small, but still enough to show that the heritor did not stand on his valuation. The same stipend is stated to have been continued, with a slight modification, in 1816. In the locality of 1827 the over-payment is considerably greater, amounting to more than 17 bolls in all, certainly a very striking excess over the 3 bolls of the sub-valuation. This stipend has been paid to the minister ever since 1827. Thus there has been over-payment for much more than forty years, sufficient, I think, to infer dereliction in any sense whatever of that term.

It is said that these over-payments were made under protest, and therefore cannot be given effect to. I can find no sufficient evidence of this. The proof apparently rests on a memorandum by Mr James Wright, the factor *loco tutoris* for the then proprietor of Balhaldies, endorsed in 1826 on a copy of the then rectified locality, bearing—"I paid under protestation." I cannot take this as proof of a formal protest having been actually made—still less of its grounds. If a protest was to avail, something a great deal more distinct and particular was requisite. The rectified locality was then in course of being approved of, and it was in fact approved of as a final scheme on 30th June 1827. If Mr Wright intended seriously to object, on account of his possessing a valuation of his teinds, he ought to have stated his objection judicially, and on that express ground. When he made no such objection, allowed the scheme of locality to be approved as final, and went on to pay the stipend allocated from thence downwards, any mere grumble at the time of payment (for it amounts to no more) cannot obviate the effect of the over-payment as establishing dereliction.

With regard to the alleged protest by the pursuer, Mr George Richmond, in 1864, it seems wholly immaterial. It was, to say the least, too late to be effectual.

The practical result of my opinion is, that this sub-valuation of 1629 ought not to be approved of, but decree of absolvitor pronounced.

Agents for Pursuers—Jardine, Stodart & Frasers, W.S.

Agent for Defenders—W. H. Sands, W.S.

Friday, June 30.

SECOND DIVISION.

PURSELL'S TRUSTEES *v.* NEWBIGGING, ETC.

Trustee—Intromitter—Business Charges—Bona fides—*Error in Law*—*Interest.* A was trustee under B's settlement. Upon B's death he appointed C one of his trustees. C, who was a law agent, managed both the trust-estates, and paid away funds of A's trust-estate to legatees under B's settlement. *Held* that C, being an intromitter with A's estate, was not entitled to business charges; that his *bona fides* would not prevent his being liable to repayment, with interest, to the beneficiaries under A's settlement, and interest allowed at the rate of 3 per cent. to the date of action, and at 5 per cent. from that time.

This was chiefly a case of accounting, and the facts sufficiently appear in the opinions of the Judges.

LORD COWAN—These conjoined processes have certainly run a very long and involved course of litigation. They were brought into Court in 1849 or 1850, and ever since I had the honour of sitting here they have been occasionally cropping up and raising questions of more or less difficulty and nicety, and involving matters of considerable moment. In the competition the case has been twice in the House of Lords, about 1853 or 1855 and afterwards in 1865. Under the judgments of this Court and of the House of Lords, the questions in the competition have been finally decided; and the parties, who appear in this discussion as objectors, have been finally preferred as entitled to the fund *in medio*, whatever that may be. Upon the case coming back from the House of Lords, with that determination as to the competition, the record regarding the fund *in medio* was prepared and finally closed; and a judgment pronounced by Lord Kinloch as Ordinary in 1866, and affirmed by the interlocutor of the Inner-House, prepared the case for a renewed remit to an accountant. The original remit had been to Mr Barstow, and under that remit the questions in the competition had been thoroughly expiscated; but not so as regards the matters relating to the amount of the fund *in medio*. Accordingly, under this second remit to Mr Scott, we have before us a very clear and elaborate report. Objections have been stated by the parties respectively, as was to have been expected in a litigation of this kind; and we have now two interlocutors of Lord Mure brought under review. The first of these disposes of questions of principle which were involved in the objections; it is dated 13th December 1870. And we have the final interlocutor ordering consignation. Both interlocutors will require to be considered in finally disposing of the cause. Meanwhile questions of principle, involved in the objections stated by the parties, are to be disposed of; and as regards them I shall trouble your Lordships with some explanation of the grounds on which I have formed the opinion I shall immediately mention.

It will simplify the consideration of the various questions that have been argued, to bear in mind that the late Mr Smith has to account for his intromissions in a twofold capacity.

Under the will of Dr Pursell, who died in 1835, he became sole surviving trustee; and as such he must account for all his intromissions with the trust-estate to the parties interested therein, according to their several rights and interests, whether as creditors or gratuitous legatees. But farther, as Dr Pursell had intromitted with the estate of his uncle James Warroch, who died in 1814, under the trust-disposition in his favour, and the funds of that estate remained to be accounted for to the beneficiaries at the death of Dr Pursell,—it is incumbent on Mr Smith, as his trustee and representative, to account for the funds of that estate to those beneficiaries.

