

No. 31. EARL OF STAIR, Appellant.—*Abercromby—Robertson Scott.*

EARL OF STAIR'S TRUSTEES, Respondents.—*Shadwell—Murray—John Miller.*

Trust.—A party having by a trust-deed conveyed his whole funds, interest and proceeds thereof, to trustees, to be vested in lands which were to be annexed to his entailed estate; and the heir-at-law and of tailzie having claimed the interest of the fund not invested in land from and after the expiration of a year from the death of the truster; and the Court of Session having assoilzied the trustees from the claim, the House of Lords remitted to take the opinion of all the Judges.

May 24, 1826.

1ST DIVISION.
Lord Eldin.

JOHN EARL of STAIR made an entail of his lands of Culquhasen, and others, in Scotland, and thereafter, on the 18th of December 1815, he executed a trust-disposition and deed of settlement in the Scottish form, by which he conveyed his whole estates, real and movable, (excepting those included in the entail,) to trustees, for payment of his debts, and of certain special legacies, and of any other he might afterwards bequeath. There then was the following declaration :—‘ And after my debts and legacies are all paid, and a sum set apart for payment of the annuities, or the same are otherwise well secured, I appoint my said trustees and their foresaids to lay out the residue of the trust funds, and interest and proceeds thereof, in purchasing lands in the shires of Wigton or Ayr, or stewartry of Kirkcudbright, and at the sight and with the advice and consent of the Lord President of the Court of Session, and of his Majesty’s Advocate for Scotland for the time being, to annex the same to my entailed estate, by taking the rights and securities of the lands so to be purchased, to the same heirs of tailzie, and under the same conditions, provisions, clauses irritant and resolute, contained in the disposition and tailzie of my lands of Culquhasen and others executed by me; and I appoint my said trustees and their foresaids to expedite charters and infestments thereon in favour of the heirs of tailzie, and under the conditions foresaid, and to get the dispositions thereof recorded in the register of tailzies; and for the more regular management of the said trust, I hereby authorise and empower the said trustees to appoint cashiers and factors under them, and to give salaries to each of them, and such gratifications to any other persons that may be employed by them in relation to the premises, as they shall think fit.’ The deed concluded by nominating the trustees to be his executors.

Thereafter, in 1819, he made a will in the English form, by May 24, 1826. which he bequeathed certain legacies, one of which was not to be payable for six months after his death, and then the deed bore—‘ And as to all the rest, residue, and remainder of my personal estate in England, which shall not consist of real or government securities, I do direct my executors to convert the same into money, and after payment of my just debts, to invest such money in government securities; and I hereby give and bequeath all such stock, together with all other stocks, funds, and securities of which I may be possessed at the time of my death, to such uses and for such purposes as I have, in and by a certain deed and writing prepared according to the Scotch form, executed by me, and bearing date the 18th day of December, 1815 years, declared of and concerning my personal estate; and as to all estates which at the time of my death shall be vested in me upon my trusts whatsoever, or by way of mortgage, I do hereby give, devise, and bequeath the same unto the trustees there named.’

Lord Stair died on the 1st of June 1821, without heirs of his body, and the trustees thereupon took possession in virtue of the trust-deed. His heir-at-law, both in his real and personal estate, was the appellant, John William Henry Earl of Stair; who was also his nearest heir-male of tailzie and of provision, and as such was served and retoured to the lands embraced in the entail.

In November thereafter, (being about five months after the death of the late Earl,) the appellant raised an action, in which, after founding on the trust-deed and relative will, and stating that he had right to the interest of the capital sum left by the late Earl, amounting (after deduction of debts and legacies) to £200,000, from and after the period of his death, he concluded that the trustees should be ordained ‘ to hold just count and reckoning with the pursuer for the whole interest, dividends, and proceeds of the real and personal estate of the said John Earl of Stair, that has arisen from and since the said 1st day of June last, or that may arise thereon,’ and to make payment accordingly. In defence, the trustees maintained, that the claim was, from the nature of the deed, unfounded, and that at all events they had not been guilty of any undue delay. The Lord Ordinary and the Court assoilzied them on the 12th of February 1823;* and this judgment was affirmed by the House of Lords on the 7th of March 1825. In

* See 2 Shaw and Dunlop, No. 187.

