MACPHERSON, . . . APPELLANT.

MACPHERSON, ET AL. . . . RESPONDENTS (*a*).

1852.
10*th and* 11*th June.*

Where a general account is directed by an interlocutor unappealed from, no demand can be considered stale.

So likewise when a trust remains unperformed.

Where an executor has received money forming part of the testator's assets he cannot discharge himself from the responsibility by saying or showing that he handed over the amount to his co-executor.

A barrister's opinion upon a question of English common law or equity, although it may bind the Court in Scotland, will not bind the House of Lords.

Where a will made in England by a person domiciled in England directed that the whole of his personal property should be laid out in the purchase of lands in Scotland to be entailed on a certain series of heirs,—HELD (reversing the judgment of the Court below), that the first taker was entitled to the income from the testator's death, and that the rule which allows executors to defer the payment of legacies for twelve months, did not apply.

Lord Eldon's decision in *Sitwell* v. *Barnard* examined.

Stott v. *Hollingworth*, before Sir John Leach, pronounced not to be law.

Point apparently overlooked by Lord Eldon in *Angerstein* v. *Martin*, as to the principle on which the claims of the tenant for life are to be given effect to, without injury to those in remainder.

Power given to the Court below to dispose of costs there incurred respecting the question upon which the judgment is reversed.

MR. *Stuart* and Mr. *Anderson*, for the Appellant.

The *Solicitor-General* (Sir *Fitzroy Kelly*) and Mr. *Rolt*, for the Respondents.

The facts, the nature of the question, the arguments of counsel, and the authorities relied upon, are sufficiently brought out in the following opinions :—

The LORD CHANCELLOR (*b*) :

My Lords, in this case, there are three points which call for your Lordships' decision. Two of them arise out of an account which was directed to be taken by the Court below. The third involves a point of law upon the construction of the will of Mr. James Macpherson, the testator in this cause.

With your Lordships' permission I will deal first with the two points of accounting; and here your Lordships will bear in mind, that, by the interlocutor of 1841, the *Lord Ordinary* expressly orders an account to be taken on the footing of the award; and as that interlocutor is unappealed against, it is not possible for Sir John Macpherson's representatives—the Appellants at your Lordships' bar—now to say that the account was not properly directed and properly taken.

(*a*) For the Report in the Court below, see Second Series, vol. xii. p. 486.

(*b*) Lord St. Leonards.

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Now, my Lords, the appeal relates to two disputed items;—the first being a sum of 305*l.* 2*s.* 8*d.* claimed by Sir John Macpherson's representatives for costs incurred by him in the prosecution of his duty as an executor. It is said that time is a bar in this case. But time cannot be a bar to a general account, directed by the interlocutor of 1841, which, as I have said, is acquiesced in. The direction to take the account stands uncomplained of. But this, in point of fact, is not a demand against Sir John Macpherson's executors, but a claim in the nature of set-off by his representatives to discharge themselves from liability in respect of a portion of the assets of the testator. It appears that there was standing in the name of Sir John Macpherson a sum of 2000*l.* stock, admitted to have been part of those assets subsequently to the award of 1810. Of course he was responsible for those assets. But the right of the Pursuer in the Court below—the Respondent at your Lordships' bar—did not accrue till 1833. Moreover, this is a case in which you cannot talk of laches in the ordinary sense, because the trust has never yet been executed; and if a trust remains unexecuted, and the parties bound to execute that trust (and Sir John Macpherson was one of them) will lie by and allow that trust to continue unperformed, they cannot complain if they are brought to an account at last, and compelled to answer.

The award expressly declared that neither party should have any demand against the other as arising out of it, and it regulated and directed the way in which the costs were to be paid; so that from the date of the award there was an end of any possible claim in respect of costs on the part of Sir John Macpherson.

I am, therefore, of opinion that the account taken bound all the persons entitled, and was a fixed settle-

ment of the general administration; and not only is the point concluded against the Appellants by the award, but it is perfectly clear that it is a claim which cannot be sustained without evidence, of which there is not a particle.

Without therefore going further into this point, I am very clear that the Court below has come to a right decision with respect to it, and that the appeal, so far, must be dismissed.