The interlocutors in 1866 by the Lord Ordinary, of date 16th February, and by the Inner-House to some extent varying its terms, on 3d July, determine so far the principles applicable to Mr Smith's obligations to account for the two estates. With regard to the accounting for the trust-funds and estate of Dr Pursell, the Lord Ordinary pronounced certain findings, but these were recalled by the Inner-House *in hoc statu*; and as to this part of the case no interlocutor has yet been pronounced, except that by the Lord Ordinary now under review, in disposing of objections to the accountant Mr Scott's report.

Upon the other branch of the accounting, viz., that which regards the funds and estate of James Warroch, the interlocutors referred to in 1866 have fixed important principles from which the Court cannot now depart. By the first finding in the interlocutor of February 1866 the Lord Ordinary found that Mr Smith was bound to account "for the estate and effects of the deceased James Warroch intromitted with by him," to the parties preferred thereto by the judgments in the competition. But this interlocutor was so far altered by the Inner-House,—it having been declared that the words "estate and effects of James Warroch," are to be understood as comprehending "only funds, properties, and investments, which were separate, or which were or ought to have been known to the raisers (Mr Smith and his co-trustee) to be separable from the estate of Dr Pursell." Other findings (the second and third) had regard to the credit which the trustees were entitled to take for payments made by them to Mrs Gowans in respect of her supposed rights and interest under James Warroch's disposition and settlement; and these findings were adhered to by the Inner-House, "but under reservation of all questions which may be raised under the Thelluson Act."

The remit to Mr Scott, under which his elaborate report now before the Court has been lodged in process, and in reference to which the interlocutors of the Lord Ordinary disposing of the objections referred to were pronounced,—was made with the view of applying the principles thus fixed to the details of the accounting on both branches.

1. The claims against Mr Smith by the beneficiaries entitled to James Warroch's estate under the interlocutors of 1866, is for his direct and personal intromissions with the funds thereof, really without a title, although nominally in his character of trustee on Dr Pursell's estate. In so far as he became aware at Dr Pursell's death that there were funds that belonged to James Warroch's estate, it was Mr Smith's duty to have preserved them separate from the proper estate of Dr Pursell; and when he dealt with such funds on the footing of their being parts of Dr Pursell's estate, he was guilty of a legal wrong, of which the beneficiaries of James Warroch's estate had just cause to complain, and for which they were entitled to demand, and are now entitled to claim, redress. Hence the investigation by the accountant, under which he brings out the three sums of £2032, 15s., £3999, 11s. 2d., and £3620, 6s. 7d., to be chargeable against Mr Smith, for the reasons stated by him on pages 24 to 29 of his report, as estate and funds of James Warroch which must be made forthcoming.

As regards the sums of £2032, 15s. and £3999, 11s. 2d., I concur with the Lord Ordinary in holding the grounds stated in the report to be satisfactory, and have nothing to add to the exhaustive views therein suggested. As regards the third sum of £3620, 6s. 7d., there is more difficulty. It consists of a balance of accounts between James Warroch's estate and Dr Pursell's, which it required considerable investigation to ascertain correctly. On the one hand, it may be contended that, having regard to the elements for such investigation which existed in the repositories of Dr Pursell on his death,—Dr Pursell's trustees failed in their duty when they did not separate this fund as much as the other two sums, as truly capable of being separated and set aside for the parties interested in James Warroch's estate. But on the other hand, there is room for a distinction between this item of charge and the other two sums. The items of charge making up the balance of £3620, 6s. 7d. required to be minutely traced to their origin, for the whole entered the general cash account of Dr Pursell, kept in his own name with his bankers. That the amount constitutes a debt due to Warroch's estate can admit of no doubt; and in the state of the accounting it may be enough for the parties interested in that estate to have it recognised as a debt to be paid out of Dr Pursell's estate. And I consider, on the whole, that this is the safer and better conclusion. But its true character must be fixed. And a debt of this kind cannot be held to fall properly within the words of the Inner House interlocutor of 1866:—"funds, properties, and investments," which ought to have been known to Dr Pursell's trustees to be "estate and effects of James Warroch."

These are the leading questions requiring to be disposed of on this branch of the accounting, in so far as regards the funds and estate of James Warroch, with which Mr Smith and his co-trustee were bound to charge themselves as belonging to James Warroch's estate. The fourth sum mentioned by the accountant, viz., £1506, 14s. 11d., it is not disputed, must be stated not as the separate estate of James Warroch, but as estate of Dr Pursell, and to be accounted for by Mr Smith as such; and the fifth sum is to be dealt with on the same footing as was conceded by the counsel at the debate on the report.