May 24, 1826. moving, however, to affirm the judgment, Lord Gifford, after adverting to the equitable rule adopted by the Courts of Equity in England, whereby, at the end of a twelvemonth from a testator's decease, though the land may not have been actually purchased, they will consider the funds for the purposes of the will as invested, so as to give from that date a beneficial interest to those for whom the lands were to be purchased, observed,—‘ If Lord Stair shall be advised to bring another action, raising the question as to the period of 12 months, or any other period farther than he has already allowed, that is five months after the death of the testator, that question will be left quite untouched by your Lordships' affirmance of this interlocutor. The judgment of your Lordships will be applied to the status of the cause at that time; and therefore, by affirming this decision, your Lordships will not preclude Lord Stair from raising any other question.’

Lord Stair accordingly raised an action against the trustees, subsuming ‘ that the pursuer, as heir of entail aforesaid, is entitled to the whole interest, dividends, and profits, arising from the said real and personal estate, from and after the 1st of June 1822, being twelve months after the death of the said Earl of Stair, and in all time thereafter during the life of him the said pursuer, until the said real and personal estate be invested in manner directed by the foresaid trust-disposition;’ and concluding, that the defenders should be decerned and ordained ‘ to hold just compt and reckoning with the pursuer, for the interest, dividends, and proceeds, of the real and personal estate of the said John Earl of Stair, that have arisen from and since the said 1st day of June 1822, or that may arise hereafter thereon, until the said real and personal estate be invested in manner aforesaid, and to make payment to the pursuer of the balance that may arise on such accounting, or otherwise to make payment to the pursuer of the sum of £10,000 annually, aye and until the termination of the foresaid trust, and the said defender be discharged of their actings and proceedings under the same.’

In defence, the trustees stated, that it was Lord Stair's intention, declared clearly and legally, according to the law of Scotland, that his trustees should lay out the residue of the trust-fund, and whatever interest should arise from the trust-fund, while under their management, as an accumulated sum in the purchase of lands; that no charge of mora attached to them, for although £35,000 of the £200,000, being the amount of the fund, was uninvested, yet that had not happened from their ne-

glect, but from the impracticability of procuring an eligible investment in the limited district pointed out by the deceased. May 24, 1826.

The Lord Ordinary, on hearing parties, found, ‘ That the late Earl of Stair died on the 1st of June 1821, and that the trustees appointed by him, the defenders in the present action, accepted the office of trustees, and took possession of the trust-funds, which at that time amounted to about £200,000 Sterling; that the defenders have stated in their defence, that they have laid out the sum of £145,000 in purchasing lands, as directed by the trust-deed, and that not above £35,000 Sterling remained to be laid out; that the pursuer having raised an action against the trustees, concluding that he had right under the trust-deed to the whole interest, dividends, and proceeds of the real and personal estate left by the Earl of Stair, the testator, since the 1st day of June 1821, with other conclusions unnecessary to be stated, which action having come before Lord Alloway, certain proceedings followed, upon which the First Division of the Court sustained the defence of the trustees, and assoilzied them from the conclusions of the action; that the pursuer having carried the cause by appeal to the House of Lords, the judgment was affirmed; but, at pronouncing judgment, it was stated by one of the Peers, who moved the judgment, that the sentence of the Court of Session was affirmed only in so far as it found that the pursuer is not entitled to the interest, dividends, and proceeds of the estate from and after the death of Lord Stair, reserving entire to the pursuer to claim the said interest, dividends, and proceeds from and after any period after the decease of the said Earl, before which it should reasonably be thought, that the trustees ought to have employed the funds left by him in manner pointed out by the trust-disposition; that no intention is indicated by the settlement of the testator to the effect that the trust-estate was to be enlarged by accumulation; that four years having elapsed since the death of the testator, it is presumable that sufficient time has been allowed for the purchase of land to be entailed according to the direction given by him; and in respect of the delay that has taken place in making these purchases, and that there is no law or equity for subjecting the pursuer to a loss of the whole proceeds and issues of the fund unemployed in consequence of such delay, that it is the duty of the trustees, and that they are bound by law to give a reasonable indemnity to the pursuer, for the loss which he has sustained, and is likely to sustain, by such delay, and therefore

May 24, 1826. ' appointed the pursuer to give in a condescence of his claim
' against the trustees upon that ground.'