The other item, my Lords, is one of 258*l.* 6*s.* 8*d.*, as to which Sir John Macpherson's executors are sought to be charged on the one side and discharged on the other upon the result of the account which is directed to be taken. In the course of taking that account there came out receipts signed by Sir John Macpherson, by which it appeared that he had himself personally received this money as a dividend from some estate, and that money beyond controversy formed part of the assets of the testator. Then how does he discharge himself? or, rather, how do his executors, the Appellants, endeavour to do this? Why, my Lords, by saying that Sir John Macpherson handed the money over to his co-executor. The question is, did Sir John Macpherson, having received this money, part of the assets, for which he was clearly responsible, account for it? It is much to be regretted, from Sir John Macpherson's advanced age and other circumstances, that the explanation is not more complete in a legal point of view; for, morally speaking, I can have no doubt that he thought he had properly dealt with the money. But, my Lords, Courts of Justice do not go on presumptions in cases of this sort. There must be proof. Some slight evidence might have been sufficient, but there is none on which any Court can rely; and therefore I submit to your Lordships that the finding of the Court below is here also perfectly correct, and

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that the appeal in this respect likewise must be dismissed.

My Lords, I am now brought to the question of law which I mentioned as having been agitated in this case; and I must own for myself that I had for a good many years thought it a concluded point; but it seems not to be so, and therefore it will be necessary for your Lordships now to consider what the law really is on this subject;—one undoubtedly of importance.

It turns on a very few words to be found in the will of the testator, James Macpherson (*a*), who died in 1796; having some years previously executed a deed entailing his Scotch estates on a certain series of heirs—his son James being the first taker. The will, which was made in England, where the testator had his domicile, and which was dated the 7th of June, 1793, contains the following clause:—

> I request and direct the Executors of my Will to consolidate into one fund the whole of my fortune and moveables, which fund they are to lay out in purchasing lands in Scotland, to be entailed upon the series of heirs specified in the Deed of Entail already mentioned, according to the strict forms of the laws of Scotland.

And immediately after, this passage follows:—

> The principal of the Annuities specified on the first page of this Will, as they respectively fall, shall be applied to the purchase of lands in Scotland, to be entailed as already directed.

Then, my Lords, if in the perusal of this will you turn back a little, you will find the passage to which the testator is referring, in these words:—

(*a*) The testator bequeathed 1000*l.* to Mr. John Mackenzie, a barrister, "to defray the expense of the publication of the original of the Poems of Ossian," adding, however, these words: "This article will become void, of course, should the poems be published before my own demise." Lord Brougham asked whether the 1000*l* was ever paid—whether the trust was ever executed—or whether the "worthy *author*," so his Lordship called the testator, ever published the "originals" in his lifetime. No answer was elicited.

That out of the first and readiest of my money and effects, the above Annuities be secured in the Public Funds; and that, as they respectively fall, the principal shall be added to the residue of my fortune, and be disposed of as hereafter directed by the Executors of this my Will for the benefit of the heirs appointed by the above-mentioned deed of entail.

Now, my Lords, independently of authority, let us for a moment consider what, in cases of this sort, ought to guide Courts of Justice. Their great object must be within settled rules of law to give effect to the testator's intention. Now, what was the intention of this testator? Clearly, as far as it could be effected by law, to place his personal property upon the same ground as his real estate. He tells you his meaning as plainly as language can describe it, intending evidently that his personal property at his death shall be considered as real, and shall accompany his Scotch estates, with all additions and accumulations, to the heir of entail according to the deed which he had executed. Suppose the heir had left the whole fund at interest upon investment; or suppose that the executor had immediately found a convenient and proper estate, and bought it? Can there be a doubt that the heir would have been entitled to the income? Clearly, he would, my Lords. It is plain that this testator never contemplated any rule of law which should compel his executors to turn the produce of his large personal property for any portion of time into capital. There is no direction in his will for accumulation by the investment of interest. The principal or capital is to be applied in the purchase of land; but the income must go to the heir of entail.

Now the rule on which the Court proceeds is, that this property was impressed by the will itself with the character of real estate, and that, being so impressed, it became real estate by construction of law;—and in my apprehension it must be treated as if it were such at the moment of the testator's death.

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It has been contended by the Appellant in the Court below that the right of James Macpherson, the first taker under the deed of entail, did not arise until after the lands were purchased and entailed; and it was urged that the English rule would be satisfied by allowing him the income from the end of one year after the date of the testator's death. The Scotch rule was also represented as to the same effect; and *Lord Stair's case* (*a*) was cited in support of this proposition. The Court below ordered that a Case upon this question of English law should be laid before a very eminent and distinguished member of the Equity Bar, who, on the 8th of July, 1842, delivered an opinion as follows:—

I think that the interest of the first beneficiary in this case would be held by the law of England to commence at the end of one year from the death of the testator. The law, however, upon this subject, is in a very unsettled state. The most recent authority on the subject is the case of *Taylor* v. *Clarke*, 1 Hare, 161. The law, whatever it may be, would be held to have been the same in 1796 as at the present time.

