of the railway company. If this continued custody contended for by the trustee were countenanced by the Court, was it likely that in any other case in future such a production of documents would be made? In that way the very object of the statute would be defeated, and trustees prevented from acquiring much valuable information. A party giving up such documents in that way, did so under the implied condition that he would get them back without action; and though the documents might remain with the trustee for a reasonable time, they must be restored to the party producing them as soon as possible.

The other judges concurred.

Agents for Reclaimer — Lindsay & Paterson, W.S.

Agents for Respondent—Graham & Johnston, W.S.

Friday, June 7.

SECOND DIVISION.

DOUGLAS *v.* DOUGLAS' TRUSTEES.

Trust—Interest—Accumulation of Interest—Bona fides. Circumstances in which held that trustees who had taken an erroneous view of their duty, but had acted throughout in *bona fide*, were bound to pay to the beneficiary the net proceeds of the estate, afterwards to pay interest at 4 per cent., and lastly, interest at 5 per cent. But no accumulation of interest allowed.

These were conjoined actions of multipleponding and exoneration at the instance of the trustees of the late J. M. Douglas against General Thomas M. Douglas, and of declarator at the instance of General Douglas against the trustees.

Major Archibald Douglas Monteith died in 1842, leaving a trust-disposition, in which he named his brother, James M. Douglas, his sole executor and trustee.

He left several legacies, and directed that the residue of his fortune should be vested in the purchase of lands in the county of Lanark, to be entailed on his brother and his lawful issue. On the death of Major Monteith, his brother James Monteith Douglas made up a title to the personal estate under the Major's settlement, and he made up titles to his real estate as heir-at-law. Shortly after the Major's death, and in pursuance of his purpose of purchasing lands to be entailed under his settlement, James Monteith Douglas bought the estate of Stonebyres, in Lanarkshire, for £25,600, and laid out £23,000 in the erection of a mansion-house and in draining the estate.

James M. Douglas died in 1850, leaving a trust-disposition, by which he conveyed his whole estates, heritable and moveable, including the estates which belonged to Major Monteith, to trustees.

One of the purposes of the trust was to employ the residue of the estate in the purchase of lands in Lanarkshire, to be entailed along with the estate of Stonebyres, on the series of heirs named in Major Monteith's disposition. On his death, General Monteith Douglas was the institute appointed under his trust-disposition. Mr Lindsay was appointed judicial factor on Major Monteith's estates.

The Court decided in 1859 that the trustees of James Monteith Douglas were bound to make a separation between the two trust-estates, and to administer them separately and in such a way that the amount of residue of the Major's estate might be ascertained and dealt with according to law, as applicable to the directions of entail set forth in his settlement. General Douglas executed an instrument of disentail, by which he acquired the whole of Major Monteith's estate in fee simple.

It was decided in 1864 that the estate of Stonebyres had not been purchased by James M. Douglas in conformity with the directions of Major Archibald D. Monteith, but that it was purchased in the *bona fide* belief that he was entitled to alter the directions of his brother; that the judicial factor of General Douglas, who, by disentail, had acquired right to the whole estate of Major Monteith in fee simple, was entitled to demand from the trustees a conveyance of the estate of Stonebyres, but only on condition that he paid the sums expended by James M. Douglas in improving the property; or that the judicial factor, in the event of his not electing to take the property, was entitled to payment of the price, "with any interest that may upon a just account be held to accrue thereon." The sole question now before the Court had reference to this interest.

Young and Shand for trustees of J. M. Douglas.

Lord Advocate and Adam in answer.

At advising—

Lord Benholme—The reclaiming note which we are now called upon to deal with is presented against an interlocutor of the Lord Ordinary, by which his Lordship repels the first and second objections for the trustees of J. M. Douglas, as contained in number 937 of process, and appoints the case to be enrolled with a view to farther procedure. The substance of the two objections to the report thus repelled is, that the accountant has proposed an accounting as between the objectors and General Douglas, in reference to the income or the interest due to the latter from the period of James Monteith's death in 1850 down to the present time, on the footing that on the capital of Major Monteith's estate (which has been ascertained by the accountant) interest should be allowed with or without annual accumulations. The accountant has proposed different rates of interest, and under alternative of annual accumulations or without them, leaving it to the Court to determine the rate of interest and the alternative as to accumulations.