Against this judgment a representation was presented by the trustees, but refused without answers. They then reclaimed by a note, accompanied by the representation; and the Court, on hearing parties, altered the interlocutor, and assoilzied the trustees on the 21st of February 1826, ' in respect that the testator has directed
' that the whole of the produce of the trust-estate, both principal
' and interest accruing thereon, shall be laid out in the purchase of
' land; and that the present is the first attempt made in Scot-
' land, for having any part of the trust-estate allotted to the heir
' in the meantime, under such circumstances; and also in re-
' spect there has been no undue delay upon the part of the trus-
' tees in laying out the trust-funds, as appointed by the truster.*

Lord Hermand.—There is a very odd finding in the judgment of Lord Eldin, that no intention is indicated by the settlement of the testator to the effect that the trust-estate was to be enlarged by accumulation. I think there is, and that is the most important part of the deed; and as to the intentions towards the heir, these seem to be plain enough. When I look at the bounds within which the purchase was to be made, I rather wonder at the activity of the trustees. Before the heir can complain, I ask him to show where an estate could have been bought. Another thing is as to the presumption of what the testator intended and expected. He could not suppose the purchase could have been made very soon, and I think the trustees have shown themselves most anxious to do their duty.

Lord Balgray.—I am entirely of the same opinion. It is impossible to get the better of the clause founded on by the trustees. The Earl appoints his said trustees, and their foresaids, to lay out the residue of the trust-funds, and interest, and proceeds thereof, in purchasing lands, &c. To apply the English doctrine, would be setting up a principle of equity against the intention of the testator,—that intention is quite clear,—he had given a large estate to this nobleman already; so far it is very different from the case of Sitwell. Besides this, it was through great prudence that he accumulated a large sum of money, and executed a deed in favour of a series of heirs, without intending any particular favour to this nobleman. To be sure, if there were great and culpable delay, or an evident intention to disappoint him, there might be a good ground of complaint; for

* See 4 Shaw and Dunlop, No. 316.

the trustees are bound to do their duty. Some delay would be unavoidable, because they are required to get the consent of the Lord President, the Lord Advocate, &c. I think it is quite impossible to support this judgment. May 24, 1826.

Lord Craigie.—It appears to me that this is a case, in which we should not confine our observations to the circumstances under which it has occurred, because it must be of importance in similar cases. This is the first instance of the kind, and in no similar case of a trust, has the notion now started been entertained. It seems to me, neither consistent with the principles of our law, nor with the opinion of lawyers. The practice of England, and I speak it with all deference, is as opposite to the will of the deceased, in this case, as possible. This claim cannot come into effect at the end of one year from the testator's death. To a certain extent, this would be making a will for the testator. I consider that if, in general, we were to allow a complaint by the heir, he would appear and object to every purchase,—or the trustees might have a partiality for the heir, and favour him at the expense of the substitutes. The purpose of the party here, was to entail the whole funds. Now, if before a purchase was made, some debtor died, how could the intention be made effectual, if the heir were to get the proceeds at the end of twelve months after the testator's death? Or take the case of a man in the East Indies, who makes a settlement of this kind; the time for making a purchase would be half expired before it reached this country. It appears to me, upon the whole, that as this is the first demand of the kind, we must alter the interlocutor.

Lord Gillies.—I entirely concur in what has already been said. I find nothing in the law of Scotland to warrant this claim. I shall always give judgment according to the law of Scotland; but I shall be also willing to adopt any sound views of the law, as delivered in the Court of Chancery. Take the case that Lord Stair had died possessed of no land at all, but a large sum of money to be invested. Keeping in view the circumstances attending this case, I think that even there, no interest would be due to the heir. I am persuaded Lord Stair never thought that his heir was to get a single sixpence, because he had made a sufficient provision for him otherwise.

Lord President.—The intention of the testator here is quite clear, therefore we cannot interpose a principle of equity, except to support that intention. The analogy stated is quite the reverse. In every act now passed relative to entails, there is a clause, importing that the heir shall not draw the interest of the fund till the money is again invested in land by a purchase be-

May 24, 1826. ing made, and for this reason, because it is more for the interest of the heir to get the rents of land.

Lord Stair appealed.