My Lords, it is urged in the printed Case of the Respondent that this House is bound by that opinion. The same argument was advanced by the learned counsel at your Lordships' bar. But, my Lords, I apprehend it proceeds on a misapprehension; because your Lordships, from your superior knowledge, are able to set right an erroneous opinion upon any question of English common law or equity; and there ought to be nothing to prevent the House from doing so in the exercise of its appellate jurisdiction, where the question, though foreign to the Scotch Court, is not foreign to this the highest Court of judicature.

My Lords, the question before you is governed by cases which admit of a very easy explanation.

(*a*) 1 Wils. & Sh. 72.

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To begin then with *Sitwell* v. *Barnard* (*a*). It was exactly in effect like *Lord Stair's case* in Scotland. In *Sitwell* v. *Barnard* an accumulation of the income was directed until the permanent investment. Now, Lord *Eldon*, when he decided that that accumulation should by construction terminate at the end of the first year, came to one of the strongest conclusions at which it was possible for a judicial mind to arrive; but for what object? Not to indulge any fanciful predilection for a twelvemonth, but on a notion of supposed convenience, looking to the analogy of the common case of administration (*b*), he thought a year a reasonable time within which the trust should be executed.

At a later period Lord *Eldon* himself doubted whether he had not taken a greater liberty with the will in *Sitwell* v. *Barnard* than he ought. And I am quite satisfied, that, if the present case had come before that great Judge, he would, without hesitation, have decided that the first beneficiary was entitled to the income as from the death of the testator.

The truth, my Lords, as I well know, is that *Sitwell* v. *Barnard* was for a long while misunderstood. Lord *Eldon* himself complained that it had been misappre-hended. Somehow or other it was supposed that he had laid down a general rule in that case. But he, on several occasions, took pains to explain to the Bar, that what he had decided there was what I have stated; and he disclaimed all intention of laying down any general rule applicable to the description of case now before your Lordships (*c*).

(*a*) 6 Ves. 520.

(*b*) In the administration of the assets of deceased persons, the rule in Chancery is, that legacies need not be paid till the end of a year next after the testator's death, because generally the personal estate may be collected within that time.

(*c*) See *Casamajor* v. *Pearson*, a Scotch case, 8 Cla. and Fin. 94, where Lord Cottenham comments on *Sitwell* v. *Barnard*; and see

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Then came *Stott* v. *Hollingworth* (*a*), before Sir *John Leach*. In that case no accumulation was directed; and yet the learned Judge thought fit to decide that the income of the first year must be added to the capital, and withheld from the tenant for life who was clearly entitled to it. There was an appeal from this decision; but the case was compromised. And Lord *Eldon*, on its being cited to him, said he should have required elaborate argument to convince him of its soundness. I apprehend, therefore, your Lordships may safely be advised that *Stott* v. *Hollingworth* is not law.

Next, my Lords, we have *Angerstein* v. *Martin* (*b*), and *Hewitt* v. *Morris* (*c*). Now so far as these cases go, they are both clear authorities bearing on the present case. In each, Lord *Eldon* gave the tenant for life the income as from the death of the testator.

Then, my Lords, how stand subsequent authorities? *La Terriere* v. *Bulmer* (*d*), before Sir *Anthony Hart*, did not go the whole length of *Hewitt* v. *Morris*, which, however, it professed to follow. It stopped a little short as to the unconverted parts of the testator's estate, and suggested a distinction which has not been followed in any subsequent reported case. But in the main it agreed with *Hewitt* v. *Morris*, which Sir *Anthony Hart* said he had always considered to have been legally decided, although he did not carry out to its full extent the rule laid down by Lord *Eldon* in that case, as well as in *Angerstein* v. *Martin*.

Now as to the other case of *Douglas* v. *Congreve* (*e*), before Lord *Lanydale*, it was asserted in argument at the bar, that Lord *Langdale* had introduced the diffi-

Mr. Cha. P. Cooper's long and learned Note (Rep. Temp. Ld. Cottenham, 66).

(*a*) 3 Madd. 161. (*b*) Turn. & Russ. 232.
(*c*) Turn. & Russ. 241. (*d*) 2 Sim. 18.
(*e*) 1 Keen, 410.

culty; and that there was no contest or controversy until he had created it. My Lords, it is not just to say so, because of the decision in *Sitwell* v. *Barnard* and *Stolt* v. *Hollingworth* there was a considerable misunderstanding; and Lord *Langdale* made this observation:

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It is embarrassing to find the rule in cases of this nature so little settled. Lord *Eldon* seems to have considered the tenant for life entitled to the whole interest for the first year. Sir *John Leach* thought him entitled to no part of such interest. Lord *Lyndhurst* thought him entitled to such a sum by way of interest as would have accrued as dividends upon so much 3 per Cents. as the residue would have purchased at the end of the year; and Sir *Anthony Hart* thought him entitled to the interest from the death of that part of the residue, which at the testator's death was invested on the securities pointed out by his will; but that the interest on such part of the residue as was not so invested was to be added to the capital.