The reasoning on which I have arrived at the conclusion now stated is this—The distinction between ancestor's estate and the estate of the heir who succeeds is a well-known distinction in competition of diligence, by the creditor of the one and other, in the law of Scotland. By the Act 1661, the heritable estate of the ancestor is allowed to stand over to pay the ancestor's creditors for a certain period of time; and by the Act 1695 the moveable or personal estate of the ancestor stands over for a twelvemonth, or even for more, so that the ancestor's creditors may make that estate available for the payment of their debts. But, as Mr Bell very clearly brings out, the estate belonging to the ancestor must be clearly identified and distinguishable from the estate of the heir himself, or of the executor. Upon that principle, it seems to me impossible to say that a balance that is brought out simply of debt, in the way that this balance is brought out, by means of tracing certain sums into the account of Dr Pursell as originating in sums that belonged to the estate of James Warroch, can ever be held to be that separate estate or separate investment which the Court intended to designate as a fund which James Warroch's beneficiaries were entitled to claim. What the Court held was, that where an estate which was James Warroch's, whether heritable or moveable, was found, at the time of Dr Pursell's death, clearly separable and distinguishable from the rest of the funds, these beneficiaries might lay their hands upon that; and, as in a *vindicatio rei*, say, that estate belongs not to Dr Pursell, but to James Warroch's succession.

There remains to be determined the payments made to Mrs Gowans, for which Mr Smith is alleged to be entitled to take credit in this accounting. This matter has been narrowed by the findings in the interlocutors of 1866, in as much as it has been thereby finally determined that such credit can be stated in reference only to payments to her that were necessary and sufficient to

discharge her claim under James Warroch's trust-settlement; and, in particular, that credit cannot be taken for payments made to her on the footing of her being either liferenter or fiar of the residue of that trust-estate. To this extent no question can be raised, excepting such as fall within the reservation by the Inner House judgment adhering to the Lord Ordinary's finding, viz., "of all questions that may be raised under the Thelluson Act."

This matter is fully treated of by the Lord Ordinary on page 21 of the appendix to the record. It is there explained, that as regards one-half of the accumulations falling under the Act, and declared to belong to the next of kin of James Warroch, it had been credited to Mrs Gowans as in right of Euphemia Warroch, and that to this no objection has been made; that as regards the other half, it had fallen in equal shares to Dr Pursell and Mrs Gowans; that the one-fourth which belonged to Dr Pursell ought to be brought to the credit of Mrs Gowans, or of Dr Pursell's estate in the accounting; but as regards the fourth which fell to Mrs Gowans herself, the Lord Ordinary was unable to hold that it ought also to be so credited, seeing that her husband was alive in 1829, and that consequently other parties may have right to claim this fourth. I cannot adopt this conclusion, seeing that the objectors have stated no right to this fund, and that there is no one having right to challenge the payment by Mr Smith to Mrs Gowans, in this process. The more just conclusion appears to be, even in this limited view, that the payment should be allowed to stand in the accounts as well made,—the more especially as it cannot be held with any certainty that the right to the sum so paid did ever vest in the husband.

2. The accounting for Mr Smith's intromissions with Dr Pursell's estate raises questions of principle different from those applicable to the other branch of the accounting. Mr Smith had a good title, in virtue of which he intromitted with this estate; and by the trust-settlement under which he acted it was expressly declared that the trustees should not be liable for omissions or presumed intromissions, but only for actual and personal intromissions; and farther, that the residuary legatees should be bound to accept an account signed by the trustees, as sufficient evidence of their whole intromissions. The nature of the present claim against Mr Smith, as surviving trustee, is, however, not such as to bring this protecting clause into operation. The claim here is for debt due by Dr Pursell's estate, and the creditors in that debt are entitled to have the trust-estate made forthcoming for their payment. The same parties may be the residuary legatees under the trust-settlement of Dr Pursell, but they are not now, or in this branch of the accounting, claiming as such. It is their claim as creditors of the estate, which alone is under discussion.

In answer to such a claim, it is no defence for trustees to say that they have no funds in their hands,—if they actually intromitted with funds of the estate which ought to have been applied primarily in the payment of debt, and have paid them away to others having no preferable right to payment. It may be, that trustees, in favourable and exceptional circumstances, can plead due administration of the estate, by payments made to parties, whose claims on the estate were inherently of a postponed nature to those of creditors whose claims were unknown and who inexcusably have kept aloof. Such is the doctrine of Lord Stair, which was appealed to. The general rule undoubtedly is, that the claims of creditors must first be satisfied before those of legatees, and the trust-deed of Dr Pursell expressly provides *primo loco* for payment to them.

