimed. That would appear to be so, but the question remains whether the respondent is chargeable under Schedule A.

Section 167 provides that the annual value of lands, tenements, &c., belonging to or in the occupation of any person claiming exemption shall be estimated for the purpose of ascertaining his title to such exemption, according to the rules and directions contained in the said several Schedules (A) and (B) respectively. It was said that the respondent was chargeable as occupier of the manse, that he was proprietor of the manse in the sense of the Act, that he was ultimately chargeable as such proprietor, and had in fact been assessed as occupier and had paid such assessment.

It appears to me that the respondent is in no sense proprietor of the manse. The trustees are proprietors, and are the persons who are ultimately chargeable as owners in respect of it.

It is true that the respondent is entered in the valuation roll as proprietor, but that will not make him proprietor or liable as proprietor. It is also true that he has been in use to pay the property tax assessment, but he was bound to do so as occupier of the manse, and it was stated, and not disputed, that it has always been repaid to him by the Deacon's Court of the Church.

The decisions which were quoted to us to the effect that ministers in the position of the respondent had been found entitled to vote as owners or otherwise of their manses, have no bearing on the present question.

I am therefore of opinion that the determination of the Commissioners was right, and that the appeal should be refused.

LORD M'LAREN—The case is so far different from that of the bank agent—*Tennant* v. *Smith*, 19 R. (H. of L.) 1—that in the case cited the Bank of Scotland was undoubtedly the proprietor of the bank office at Montrose, including the agent's residence, and was liable to assessment under Schedule A, unless it could be shown that the bank had given its agent a right which might be treated for the purposes of Revenue legislation as a qualified ownership. Now, in the present case the feudal owners of the subject are a body of trustees, who hold the manse in trust for the benefit of the minister of the congregation for the time being, and no one but the minister derives any benefit from the manse directly or indirectly. If I were approaching the consideration of this case without the aid of previous decisions, I should be disposed to hold that the primary question was, whether the minister was liable (without relief) for property-tax under Schedule A. If he is so liable, then the occupation of this house is part of his income, and he is not entitled to the abatement claimed. This way of looking at the case seems to be consistent with the opening sentences of the opinions of Lords Watson and Macnaghten in the case referred to.

But then another criterion applicable to claims of this description is proposed in the opinion of the Lord Chancellor, and I think assented to by all their Lordships, viz., that in construing the statutory provision as to abatement, and in particular the expression "total income from all sources," nothing is to be treated as income unless it is capable of being turned into money. I think the circumstance that the bank agent was not entitled to let his residence, but was under obligation to live in it, was the decisive element in that case, although other elements were referred to; for example, that the occupation of the bank agent was that of a servant or manager under a contract of service as distinguished from that of a tenant. In the present case the manse is vested in trustees, and it is not said that the minister is a tenant. He is a beneficiary under the trust, and it is to my mind perfectly clear that under the conditions of the trust the minister has a residence provided for him to enable him to discharge the duties of his office, and that he would not be able to let this residence to a yearly tenant without committing a breach of contract. His equitable estate is therefore not a right capable of being turned into money, and I attach no importance to the consideration that with the consent of the trustees the minister might let the manse furnished for a few weeks in summer when absent from his charge, or when his duties did not require that he should personally occupy the manse. It is no doubt true that the use of the manse is part of the consideration which the minister receives under his contract with the congregation or their ecclesiastical superiors, but if I rightly follow the decision in *Tennant's* case it is not "income," and is not to be taken into account in estimating his right to an abatement of tax on the ground that his total income from all sources is under £400.

I do not of course mean to imply that the manse is to escape taxation under Schedule A. How it is to be assessed is a question not before us. In the present case we are only concerned with the question whether a value is to be put on the occupation for the purposes of the claim of exemption.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court affirmed the determination

of the Commissioners and allowed the abatement claimed.

Counsel for the Surveyor of Taxes—Dean of Faculty (Sir Charles Pearson, Q.C.)—A. J. Young. Agent—The Solicitor to the Board of Inland Revenue.