Lord *Langdale*, in the same case of *Douglas* v. *Congreve*, made a further remark, which applies to the case before your Lordships:

> In a case where there is no direction to accumulate, and therefore no direction to add interest to capital, it appears to me more likely to have been the intention of the testator that until the lapse of such convenient time as may be allowed to the executor to make the conversion directed by the will, the tenant for life should enjoy the interest actually accrued.

That is clearly a dictum in favour of the rule which I am recommending to your Lordships. Lord *Lyndhurst*, in *Dimes* v. *Scott* (*a*), came to the same conclusion. I admit that this was at the end of an argument on another point, and therefore I do not give to his Lordship's opinion all the weight to which his decisions are so justly entitled; but he must have considered this to be the rule, and he acted on it. In the case of *Taylor* v. *Clark* (*b*), before *Vice-Chancellor Wigram*, his Honour went into a considerable comment

(*a*) 4 Russ. 195. (*b*) 1 Hare, 161.

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on the cases, and although a little embarrassed, he admitted the rule. Therefore, my Lords, I have no difficulty upon the authorities, as I think this point is now settled. But the difficulty which has arisen in the later cases is of a different nature; it is not whether the tenant for life is to be entitled from the death of the testator or not, but in what manner is he to have the benefit of that rule, as between himself and the person entitled in remainder? In a case like this before your Lordships, where the fund was invested in Three per Cent. consols, he would clearly take the interest without making any call on the capital, according to the rules of equity; but where, as in the case of *Angerstein* v. *Martin*, the fund stood in Russian Stock, bearing a very large interest affecting the capital, a difficulty might arise. Lord *Eldon* gave to the tenant for life even that large rate of interest. Judges have since supposed that his attention was not drawn to the point. And I incline to think so; for although you give the first year's income to the tenant for life, you must so do this as not to injure those in remainder. But I apprehend there will be no difficulty in dealing with such cases when they arise.

In conclusion, my Lords, I submit that so far as the question respecting the first year's income was decided against the Appellants in the Court below, the interlocutor must be reversed, and there must be a declaration that the first year's dividends were properly paid by them to James Macpherson, the first taker under the deed of entail.

Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, on the whole I agree with my noble and learned friend.

On the question of construction I have had no doubt from the beginning that the Court below had

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miscarried; and without going into the argument upon which my noble and learned friend has already addressed your Lordships at great (though by no means unnecessary) length, I wish to profess my opinion to be entirely the same with his on that subject.

It is unnecessary, my Lords, that I should follow him in his commentary on the authorities further than to say, that I take it to be clear that the case of *Stott* v. *Hollingworth* can no longer be law.

My Lords, I am quite satisfied that we shall do well in reversing the judgment of the Court below on this point of the construction, and in declaring our opinion as proposed by my noble and learned friend.

ORDERED and adjudged, That the interlocutor of the *Lord Ordinary*, of the 20th of March, 1849, and the interlocutor of the said Lords of Session there, of the second division, of the 21st of November, 1849, complained of in the said appeal, be, and the same are hereby affirmed; and that the said petition and appeal, so far as relates to the said interlocutor of the 20th of March, 1849, and to the said interlocutor of the 21st of November, 1849, and also so far as relates to the interlocutor of the *Lord Ordinary* of the 16th of July, 1842, be, and the same is hereby dismissed this House; and that the said interlocutor of the Lords of Session, of the second division, of the 18th of July, 1850, subject, nevertheless, to the power of recall in the remit hereinafter directed, be, and the same is hereby affirmed; and that the said interlocutor of the said Lords of Session, of the second division, of the 5th of December, 1849, also complained of in the said appeal, and also the said interlocutor of the said Lords of Session, of the second division, of the 30th of November, 1849, complained of in the said appeal, so far as the same interlocutor is inconsistent with the Declaration hereinafter contained, be, and the same are hereby reversed: And 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 said late James Macpherson, and the Representatives of the Executors of the said James Macpherson the elder, are not liable to repay the same: And it is hereby ordered and declared, That with this Declaration the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this Declaration and Judgment, and with power to the said Court to

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recall the said interlocutor of the 18th of July, 1850, "in so far as it relates to the expenses of the discussion in the said Court as to the first year's proceeds of the said Estate, and the liability of the said Executors and Representatives to repay the same, and to dispose of all claims of either party to the expenses in the Court of Session of the said discussion."

HORE & SONS.—T. W. WEBSTER.