Now, in this case the trustees made payment to Mrs Gowans, the liferentrix under Dr Pursell's settlement, of the free annual proceeds of his estate while the debts due to the claimants were unsatisfied, and the question is, whether they can found on those payments as exonerating them from liability to the creditors who have been preferred in the competition, in so far as their debts remain unsatisfied out of the separate estate of James Warroch?

The Lord Ordinary (Kinloch), by the fourth finding of his interlocutor of February 1866, but which was recalled by the Inner-House *in hoc statu*, found that Mr Smith "is not entitled to take credit for any payments to Mrs Gowans beyond what were necessary and sufficient to discharge the claims competent to her against the said estate of" Dr Pursell or George Warroch, (which became merged in that of Dr Pursell) and have been fixed by prior judgments in the cause; and in the sub-division of the elaborate note annexed to the interlocutor, as to this matter, his Lordship observes that he was not prepared "to draw any distinction between James Warroch's trust-property generally, and the debt due by Dr Pursell to James Warroch's estate in respect of intromissions, for this was like the others simply an asset of the trust-estate, which ought to have been preserved as inviolate as the rest." This may ultimately be found a correct view of Mr Smith's position; but I believe the Court are not satisfied that it can be affirmed without farther discussion. The position of Mr Smith in his intromissions with the two estates was certainly different, in as much as he intromitted with the one without a title, and with the other under his completed title as trustee. In making the payments which he did to Mrs Gowan, so far as the annual proceeds of Dr Pursell's estate are concerned, the defence of *bona fides* so powerfully urged by the senior counsel for Mr Smith's representatives arises for consideration now, in a different state of the process from what it did when the Lord Ordinary had the matter before him. The elaborate report of the accountant has now brought forward all the facts bearing on this question. It seems therefore that the right course for the Court to adopt will be to allow parties an opportunity to be heard farther on this important matter, and this more especially as there are other questions of a subordinate character which will require to be debated before the Court can finally decide the whole questions involved in the cause, with a view to a final adjustment of the accounting under a renewed remit to the accountant.

In conclusion, I may observe that the calculations made by the accountant in reference to the commission chargeable by Mr Smith will require readjustment in consequence of the change effected by this judgment upon the accounting in reference to the two estates, and it may also be for consideration how far the rates of interest stated by the accountant should be in all respects adopted by the Court. These are matters, however, which will be for subsequent consideration.

LORD BENHOLME—I concur in the views of Lord Cowan: and the only point to which I think it necessary to refer is, what should be done with the find-

ing as to interim payments? I think we should recal that part of the Lord Ordinary's interlocutor.

LORD COWAN—I meant to have stated that the interlocutor in that respect must either be recalled or modified as to the amount, as your Lordships may consider fit and proper. Undoubtedly as regards commission, there must be a great change made on it.

LORD NEAVES—I quite concur in the course proposed to be followed.

LORD JUSTICE-CLERK—In regard to the consignation, it may either be recalled *in hoc statu*, or, as we are not exhausting the reclaiming note, and not dealing with the whole of this interlocutor, it may remain in the meantime till the Reclaiming Note is entirely disposed of. Upon the general question in the case, I entirely concur in the view that Lord Cowan has stated, and the result will be that we exhaust the judgment of 3d July 1866, and give final effect to the views there laid down in regard to the liability of Mr Smith for James Warroch's estate, the result being that the first two items are found to have been separate or separable, and that therefore Mr Smith is responsible for them and must account for them. Therefore there can be no farther question in regard to personal liability on this head, as far as this Court is concerned. The result of that will be to throw back into Dr Pursell's estate the sum of £3620, the liferent of £1500, and the miscellaneous funds which the Lord Ordinary has also thrown back, which will leave an estate of £5600 subject to the debt of £3620.

The questions that still remain are, the liability of Mr Smith for having paid the life interest of that sum and the capital of it to Mrs Gowans. I should say, however, upon the first branch, that there is one matter to which Lord Cowan has not referred,—I mean the argument, which was very strongly pressed, about the £2000 left by James Warroch out of his own estate to Mrs Gowans. It was maintained that as Mrs Gowans had the right of disposing of the fee of the sum, the factory in favour of Mr Smith might be held to be in exercise of that power, at least to the effect of protecting Mr Smith in the administration of it under the factory. I am very far from saying that there might not be a good deal of force in that argument; but looking to the views expressed in the House of Lords, I don't see how we can give effect to it.