Appellant.—The late Earl merely meant, that whatever interest was due at the period immediately after the debts, legacies, and annuities were paid and provided for, (and when consequently the amount of the fund became known,) was, along with the principal, to be invested in land. His Lordship did not contemplate any farther accumulation of interest—nor can such intention be inferred from the trust-deed. The trustees had no right to delay beyond that period, because, quod pure debetur presenti die debetur. The appellant is, therefore, entitled to claim the annual interest of the funds, as a surrogatum for the rents of the lands which he would have enjoyed, had the testator's instructions been duly carried into effect. It is not necessary that the appellant should instruct blame on the part of the trustees. It is enough, if there has been delay. If that delay arose from prudential motives, the posterior heirs are not to be benefitted at the expense of the present heir. He is as much entitled to be favoured as any other who is to succeed to him. In point of equity, the whole fund should be regarded as invested in land, and the interest as the rents due to the appellant. The principle of this claim is in perfect accordance with the rules of equity that govern the practice of the Scotch Court, and the very question has in England been decided in favour of the heir making the claim. If the latitude insisted for by the trustees were granted, there would be no limit to delay.

Respondents.—The plain and obvious intention of the late Earl was, that the interest and proceeds equally, as well as the principal sum itself, should form part of the trust-estate, and as such be employed in the purchase of lands, for behoof of the heir of entail. His object was not to favour any particular individual, but that an extensive landed estate should be acquired to, and enjoyed by, those who represented him in his titles and dignities. Therefore, the appellant cannot say that any special favour for him can be gathered from the deed of the late Earl, and which distinguishes this case from others, where a trust is made for behoof of a particular person, on a recital of love and favour; and, consequently, he cannot maintain, that it was the intention of the late Earl that he should enjoy the proceeds of the funds until they were vested in lands. He was to have no right to the proceeds prior to their being so vested, and it was rents, and not

interest of money, which he could demand. Neither has he any claim, because there has been some time lost in getting the funds laid out on land. He enjoys an ample provision of £17,000 a-year under the deed of entail, and therefore, he cannot complain of hardship. No doubt, if the respondents had been guilty of undue and improper delay in accomplishing the purposes of the trust, with the view to injure the appellant, he might have had a claim. But no such thing can be suspected. On the contrary, considering that the respondents are limited in making their purchases within a particular district of no great extent, they have been most active in the performance of their duty. The claim is unsupported by any authority in the law of Scotland, and is contrary to the practice there followed, and the understanding of practical men. May 24, 1826.

The House of Lords ordered, ‘ that the said cause be remitted to the Court of Session in Scotland, to review generally the interlocutor complained of; and it is farther ordered, that the Court to which this remit is made, do require the opinion in writing of the other Judges of the Court of Session, on the whole matters and questions of law which may arise in this cause, which Judges are so to give and communicate the same; and after so reviewing the interlocutor complained of, the said Court do and decern in the said cause as may be just.’

LORD GIFFORD.—My Lords, I rise, not for the purpose of moving your Lordships to give judgment at the present moment, but to correct a misapprehension which appears to have existed in Scotland as to the import of the decision of this House, on what fell from myself, in calling your Lordships’ attention, on the former occasion, to the question then before you. It seems to have been supposed that this House was anxious to engraft upon the law of Scotland that which was the law of England, as applied to cases of this description. My Lords, speaking of myself, I can state, that it was very far from my intention to convey any such idea to the Courts of Scotland. It was then stated, that if Lord Stair should be advised to bring another action in the Courts of Scotland, to endeavour to obtain the interest on this fund before it was laid out, a question of great importance would arise, and a question which, it was admitted, would, for the first time, be brought to decision before the Court of Session. Upon that occasion an English case was referred to, and in calling your Lordships’ attention to that case, I took the liberty of observing, that whenever this question should be brought before the Courts of Scotland, I thought it would require very grave consideration on their part, whether they might not feel it necessary to adopt some rule—not saying the rule adopted in England,—but some rule as applied to all cases, as a rule had been applied in the law of England, and not leaning to the circumstances of each particular

May 24, 1826. case, to have it determined, whether, in that particular case, the person entitled to the enjoyment of the fund, should be entitled to the interest and proceeds of the fund till it was laid out. That was what was intended to be conveyed to your Lordships, when that former judgment was pronounced; but it was far from the intention of any noble Lord in this House, to throw out, that they were to look at the law of England as the law by which they should be governed. But in referring to the rule adopted in the law of England, I referred to it by way of illustration, not suggesting that a principle should be adopted, because it was a principle of the law of England; but that it should be adopted, if at all, on principles of convenience—not myself applying such a rule, but leaving the case quite untouched.