Whilst the objectors object *in toto* to the principle of the report, and suggest various alternatives, some of which would exclude all accounting as between the parties during the foresaid period, and others point in various ways to a modification of the report, both as to the principle and as to the details, it seems unnecessary to specify these alternatives, since the interlocutor now under review repels the objections *in toto*.

The interlocutor itself does not select any of the alternative rates of interest proposed by that accountant, nor does it presently determine the question of accumulations. But the note of the Lord Ordinary intimates his opinion that both legal interest and accumulations should be given.

After the best consideration I can give to the case, I cannot concur in this. I think that justice requires that the whole period from 1850 downwards should not be dealt with on the same footing. It is to be observed that from 1850 till the decision of the Court, pronounced in 1859, by which it was determined that James Monteith had no power to deal with his brother the Major's estate, as substantially merged in his own. There was a complete uncertainty whether it would ever

be necessary to separate the two estates or to consider the General as entitled to the character of a creditor for the full amount of the Major's estate as at the date of his death. Now the cause of that uncertainty was certain expressions in the Major's settlements which seemed, in one view of them, to give his brother very ample, if not unlimited, powers in altering or modifying the Major's settlements. There seems to be no doubt that James, during his whole life, was under the *bona fide* belief that these extensive powers were vested in himself. He certainly acted upon that footing; and upon his death it is not wonderful that his trustees considered themselves not only entitled but bound to execute his trust instructions as applicable to the whole property, of which their constituents died possessed, and as constituting one undivided trust.

During this period of uncertainty, therefore, occasioned by the ambiguity of the Major's settlement, I cannot think that the objectors are bound to account to his successor upon the footing of his being the ascertained creditor of James, and not rather as the beneficiary under both trusts. On the contrary, I think that justice will be done between the parties by holding that, until that ambiguity was put an end to by the final decision of the Court, the General is not entitled to demand more than that there shall be paid over to him, in his double character, the whole net process of the joint estate under the management of the objectors, in so far as these have not already been accounted for to him. But by the decision of the Court in 1859, the true character of the General was clearly ascertained to be that of a creditor; and it appears to me that from that date he is entitled to demand interest upon the capital. I must observe, however, that the very ground upon which he is entitled to demand in trust, as purely the creditor upon his brother's estate, excludes him, in my opinion, from claiming accumulations, or, in other words, compound interest upon his debt. The ordinary rule of our law is against compound interest, and the General's resulting character of creditor, in consequence of the judgment of the Court in 1859, does not entitle him to so unusual a benefit as that which compound interest would confer upon it.

But it is necessary to attend to another and subsequent date in the history of this litigation. It was ascertained that the estate of Stonebyres had been purchased by James as the property to be entailed, that the purchase was made with money (amounting to £25,600) which clearly formed part of the Major's estate. Upon this property James had afterwards expended an additional sum of his own money, exceeding the original purchase money in the way of improvements. Now the General claimed right to Stonebyres, with these improvements, as belonging to him, at the value of the original purchase money; and after some litigation it was determined that he had an option to take or reject the estate, but that if he took it he must give credit to James' estate for the money laid out in improvement, as well as the purchase money. The judgment of the Court, dated 30th March 1864, contained the following passage:—"Find that in the event of the said factor and the said General Monteith Douglas electing not to take a conveyance of the estate of Stonebyers, under the conditions foresaid, they will then be entitled, in accounting, to receive payment or credit of, or credit for, the said sum of £25,600, paid out of the funds of the said Archibald Douglas Monteith, as the price of the said estate, *with any interest that may upon a just accounting be held to accrue thereon*, after making allowance for the liferent use and enjoyment by the said James M. Douglas of the said sum as part of the residue of the estate of the said A. D. Monteith." General Monteith having, by minute, declared his option to reject Stonebyres on the terms by which his option was fettered, "the Court of this date (20th July 1864) having resumed consideration of the cause with the minute for the judicial factor and General M. Douglas, number 2099 of process, remit to the Lord Ordinary to give effect in the accounting to the interlocutor of 30th March 1864, and the said minute."