The only thing that remains, therefore, is the accounting upon the footing of this estate of Dr Pursell's, and there will arise, in the first place, the question whether, as Mrs Smith had a good deal to administer, and paid as he says in good faith—whether the payments made to Mr Gowans can be protected on that ground. On that of course I give no opinion. In the view that we have taken, they will not begin to run upon James Warroch's estate till 1839, because the result of Lord Cowan's view with reference to the Thelluson Act is really to make a payment of the whole liferent down to that time a legitimate payment. However, that and the remaining questions in regard to the details of the accounting, will now come up for argument freed entirely of the questions that have hitherto arisen in regard to James Warroch's estate. Therefore our judgment will substantially be to find that these two first sums were separate or separable estate belonging to James Warroch, and that Mr Smith is bound to account for them; and *quoad ultra* we shall hear the cause further.

The case was again argued, and the Court made avizandum.

At advising—

LORD JUSTICE-CLERK—By the last judgment which your Lordships pronounced in this case of Pursell, the question as to the amount of James Warroch's estate was definitively fixed. By the judgment which the Court pronounced on the 6th of March 1866 they decided that the findings of the Lord Ordinary, in regard to Mr Smith's right to take credit for payments made to Mrs Gowans out of the income of James Warroch's estate, applied to such portion of the estate as was separable or ought to have been known to be separable to the raisers, that is to say, Mr Smith, now his executor; and the contention since that date has substantially related to the amount that fell under that definition or finding. By your Lordships' last judgment that question has now been conclusively determined. The effect of that judgment was to restrict the amount of the separate estate of James Warroch by three separate sums which are dealt with in the interlocutor of the Lord Ordinary now before us of 13th December 1870, the first being the sum of £1506, which the accountant and the Lord Ordinary consider as being part of the estate of James Warroch, but which the decision of the Court found not to have been a debt due by Dr Pursell to James Warroch at all, and therefore that sum falls into Dr Pursell's estate. The second sum which was dealt with was the fourth of that portion of the income of the estate of James Warroch which fell under the Thellusson Act. The other three fourths have been found by the Lord Ordinary to belong to Mrs Gowans, and your Lordships' judgment found that that fourth also belonged to Mrs Gowans, and that consequently the whole of that amount should be carried to her credit. The third matter was that the sum of £3620, which the accountant had reported as part of the separate or separable estate of James Warroch, was not such, but was truly a debt due by the estate of Dr Pursell to James Warroch's estate, but that it was properly in the hands of Dr Pursell's trustee as administrator, and was a debt which fell to be accounted for. These matters exhaust the whole question as to the amount of James Warroch's estate, with the exception of some minor matters which are dealt with in the interlocutor of 13th December 1870. Those matters relate in the first place to some objections to the additional report of the accountant as to the mode of valuing certain heritable property, and also as to the application of the annuities upon certain parts of the estate. These appear not to have any material bearing upon the accounting. The Lord Ordinary has dealt with them in that interlocutor, and I am of opinion that he has rightly dealt with them. He has repelled the whole of the objections to the additional report. They are, as I have said, very minor matters, but I have looked into the grounds of the judgment,—we heard nothing suggested against the Lord Ordinary's interlocutor in that matter,—and I am of opinion that he has treated them quite reasonably. In regard to the other objections—which are in some respects sustained, and in some respects repelled,—apart from the matters that I have now spoken to,—they also stand in the same position; and I propose to your Lordships that we should adhere to so much of the Lord Ordinary's interlocutor as deals with these minor objections. But then the main question that was argued to us was, whether the interest of

