The defenders objected, and moved that they should be allowed to retain their own expenses out of the trust estate. They argued that their conduct had been reasonable, and that they had been in good faith in defending the action, more especially as a very serious attack was made upon their own character. The pursuer had withdrawn certain of the charges, and the defenders had been completely exonerated by the jury. It was a question of circumstances whether trustees who had unsuccessfully defended a trust-deed were entitled to their expenses — *Watson* v. *Watson's Trustees*, January 20, 1875, 2 R. 344.

LORD PRESIDENT—The jury have given a special verdict. On the first issue they find in general terms for the pursuer; but on the second issue they do not find for the pursuer, but "find that the deceased William Ross was of weak mind, but unanimously exonerate the defenders from all charges contained in the second issue." It seems to me that we must give at all events equal, if not greater, deference to the special finding upon the question of fact, more especially when the question is one of conduct. Now, on the assumption of the soundness of the jury's verdict, the position is that these gentlemen, the defenders, acted honestly and rightly in relation to this will, and it follows that they were right in accepting the trusteeship purported to be imposed upon them by the will. The facts are peculiar in this respect, that the charges from which these gentlemen are exonerated are exactly the charges which apply to the inception of the will, and to the accepting of the trusteeship, and we could not hold that the views of the jury were correct, and at the same time that the trustees were blameworthy, and were not entitled to be indemnified out of the estate from the consequences of this action. I must own that I have some difficulty in harmonising, or conjecturing any harmony between, the jury's finding in fact and the implications contained in their findings in favour of the pursuer on the two issues, but I am disposed to think that they may have considered there was some strain of insanity in the testator, which, though occult, none the less disabled him from executing a valid testament. I do not say that is my own view of the facts, but state the theory, because some such theory is necessary as a condition of the argument upon the question of expenses. On the other hand, my own view, as well as that of the jury, is that these gentlemen acted rightly, and accordingly I am of opinion that they are entitled to be indemnified out of the estate.

LORD M'LAREN—I am of the same opinion. It seems to me that when the character of trustees is impugned in an action of this nature, if they are honest men they are bound to defend their character. If the verdict is in their favour on the question of fraud and circumvention, I think it would not be equitable under any circumstances that the trustees should be subjected to an award of expenses. As to whether the defenders are also entitled to have their expenses paid out of the trust estate, I should be guided by the impression formed by the presiding judge as to the merits of the action. In the present case I have no hesitation in agreeing with your Lordship in the chair.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

> "Apply the verdict . . . and in respect of the finding upon the first issue reduce the trust-disposition and settlement: Find the defenders entitled to retain their expenses out of the trust estate, also find the pursuer entitled to his expenses out of the trust estate."

Counsel for the Pursuer—A. J. Young—Macaulay Smith. Agent—George M. Leys, Solicitor.

Counsel for the Defenders—Guthrie, Q.C. —Kennedy. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, May 25.

FIRST DIVISION.

M'INTOSH *v.* ROY.

Poor's Roll—Probabilis causa litigandi.

The Court will not entertain any application to review the decision of the reporters on *probabilis causa litigandi* unless it is alleged that there has been a gross miscarriage of justice or failure of duty upon the part of the reporters.

This was an application by Alexander M'Intosh in a petition presented by him for admission to the poor's roll. Counsel for the parties having been heard by the reporters, they found that the applicant had no *probabilis causa*. He now appeared and presented a note to the Court in which he stated that the reporters had given no grounds for their finding, and that it was erroneous. He craved the Court either to admit him to the roll or to order the reporters to give the grounds of their decision.

Counsel for the respondent maintained that the decision of the reporters was final, and that it could not be subjected to review unless there were allegations of a gross miscarriage of justice or failure of duty on the part of the reporters. He quoted in support of his argument the cases of *Currie*, January 21, 1829, 7 S. 302, and *Robson*, May 12, 1876, 13 S.L.R. 421.

LORD PRESIDENT — The decisions are conclusive on this matter. The Court will not, apart from allegations of the character of those referred to by Mr Morison, entertain the question whether the reporters on *probabilis causa litigandi* are right or

wrong on the merits of an application for the benefit of the poor's roll. There are no such allegations here.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the prayer of the note.

Counsel for the Respondent—T. B. Morison. Agent—Peter Morison, S.S.C.

Wednesday, May 25.

FIRST DIVISION.