In reviewing the interlocutor of the Lord Ordinary reclaimed against, the Court must now give effect to that part of the interlocutor of 30th March 1864 which finds that General Monteith is to have credit for the purchase money, "with any interest that may on a just accounting be held to accrue thereon." Now on this part of the case the consideration of the rate of interest on the sum in question has been interrupted by a convention on the part of James' trustees, that no interest should be allowed on this sum; nay, that no interest should be allowed on a part of his capital equal to the total amount laid out by James, both in purchasing and improving Stonebyres. This pretention could not be founded upon the footing that James was justified in purchasing this comparatively unproductive property, or in so lavishly improving it, since it had been expressly found by the Court, in their interlocutor of 36th March 1864, that "the said purchase was not authorised by nor in conformity with the directions contained in the will of Archibald D. Monteith." But it was contended that had it not been for the General's claim to a conveyance of Stonebyres, the trustees might have sold the estate in 1859, and might have got a price equal to the whole sum laid out upon it. It was therefore argued that the General should forego interest upon a part of his capital equal to this whole sum, and in lieu of such interest, be contented with the net revenue of the estate.

This contention was ably supported, and had considerable plausibility, but after anxious consideration I have not been able to adopt it.

I think, in the first place, it is very far from clear that had the General's claim for Stonebyres been propounded in 1859 and maintained till 1864, the trustees either would or could, consistently with their duty to the beneficiaries under James' trust have parted with Stonebyres, a property which was purchased by their constituent, and which they were directed by him to entail. They seem not entitled to sell that estate unless under an emergency in the affairs of the trust, which could not have been certainly known to have occurred in 1859. And this doubt in my mind is very much strengthened by the conduct of the trustees since the General's pretentions have been finally disposed of; for since 1864 down to the present time, no sale of Stonebyres has taken place, nor so far as appears has been attempted or resolved upon. But in the second place, I think it not to be assumed as certain or even likely, that had the estate been sold in 1859, it would have fetched the large price at which it is contended the General must be bound to estimate it.

In these circumstances, the remedy contended for by the trustees is one which I cannot concur in. At the same time, I think that the General's pretention as to Stonebyres must have had the effect

of delaying for five years the final extrication of the two estates, a delay which manifestly must have in some measure embarrassed the management of the trustees in the administration of the trust-estate, and I think that the judgment of the Court I have already quoted, points at a modification, greater or less, of the rate of interest upon the sum of £25,600.

Now, instead of a great modification of the interest of this sum, I think a simpler course would be to adopt a lesser modification upon the interest of the whole capital, and I would propose that on his whole capital the General should be entitled only to interest at 4 per cent. from 1859 to 1864.

After 1864 I see no reason to allow him less than the legal interest, at 5 per cent.

I have only further to observe, that from 1859 downwards, the General must give credit for his possession of the mansion-house and house farm of Stonebyres of a fair sum as rent, to be fixed by arbitration.

Lord Cowan and Lord Neaves concurred with Lord Benholme.