the sum of £3620, which now has been found to be part of Dr Pursell's estate, but a debt due by that estate to James Warroch, should or should not be a charge against Mr Smith? in other words, whether he is to be found liable as the creditor in that sum in interest from 1835, when it became due, down to the present time. Now, Mr Smith in that respect is acting as trustee and administrator. In regard to James Warroch's estate, it has been found that he was not trustee, and was not administrator, and that he was nothing but an intromitter; and therefore it has now been fixed, and that is now conclusive in this Court, that he must account on that footing, and that he had no title of administration at all. But the matter of course is entirely altered when the question arises in regard to the fund which he was entitled and bound to administer. That £3620 was part of the estate of Dr Pursell, but the trustee was bound, according to the finding of the Court, to have paid that debt to the proper creditor in it. The creditor has now come forward, and he wants payment of his debt, with interest. Payment of his debt he has received; at all events he has received credit for it in the accounting, and there is no dispute about it, because the funds are extant to pay him with. But in regard to the interest, what Mr Smith says is this:—"I was acting in good faith in the administration of this estate; no claim was made against me on account of the right of the creditor in this sum; Mrs Gowans was entitled to the income of Dr Pursell's estate; I believed that she was also entitled to the income of James Warroch's estate; and I was so advised;" and in these circumstances the good faith with which the trustee acted is pleaded as a reason why he should not be liable in interest up to the time when the first demand was made by the creditor. There are two grounds, therefore, on which this contention is maintained by Mr Smith's representative. He says, in the first place, "I paid the liferentrix of Dr Pursell's estate, because no claim was made against that estate on account of James Warroch's estate. The creditor and I was not aware, and I was not bound to know, that there was any such claim of debt in existence." He says, in the second place, "Even if I did know, I believed, and I was led to believe by the advice I received, that, even if there were a debt, Mrs Gowans was creditor, because I supposed that she was entitled to the life interest of the estate." On these two grounds, he pleads the good faith of his administration. I cannot say that I have found that matter to be altogether one free from difficulty, but I am of opinion, in the first place, that it is not a sufficient answer to say that Mrs Gowans was entitled to the life interest of Dr Pursell's estate, because I am satisfied that Mr Smith was not only bound to have known but knew—I do not say the full extent of this debt of £3620—but that there was a very important question of accounting between Dr Pursell's estate and that of James Warroch, and the case which he laid before Mr More for opinion discloses that quite clearly. It was argued that the states which he himself put into process afterwards did not indicate previous knowledge. I do not think it necessary to go very deeply into that matter, because it is, I think, certain that, although he did not know the details of the accounting, he had quite warning enough to put him on his guard, and to show him that he was not safe to pay the legatee so long as the debts were not cleared off. In regard to the second point, there certainly is a great deal of equity in what Mr Smith says. He was advised by Mr More, in the opinion which he gave on the case stated, that Mrs Gowans was entitled to the life interest of this sum, and he acted upon that advice. As a general rule, however, if the trustee or administrator, from an error in law, pays a party, supposing him to be a creditor when he is not, that will not protect him. That is the general rule, although the good faith of the transaction, and the action of the true creditor, must fairly be taken into account in determining questions of that kind. We had occasion the other day, in the case of *Evans*, to deal with the whole of that branch of the law. But there is one element here that I think deprives Mr Smith of the power of protecting himself against this demand for interest to its full extent, on the ground of his good faith, and it is this: he took from Mrs Gowans, no doubt under advice, but still he took from her, a factory or mandate, on the ground that the trust had devolved on Mrs Gowans as the heir of Dr Pursell. He was advised that that would be a sufficient title, but that very act showed that he was conscious that there was a difficulty in that matter; and there was one clear course that he might have followed. He ought to have had a separate administration for James Warroch's estate, and then he would have had a creditor with whom he would have been able safely to deal. The great mistake which Mr Smith made, and one which, I think, is fatal to his plea, to the extent to which he carries it, is that he preferred running the risk of the combined management of the two estates to the clear duty which, I think, was laid upon him, to see that he had a creditor from whom he could obtain a discharge, and who would have been entitled to sue. Therefore I am not prepared to give effect to that plea. But then the question arises in regard to Mr Smith's liability for interest, and I think that is a matter which stands differently from payment of the capital or principal of the debt to a party who is not the true creditor. In that case I do not think we should have had any discretion but to have found the trustee so paying liable in the full amount of the debt; but the question of termly interest is a matter to a certain extent within the discretion of the Court. Now, it is quite certain that it might in other circumstances have had a material effect on the question I have been speaking to, that the creditor in this debt, that is to say the beneficiaries who have been found entitled to the bulk of James Warroch's property from 1835 to 1850, never made the smallest claim on Mr Smith, and allowed him to go on, we must hold in the knowledge of their right, because the knowledge was quite available to them down to the death of Mrs Gowans in 1849. And not only so, but when they did come into Court, they came into Court on the footing that their right had only emerged by that event, and that down to 1849 the right had not vested in them. I think that that is an element which we are entitled to consider in imposing on Mr Smith, who admittedly has not retained, but has paid away the funds, the liability for the accruing interest. I think the delay on the part of the creditor to claim is always an element in that matter. He has allowed another application of it, in the knowledge, or when he had the means of knowledge, of his own claim. It is quite true that these beneficiaries were not in the right to claim the amount during Mrs Gowans' life, because, as long as it was possible that she might have children,