MACPHERSON *v.* HOY.

Appeal to House of Lords—Leave to Appeal—Interlocutory Judgment—Appeal from Dean of Guild Disposed of in Court of Session and Remitted to him to Pronounce Operative Decree—Judicature Act 1808 (48 *Geo. III. cap.* 151), *sec.* 15.

Held that a judgment of the First Division in an appeal from the Dean of Guild Court, which exhausted the conclusions of the appeal, but remitted the case to the Dean of Guild with instructions as to how to dispose of it, was not an "interlocutory judgment" in the sense of section 15 of the Judicature Act; and a petition for leave to appeal to the House of Lords, which was presented after the Dean of Guild had pronounced judgment in the cause in terms of the remit, no appeal having been taken against that judgment, *refused.*

Opinion (*per* Lord President) that even if the judgment of the Court were regarded as interlocutory in the sense that it was pronounced in a process brought to the Court on appeal from the Dean of Guild, and subsequently remitted to him, any appeal would be futile against an interlocutory judgment which was followed by a final one, so long as the last named stood unappealed.

Mr John Macpherson on 3rd April 1897 presented a petition in the Edinburgh Dean of Guild Court for warrant to take down certain buildings Nos. 9 to 13 Market Street and erect new ones on the sites. Answers were lodged by Mr James Hoy, who pleaded, *inter alia*, "The respondent having a servitude *non altius tollendi* over the petitioner's property, the petition ought to be dismissed," and the Dean of Guild, after hearing parties, found that the respondent Hoy had no right of servitude *altius non tollendi* over the property of the petitioner, repelled the above plea-in-law, and granted warrant in terms of the prayer of the petition.

The respondent appealed to the First Division, who on 22nd October 1897 pronounced an interlocutor whereby they "Sustain the appeal: Recal the interlocutor of the Lord Dean of Guild dated 13th May 1897 in so far as it finds that the respondent Hoy has no right of servitude *altius non tollendi*, and repels the third plea-in-law for the respondent, and grants warrant to the petitioner in terms of the prayer of his petition and plans, and finds the petitioner entitled to expenses, and remits the account to the Auditor: Find that the respondent Hoy has a right of servitude *altius non tollendi* over the properties Nos. 9 and 10 Market Street, and is entitled to have the prayer of the petition refused in so far as it relates to those properties: *Quoad ultra* adhere to the said interlocutor: Find the respondent Hoy entitled to expenses in both Courts, and remit the accounts thereof to the Auditor to tax and to report, and continue the cause and decern."

On 16th November the Court pronounced a further interlocutor whereby they "Approve of the Auditor's report upon the account of expenses of James Hoy, the appellant, No. 99 of process, and decern against the petitioner John Macpherson for the taxed amount thereof, being £86, 5s. 3d.: Further, remit to the Dean of Guild to refuse the prayer of the petition in so far as it relates to Nos. 9 and 10 Market Street, and *quoad ultra* to proceed."

These interlocutors were extracted by the respondent, and the process was transmitted to the Dean of Guild Court.

On 16th December the Dean of Guild pronounced the following interlocutor:—"Having resumed consideration of this petition, with certified copy interlocutors of the First Division of the Court of Session of 22nd October and 16th November 1897, in terms of these interlocutors refuses the prayer of the petition in so far as it relates to the properties Nos. 9 and 10 Market Street, and ordains the petitioner to amend his plans in this respect in conformity with the findings of the interlocutor of 22nd October 1897: Grants interim warrant to the petitioner to take down and remove the existing buildings Nos. 11, 12, and 13 Market Street, and *quoad ultra* continues the cause."

A petition was presented to the First Division by John Macpherson craving for leave to appeal against that part of the interlocutor of 22nd October recalling the judgment of the Dean of Guild so far as dealing with the respondent Hoy, and against the interlocutor of 16th November.

The respondent objected to the competency of the petition.

Argued for respondent—The process was no longer in the Court, having been remitted to the Dean of Guild Court. The decree had been implemented there, and it was no longer competent to come back here and obtain leave to appeal against it. In point of fact, the judgment of this Court was not an interlocutory one at all, but a final judgment exhausting the conclusions of the Court of Session process, for there was nothing more which the Court could do to dispose of the case. Accordingly, it was not competent to ask for leave to appeal against it in terms of section 15 of the Judicature Act. In any case, the proper course for the petitioner would be