Counsel for Mr Sutherland—Jameson—Guthrie. Agents—Cowan & Dalmahoy, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Sheriff of Berwickshire.

WILSON *v.* CARMICHAEL & SONS.

Sale—Disconformity to Contract—Loss of Profit—Consequential Damages—Duty of Timeous Inspection by Purchaser.

In June 1891 a nursery gardener purchased from a firm of agricultural seedsmen 30 lbs. of what purported to be "Enfield Market Cabbage Seed," being so described on the invoice sent by the sellers and on the parcel of seed itself. This kind of seed ought to produce an early variety of cabbage. The seed was sown in July 1891 by the purchaser in his own garden, and the plants which came up were for the most part retailed by him to various customers during the months of March, April, and May 1892. After disposing of most of the plants he discovered that the seed in question had not been "Enfield Market Cabbage," but that of a late common cabbage. The evidence led showed that it should have been possible to see the disconformity of the seed to contract as early as September or October of the previous year. The purchaser claimed damages from the sellers, on the grounds (1) that claims for damages had been made against him by the purchasers of the plants; (2) that he had lost business owing to the disappointment of his customers; (3) that he had lost the profit which he would have made by retailing early cabbages; and (4) that even before September 1891 he had, through having sown the wrong kind of seed, lost the profitable occupation of his ground.

Held that as the purchaser ought to have discovered the mistake in the autumn of 1891, and the first three grounds of damage depended primarily and directly on this failure of duty on his part, he was not entitled to damages on these heads, but that on the fourth head he was entitled to damages, his loss being due directly to the breach of contract on the part of the sellers.

This was an action by John Wilson, gardener, Crailing Orchard, near Jedburgh, against Messrs R. Carmichael & Sons, agricultural seedsmen, Coldstream, concluding for £200 for breach of contract.

On the 4th of June 1891 the defenders, in compliance with an order given the previous month, forwarded to the pursuer a parcel of cabbage seed marked "Enfield Market Cabbage." This seed had been procured by the defenders, in order to complete the order, from an Edinburgh firm of seedsmen. The seeds were planted by the pursuer in his own garden in the month of July without any suspicion that they were not the kind which he had ordered. During September and the autumn months the pursuer, owing to illness, did not go near his fields, which were looked after by his son, who had not so great a knowledge of gardening as the pursuer. A certain number of the plants were retailed to farmers as early cabbages in September 1891. In April and May 1892 large quantities were sold to various customers by the pursuer, still under the notion that they were the early variety of cabbage, and in all some 200,000 plants were sold. About the middle of May a number of plants were transplanted to part of the pursuer's garden for the purpose of selling them as grown cabbages. He became suspicious at this time as to the nature of the plants, and on discovering that they were really a late common variety, ceased to sell them as "earlies," and ploughed down the remainder of the crop—from 70,000 to 100,000 plants.

Complaints as to the character of the cabbages supplied to them were made to the pursuer by many of his customers, and various claims for damages were lodged with him.

In December 1892 he raised an action in the Sheriff Court of Berwickshire against the defenders for breach of contract in having supplied the wrong seed, and averred that owing to his having through the fault of the defenders sold late in the place of early cabbages, he had suffered much loss to his business, that claims for damages had been made against him, that he had lost the profits upon the plants which he could not sell, and that he had lost the profitable occupation of his ground for the season.

He pleaded, *inter alia*—"(2) The defenders having delivered a late variety of cabbage seeds in the place of the variety contracted for, they have caused loss and damage to the pursuer as condescended on, and he is entitled to the amount of damages sued for, with expenses."

The defenders averred that they had carried out the order in good faith, having specially procured the seed from another firm of seedsmen. They maintained that any practical gardener should have found out the mistake when the plants were quite small.

They pleaded, *inter alia*—"(2) The pursuer having known that the plants sold by him were of a late variety of cabbage, is barred from claiming damages. (3) The amount claimed is excessive."

Proof was led at considerable length on both sides. For the pursuer it was principally directed to establishing the amount of damage suffered by him owing to the mistake. The defenders succeeded in proving that any skilled gardener should