they would have no right; but still I think that the good faith of the adminstration of Mr Smith is sufficiently proved by the facts that I have referred to, and on the whole matter, I have to suggest to your Lordships that we should only do justice if we limited the amount of the interest due by him to 3 per cent. from 1835, when the claim emerged, till 1850, when the multiplepoinding was brought. After that, when the challenge of the administration was made, of course there are no grounds on which interest can be refused. There is only one matter remaining, and that is the amount of the business accounts and commission. The accountant in his report reserves that matter for the consideration of the Court, on the ground that Mr Barstow had refused Mr Smith right to charge professional charges in his business account, on the ground that he was a trustee. But then Mr Scott says, if he was not a trustee, but only an intromitter, will that principle apply? I think very clearly that it does apply; and that if a trustee is not entitled to make profit of his funds, still less is a person who usurps the position of trustee by his own act; and I think the same principle must apply to the commission also. I would, therefore, recommend to your Lordships that we should adhere to the Lord Ordinary's interlocutor in regard to that matter, the result of the whole being that we should find that Mr Smith is liable in the interest of this sum; that that interest should be calculated at the rate of 3 per cent. from 1835 to 1850; and that *quoad ultra* we should adhere to the interlocutor of 13th December. The interlocutor of 24th December directs the consignation of the balance; but I think that before we ultimately pronounce a judgment on the reclaiming note as against that interlocutor, we should see from the accountant what the effect of these findings would be upon the balance reported. It may be, and I rather think it is, that these matters that we have decided will not affect this balance of £1186; but at all events there can be no substantial injury to the parties in delaying consideration of that matter until we have Mr Scott's report; and therefore I propose that, with the finding I have suggested, we should adhere to the interlocutor *quoad ultra*, and remit to Mr Scott to apply this finding, and to report to us the balance.

Lord Cowan—The views which your Lordship has so fully explained have been the subject of very deliberate and anxious and frequent consultation amongst us; and so far as my opinion goes, they are consistent with what I think right and justice, and the legal principles applicable to this accounting. The only question that has given me a little difficulty has been the question of interest —How far there should be any abatement on the rate which the accountant has given on the £3620, which is 5 per cent. But the views which your Lordship has explained, and the grounds upon which you have put the propriety of the Court exercising the undoubted power which they have, to look at all the circumstances and see whether there should not be some deduction on the legal interest, have satisfied me that what your Lordship has proposed is a right and proper course for us to adopt. With these few observations, I simply say that I am very glad that we now see our way to the termination of a litigation which has been coming and going before us ever since I had the honour of a seat in this Court.

Lord Benholme—This important case has been the subject of very anxious deliberation by us, and the result is that we have arrived at a conclusion that entirely satisfies my mind. I shall therefore only say that I concur in the judgment which your Lordship has proposed.

Lord Neaves—I quite concur in the opinions which have been delivered. I think we are entitled to take into view all the circumstances, including the fact that these claimants who now claim were long of coming forward, and that their own claims at first showed delicacy and intricacy of the question on which Mr Smith made a mistake as to the rights of the parties. In these circumstances, I think we are entitled to abate the legal interest, and to make it at the modified rate which your Lordship has stated.

Lord Justice-Clerk—I suppose there are no other points in the interlocutor that remain undisposed of.

Mr Rettie—We were under the impression that the last debate was to be confined to the sum of £3620. The parties were not heard on several other points, one of these being the difference between the speculative values given by the accountant of Dr Pursell's heritage, and the price actually realised from the sale. The Lord Ordinary has made a mistake in supposing that this difference was only £50, because it was above £1300.

Lord Justice-Clerk—We considered that question, and came to the conclusion that the accountant was right in the view that he took of it.

Mr Rettie—There is also the point under the Thelluson Act, whether the annuities left by J. Warroch's will were to be regarded as burdens on the heritage exclusively.

Lord Justice-Clerk—It is true that the discussion was confined to a large extent to the £3620, but certainly not by the desire of the Court.

Mr Rettie—My learned friend and Mr Watson were both under the impression that the Court desired the argument to be confined to the one point.

Mr Horn—There must be some mis-impression on my friend's part, because before I commenced to address your Lordships I asked if there were any other points on which he desired to be heard, and I understood that there were not.

Lord Justice-Clerk—It certainly was our impression that the whole debate was concluded on the interlocutor of 13th December. The question about the valuation was considered by the Court, and we formed an opinion upon it, though it certainly was not argued.

Mr Rettie—I only wish to keep the question open that we may not be foreclosed in the event of our going to the House of Lords. Mr Horn opened on the one point first, and Mr Watson replied. Then my learned friend opened on the other points, and we had only the one opening by Mr Watson on the one point.

Lord Neaves—It should have been set right at the time. You were entitled to reply. I am sure there was plenty of rope given.

Lord Justice-Clerk—I certainly was under the impression that we were entitled to deal with the Lord Ordinary's interlocutor on the footing that whatever in it was not argued was to be ad-

hered to; but we did not so deal with it. We have gone into the whole points and considered them, and I do not think we can re-open them.

LORD COWAN understood that counsel had argued all the points on which they wished the review of the Court, and if there was any point on which they were wrong, it was open to be stated in the House of Lords.

Interlocutor read.

Expenses reserved.

Agent for the Trustees—Henry Buchan, S.S.C.