My Lords, this being the first case in the Courts of Scotland, and likely, therefore, to establish a precedent for future cases, I very much regret that that course has not been pursued in this case, by which the concurrent opinion of the Judges in the Court of Session could have been taken upon the subject before your Lordships were called upon to decide upon it. I regret this the more particularly, when I find that the First Division of the Court of Session differed from the very learned Lord Ordinary Lord Eldin. However, it appears that course was not pursued, and it is for your Lordships to consider, in the first place, whether the decision of the First Division is right or not. If it be right, your Lordships will only have to affirm; but if your Lordships should not concur in the decision at which the First Division of the Court of Session have arrived, it will be for your Lordships' consideration, what course it will, under such circumstances, be proper to adopt.

My Lords, I have thought it my duty to state so much at the present moment, that the impression which appears to have existed in Scotland, might no longer remain, namely, that there is any anxiety on the part of any member of this House, to introduce into Scotland the law of England. Speaking for myself individually, I can say, that whenever Scotch cases have been discussed before your Lordships, in which I have assisted, I have been most anxious, (whether I have succeeded, it is not for me to say,) to decide those cases upon the principles of the law of Scotland, divesting myself, as far as possible, of all prejudices and feelings which I might have imbibed from having been educated in the law of England. That was my purpose on the present occasion, and I must have been very much misunderstood, if I was supposed, when this case was before your Lordships' House on a former occasion, to have intimated any desire, that the Courts of Scotland should adopt the law of England. I left that question quite untouched, and stated that it was most desirable that the case should be considered and decided in the Courts of Scotland on the principles of the Scotch law—that if the case should be again brought before your Lordships by appeal, you might consider how far the principles of Scotch law, and of Scotch law alone, justified or not that decision. For the present, I have only taken the liberty of making this statement, for the purpose of preventing any such impression in the minds

of the learned Judges of Scotland being longer retained ; and I will now close, by moving your Lordships to adjourn the further consideration of this case to a future day. May 24, 1826.

LORD GIFFORD.—My Lords, there is a case of very great importance which has been heard at your Lordships' bar, in which the Earl of Stair was the appellant, and Sir John Dalrymple Hamilton M'Gill of Cowsland, Bart. and others, trustees of the late Earl of Stair, were the respondents. The question that arises in this case, is a claim made by Lord Stair to the interest and proceeds of certain funds which were disposed by the late Earl of Stair, to trustees, in an instrument called a trust-disposition, made by his Lordship in the year 1815, and by which settlement he gave and disposed to the respondents all and sundry lands and heritages, &c.

Then by his will, which is an English will, executed in the year 1819, he gave all his stock in government securities, together with all other stocks and securities of which he might be possessed at the time of his death, to such uses and to such purposes, as he had by this deed of 1815 declared of and concerning his personal estate. The effect of this was to increase his settled estate. He died on the first of June 1821, without leaving any heirs of his body ; and the present appellant, John William Henry, Earl of Stair, who is the nearest heir-at-law to the late Earl of Stair, is the person who is now entitled to the possession of the tailzied estate, and of course entitled to the rents of the estates which were to be purchased by those trust-funds.

The appellant, within a few months after the death of Lord Stair, raised an action in the Court of Session against the trustees, contending that he was entitled to the interest of the trust-fund from the time of my Lord Stair's death. The judgment of the Court of Session was against him on that occasion. That case was brought before your Lordships by appeal ; and, my Lords, it was contended in that case, upon the principle of several English decisions in the Court of Chancery, particularly a case decided by the present Lord Chancellor, of *Sitwell v. Bernard*, reported in the 6th volume of Vesey Junior's Reports, that the object of my Lord Stair being to increase the tailzied estate, the present appellant ought, before the property was invested in land, to have the interest of the money, because otherwise his enjoyment of it might be postponed to an indefinite period, and he might never enjoy any benefit from that trust at all. The English Courts under similar trusts have decided that in order to do justice between the tenant for life, (the heir of tailzie in Scotland being, as far as enjoyment goes, the same individual,)—that in order to do justice between the person who is first to take, and those who are to follow in the succession, (unless there is an express trust declared by the testator that the interest shall accumulate until it is laid out,) some reasonable period should be given after the death of the party, or after the commencement of the trust, at the termination of which it shall be considered, that if the property be not invested, it shall be held as invested ; that,

May 24, 1826. therefore, the tenant for life shall enjoy the benefit of it from that period ; and, by analogy to the rule which prevails in the payment of legacies, where no time is specified, the Courts have held that at the end of one year the party shall be entitled to the interest.