Lord Justice-Clerk—I concur generally in the opinion which has been given by Lord Benholme, that the trustees of James Douglas are liable only for the actual proceeds of the estate as invested by James Douglas down to 1859, the period at which it was fixed by the Court that the estates were subject to be divided; but I differ in regard to the period between 1859 and 1864, and I think that the same rule should be applied to that period as to the preceding, and that the same principle of accounting should regulate it. The whole estate was vested in the trustees by James M. Douglas, who acted in *optima fide;* and his trustees were bound to vindicate the position he had taken up. They could not, while the question was being determined, at their own hand alter the investment; moreover, from the time of serious challenge, they, by bringing the multiplepoinding into Court, placed the administration of the estate under control of the Court. They did not act as proprietors of the estate, and they would have acted rashly if they had done so. The Court decided in 1859 that the estate of Archibald Monteith was to be separate from James' estate; but it was not till 1864 that General Douglas elected not to take the estate of Stonebyres. The General during all this time claimed to retain possession, and to pay no more than the estate originally cost, rejecting altogether the sums expended by James. It appears to me that this claim was made in such circumstances as to paralyse the trustees. It remained uncertain whether he would take the money or the estate, and I am unable to see how the claim for interest during this period can be maintained. I feel the effect of the former judgment as somewhat different from my views; but the interlocutor of the Court does not exclude the opinion I now give.

Agent for Trustees of J. M. Douglas—Melville & Lindsay, W.S.

Agent for Judicial Factor on Major Monteith's estate—Alexander Howe, W.S.

Agents for James Douglas—Dundas & Wilson, C.S.

Friday, June 7.

HUNTER *v.* COCHRANE.

Commonty—Decree—Possession—Negative Prescription—Nonuse—Proof—Onus. A decree of the Court of Session in 1764 being construed to find that certain specified lands were held by two proprietors as a commonty, (1) Held that the successor of one could not constitute, as against the successor of the other, an absolute right of property, unless he could establish not only disuse by the latter during the prescriptive period, but his own exclusive possession by acts inferring an absolute right of property. (2) Held that the proof established no cessation of possession by one party, and no exclusive possession by the other. (3) Held that, standing the decree, the *onus* lay upon the party challenging or asserting a possession inconsistent with it.

This is an action brought by Mr Hunter of Easter Colzium against Mr Cochrane of Harburn, for division of the lands of Broadbents, in the parish of Mid-Calder and sheriffdom of Edinburgh, which the pursuer alleges to be a commonty belonging to him and the defender. The pursuer alleges that he has possessed the lands as a commonty upon titles conferring upon him an express right; which titles, and the possession which had been had upon them, had been interpreted by a decree of the Court of Session in a question between his and the defender's predecessor in the year 1764, which established a right of common property in these common predecessors in the lands in question. He also alleges that he and his predecessors and authors have, since the date of the said decree, possessed the said lands by exercising rights of commonty upon them, and especially by the pasturing of sheep. When the case came into Court, the defender objected to the title of the pursuer to insist upon a division of the commonty, maintaining that his titles and the decree foresaid gave him no higher right than one of servitude; and further, that, even if the pursuer had once had a right of common property in the lands, he had lost it by not exercising it for forty years, and that he (the defender) had had for the same period a continuous, adverse, and exclusive possession, which had destroyed any rights the pursuer ever had. He claimed the lands of Broadbents as his exclusive property, though he did not dispute that the pursuer might have servitude of pasturage over them. The defender had no title conveying the lands of Broadbents to him expressly, but he claimed them under a clause of parts and pertinents of the lands of Crosswood Burn, which form part of the estate of Harburn, of which he is proprietor.

The Lord Ordinary (Jerviswoode), before whom the action depended, allowed parties a proof of their averments, and appointed the pursuer to lead in the proof, although the pursuer contended that the *onus* lay upon the defender, who sought to dispossess him from the lands by establishing a possession of them adverse to and destructive of his express titles. A lengthened proof was led as to the use of the commonty since the date of the decree of 1764, and especially during this century. Thereafter the Lord Ordinary found (1) that the pursuer had failed to prove that since the date of the decree, or for forty years prior to the date of the present action, he had possessed the lands; and (2) that the defender had possessed for forty years and upwards, "by pasturing sheep and cattle, by killing game thereon, and by excluding the pursuer, his predecessors, and authors," from using the lands for such purposes. His Lordship therefore assoilzied the defender, with expenses, saying, *inter alia,* in a note, that he was of opinion that