Agent for the Beneficiars—L. M. Macara, W.S.

HOUSE OF LORDS.

MINISTER OF BANCHORY-DEVENICK *v.* THE HERITORS.

(*Ante*, vol. vi, p. 620.)

Teinds—Valued Lands—Moss-lands—Decree—Onus *of Proof. Held* (affirming judgment of Second Division) (1) on a proof, that the teinds of certain lands were valued; and (2) that the *onus* of proving that the teinds of lands in the parish were unvalued lay upon the minister.

This case was formerly before the House of Lords upon important questions of teind law, but the only question now before their Lordships was, —whether or not the minister of the parish of Banchory-Devenick had made out, upon a proof, that the teinds of certain parcels of land in the parish were unvalued. Their Lordships unanimously affirmed the judgment of the Second Division, holding that the *onus* which fell upon the minister had not been discharged, and that the teinds must be presumed to be valued, in the absence of satisfactory proof to the contrary.

At advising—

LORD CHANCELLOR—My Lords, in this case the appellant contends, in a proceeding which has been raised before the Court of Teinds in Scotland, that he is entitled, as a minister of the parish of Banchory-Devenick, to the teinds of certain lands within the Barony of Findon, which, as he alleges, have not been valued hitherto, and which ought now to be valued in a process which is pending for augmentation of the stipend and allocation of teinds. The case has been before your Lordships' House upon a former occasion, and the ground has been cleared to a considerable extent with reference to some of the difficulties which have presented themselves.

It appears that the teinds of this district (I will not say the parish, because that prejudges the question) were to a certain extent valued by a decreet of valuation as long ago as the year 1682. For some time after that, up to about the time of the present litigation, there had been a notion, which turned out to be erroneous upon a decision of your Lordships, that the teinds of the whole parish had been valued by the terms of that decreet. That depended upon the construction of the decreet itself; but however, when that decreet came to be analysed, it appeared to your Lordships' House that it was clear upon the face of the decreet that there was a portion, at all events, of the land as to which the teind was left unvalued, and that in respect of that the minister would of course be entitled to a valuation according to the present existing value.

Now the case is somewhat singularly circumstanced as regards the character of the land in the parish, because it appears to have consisted, in the year 1682, of a considerable quantity of moss land, as it is termed, which was unproductive, as well as of certain farms and holdings which had been appropriated to cultivation, and as to which a regular rental was paid in respect of such cultivation. It appeared to your Lordships' House upon the former occasion that, regard being had to the whole terms of the decreet, there were certain portions of land in respect of which nothing but moss land was reserved; in other words, there was no rental payable for them in respect of the cultivation of the land, but the rental was payable only in respect of the privilege of cutting peats for the purpose of burning them, which peats so cut would not be in themselves properly teindable matters. And therefore in the decreet it was carefully stated that with regard to certain lands, therein mentioned by name, the rental of these lands (I think that was the expression) had not been valued; that is to say (as one of your Lordships said), that those lands so specified by name should be taken as not being covered by the valuation of 1682. There was another certain portion of land called Badentoy in respect of which a rental in two characters was payable; there was a certain double rent which was payable; there was a certain silver rent which was payable, which latter rent (the silver rent) the Commissioners, in their decreet of 1682, stated to have been payable for the moss allenarly, and as regards that silver rent they deducted it from the valuation.

My Lords, I apprehend the case stands thus, that it is admitted on both sides that if the land were all land in one parcel, including cultivated land and moss land, whatever may be the extent of either the one or the other, and if it were all let at one rental, and that rental were valued, the teinds would be then valued for the whole of that holding. It is not because a part of the holding never produces any teinds that therefore you are to consider it as not to be valued; because, looking at the Act of Charles the First, which appears to have been a very beneficial Act for Scotland, the purpose for which that Act was passed was this, that the teinds being valued in money then and there, the settlement might be a settlement for ever, and in order that all lands, whether productive or not at that time, which was held together with other land which was held as a profitable holding, should be taken as included in the valuation, and if afterwards it should be found suitable for improvements, and improvements could be made thereon, the heritor would have the advantage of that improvement without being subject to any greater amount of teinds. But when it was found that the rental was specifically reserved in respect of any particular subject, which subject was not in itself a teindable subject, then the course of law appears to have been to deduct the rental, where it could be ascertained, from the teindable rental—it being a subject of deduction from the whole value which ought to be put upon that teind. But it did not on that account follow that the subject itself in respect of which such rent might be reserved could not be taken to be valued. An instance of that appears very clearly and plainly in the present case, namely in the case of Badentoy. Badentoy is let partly at a silver rent, and that silver rent is found to be a moss rent allenarly, and that is therefore