Proceeding on the principle of that case, Lord Stair instituted his original action ; but he did not follow up the analogy from the law of England, for he claimed the interest and produce within five months after the late Earl of Stair's death. Upon that case coming by appeal before your Lordships, your Lordships sustained the judgment of the Court below, being of opinion, that supposing the Earl of Stair was entitled to interest, still he applied too soon ; that the principle of the English law being to allow a reasonable time for the execution of the trust, Lord Stair was at all events too soon in bringing his action ; and, my Lords, in delivering judgment upon that occasion, I adverted to the case of *Sitwell v. Bernard*, and other cases, stating, or at least intending to state, that they were no further applicable to a Scotch case, than as they proceeded upon general principles, and not upon principles extracted particularly from the English law upon the subject. When that case was determined, (which I think was the first case in which it was determined, that the plaintiff was entitled to interest from the period of a twelvemonth after the testator's death,) it was felt that if each case were to be determined on its particular circumstances—if the Court were to say in one case, if you delay eighteen months, that is improper ; and in another case, if you delay two years, that is not proper—that uncertainty would be attended with the greatest inconvenience ; and an expression was used by one of the learned Judges, in one of the cases, that it would be better to cut the knot, and to lay down an equitable rule, as between the person entitled to immediate succession to the estate and the parties to take the succession after him. Under these views, I intimated that I thought it would be highly desirable, that the Scotch Courts should consider, whether or not they could, consistently with the Scotch law, adopt any general rule, not laying down twelvemonths as the extent, or any precise or definite period, within which this trust should be considered as executed in favour of the party interested, but at the same time taking care not to prejudice those coming after him. I have referred to this, because an expression fell in the course of the argument, at your Lordships' bar, which I took the liberty of correcting, that it was considered, that what had passed in your Lordships' House upon the former occasion, seemed to imply an opinion, that the Court of Session were bound to adopt the English rule, than which nothing was further from the intention of the individual having the honour of addressing your Lordships ; and I perceive, from the notes which were taken of what passed upon that occasion, that I expressly stated, ' that is a question which deserves the consideration of the Court below, whenever it is properly raised ; but in this case, looking to the form of the summons, which looks to the death of the testator, and the action brought at a period which no principle established by the English cases can justify, your Lordships cannot, I think, in this case, be called upon to decide that case hypothetically. If the question

‘ arises in this or any similar case, it is most fitting that it should receive all
 ‘ the consideration it can receive in the Courts of Scotland, which may, for
 ‘ reasons that I may not be at present aware of, think that though it may be
 ‘ convenient to lay down a general rule, the rule laid down in the English
 ‘ Courts cannot apply. I think therefore that your Lordships, by affirming
 ‘ the decision of the Court of Session, will not preclude Lord Stair from rai-
 ‘ sing that question, which I will not now enter into, not knowing whether
 ‘ the trustees have yet laid out the whole of this residue or not. If Lord
 ‘ Stair shall be advised to bring another action, raising the question as to
 ‘ the period of twelve months, or any other period farther than he has
 ‘ already made, that is five months after the death of the testator, that
 ‘ question will be left quite untouched by your Lordships’ affirmance of
 ‘ this interlocutor.’

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Your Lordships were asked upon that occasion, to do that which I felt it quite impossible to do, that if your Lordships should be of the opinion, as you were, that the judgment below should be affirmed, you should declare, prospectively, from what period Lord Stair should be entitled to the interest. I stated that, considering that was a question which ought to be discussed in the first instance in the Scotch Courts, and to receive the decisions of the Scotch Courts, I thought that your Lordships ought not to be called upon, at that time, to pronounce any decision upon that question, particularly where it was admitted on all hands, that it would be a new decision in the law of Scotland.

My Lords, subsequently to that decision, another action was raised by Lord Stair, concluding to have it found that he was entitled to the interest and proceeds from the 1st of June 1822, being twelve months after the death of the late Lord Stair. My Lords, this case came before a very learned Judge as Lord Ordinary, Lord Eldin; it was discussed before him, and it was contended that the general principles of the English Courts did not extend to cases in the Courts of Scotland, and that, in the Scotch Courts, no such decision had ever taken place. My Lord Eldin, on the 7th of July last, pronounced this interlocutor, (his Lordship then read it.) After that a representation against this interlocutor was presented to the Lord Ordinary by the respondents, but his Lordship, without ordaining the appellant to lodge answers, pronounced another interlocutor, on the 12th of November 1825, refusing the desire of the representation, and adhering to his former decision.

My Lords, the respondents then presented a note to the Lords of the First Division, praying their Lordships to alter the Lord Ordinary’s interlocutors, and their Lordships having resumed the consideration of this note, they differed from Lord Eldin, and they pronounced an interlocutor, on the 21st February 1826. (His Lordship here read the interlocutor.)

The Judges, in delivering their opinions, some of them at least, seem to have considered that this case was attempted to be supported entirely on English law.

My Lords, I am sure that the Court of Session must have very much misunderstood the observation, or the natural conclusion from any obser-

May 24, 1826. vation I ever made in a Scotch case, if they suppose that it was ever my wish to advise your Lordships to adopt a rule, as applicable to a Scotch case, because it had been laid down and applied to an English case. My Lords, in the hearing of the case of my Lord Stair before your Lordships' House, the case of *Sitwell v. Bernard*, and *Campbell v. Monzie*, and others, were unquestionably mentioned. In the former action, the Scotch lawyers argued,—but they argued without success, and rightly without success in that case,—that as in England the Courts had in a very recent period held it desirable to lay down a rule to govern all cases where no general rule existed, that the Courts of Scotland ought to adopt a similar rule to the English Courts. The rule, whether right or wrong in England, is not drawn from English law, but is supposed to be founded on principles of general equity, applying to such cases; and, therefore, I regret extremely to see any feeling upon the part of the learned Judges of the Court of Session, arising from the idea that there was any attempt, by anything which passed upon the former occasion in your Lordships' House, to impose on the Court of Session a rule which had been adopted in the Courts of England. I think that would be a most improper attempt. If the Courts of Scotland cannot consistently with their rules adopt such a rule, or if they think that it would be inconvenient to adopt such a rule, or that it is not necessary, on their general principles of law, to adopt such a rule, I do not mean to say, that the decision of the Courts of Scotland, so finding, would be to be found fault with. But, on the other hand, it is to be recollected, that this is the first time this question has ever been litigated in the Court of Scotland. I do not find any of the Judges say that there is any series of decisions which has settled this question. They seem to consider it as the first case of the kind which has occurred there. I regret, therefore, particularly when I find Lord Eldin, the Lord Ordinary, of opinion, 'that there is no law nor equity for subjecting the pursuer to a loss of the whole proceeds and issues of the fund unem- ployed, in consequence of such delay;' that it should have been conceived that by the expression of a wish, that it might be considered whether some rule would not be convenient, there was a desire to impose upon the Courts of Scotland that which was the rule in the English Courts. My Lords, see what the effect is, if there be not some such rule. Suppose, instead of the trustees having laid out the money they have done in land, that they had, without any improper delay on their part, said that they had not found opportunities of purchasing land during the life of Lord Stair. According to this decision, Lord Stair could not receive a farthing of interest during his whole life, though he was the favourite person pointed out specifically by the late Lord Stair, as the person to succeed to the tailzied estate, and it was clear that it was intended he should derive a benefit from this property.

My Lords, it was said in the argument in the Court below, and was argued at your Lordships' bar, that the only medium on which the Earl was to receive an interest from the fund, was in the shape of land; and that until it was laid out in land, at whatever time, he could derive no

benefit from it. I took the liberty of putting a question to the learned May 24, 1826. counsel, who argued this case very ably, whether he pushed his doctrine to this extent, that until it was laid out in land, at whatever time, he could derive no interest; because, if so, in case of an improper delay, did he mean to say that Lord Stair could not then proceed against the trustees? I do not mean against them personally for damages, but could he not claim, in the Court of Session, a right to the income from the property that was not invested? Lord Eldin's interlocutor shows his opinion to be, that if there has been an improper or unreasonable delay, or if a reasonable time has elapsed, even without any improper conduct on the part of the trustees, in the way in which it might be fairly expected property might be fairly laid out, it is the duty of the trustees, and that they are bound in law, to give a reasonable indemnity; because, if it were not so, Lord Stair might in such circumstances be deprived, during his whole life, of the opportunity of touching one sixpence, and it may happen that the party has no other provision. It is said, that, in this case, he has another provision; but the argument would go to the extent, that even if he had no other provision, still he could not touch this property till it was laid out in land.

My Lord, I took the liberty of stating at the close of the argument, that I regretted extremely the feeling on the part of the Court of Session, and as it is a question quite new, and depending upon general principles, and upon principles which affect a great variety of cases, I would take the liberty of stating, that I regret they have not done that which they have very often done in other cases with great advantage, namely, taken the opinion of the other Division of the Court of Session; because, I am sure that it would be far from your Lordships' wish to do that which has been supposed, namely, to force that upon the Court of Session which you think right in the English Courts; and that is not the effect of any judgment which has been pronounced while I have had the honour of assisting your Lordships. The only question is, whether, being a case quite new,—untouched by any decision,—Lord Stair, the appellant, has any equity against these trustees, to receive from them any part of the income of this property till it is laid out in land. I think I might venture to ask the Lords of the Court of Session, to what period they would say this property is to be tied up in the hands of the trustees? If they say, that, looking to the interest which the present Lord Stair was to enjoy in the fund, and looking also to the interest of those to come after him, it was the clear intention of the late Lord Stair that this fund should be invested with due expedition in land; then I would ask if it could not be so invested, was it his intention to withdraw from the present Lord Stair altogether the interest of that fund? If that was not his intention, the result would seem to be, that it would be unjust or inequitable to deprive Lord Stair for an unreasonable time of the benefit of it.

Upon the whole, my Lords, I would take the liberty of suggesting,—not meaning to impugn the decision of the Court of Session, but, as I threw out when the case was argued at your Lordships' bar, being a decision not affecting this particular trust merely, but other trusts in Scot-

May 24, 1826. land,—that this case should undergo further consideration in the Division of the Court in Scotland in which the case was heard, and that their Lordships should take the opinion of the other Division of the Court upon the subject. It may be, as I have stated to your Lordships, that the other Division may concur with the learned Judges who have given their opinion, or it may be that they may not. Considering the importance of the general question raised in this case, and considering how materially it affects trusts in general, as well as the value here in question, (not that I should ever think of remitting a case because it involved a question of value, if it were not a question of difficulty,) the best advice I can offer your Lordships, is to remit this case to the First Division of the Court of Session, that they may review the interlocutor they have pronounced, with a direction to them to take the opinion of the other Division on it; and that will have this good effect, that at all events the question having been reviewed, it will be now fixed at least one way or other. If it should come before your Lordships to decide, whether the rule laid down in Scotland is a bad rule, or not, your Lordships will have the advantage by the remit, of establishing, with the concurrence of both Divisions of the Court, some rule or other applicable to all cases, or the Judges will state to your Lordships, that each case must depend upon its peculiar circumstances; and I do not mean at the present moment to state, that they will not say rightly that each case must depend upon its particular circumstances. The former judgment of your Lordships declared, that the Earl of Stair was not entitled to the interest, dividends, and proceeds, from any period, after the decease of the late Earl, before which it could reasonably be thought that the trustees ought to have laid out the funds,—which are the very words which occur in English cases upon the subject; and certainly Lord Eldin was of opinion, that it was not the intention to tie up the proceeds indefinitely, but that the interest and proceeds should be paid to the Earl of Stair, until the property could be fairly laid out in land,—the question being left quite open, whether that time was one year or two years, or whether it was in the discretion of the trustees to be regulated by circumstances. My Lords, with a view to have this important question set at rest, and with a view to guard myself from being supposed to lay down such a rule as that which has been supposed, I would take the liberty of proposing, as your Lordships' judgment, that which I have stated to your Lordships.

Appellant's Authorities.—Campbell, 6th June, 1752 (7440 and 14703)—Sitwell v. Bernard, 27th July and 5th Dec. 1801. (6 Vesey, jun. v. G. p. 520.)

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