

No. 3. Answered: 1. A cautioner who pays in consequence of a peremptory demand, whether judicial or extrajudicial, pays *necessarily*, and wherever he does so, he must be entitled to full relief, and of course to interest upon the sum which he has paid, without which he would not be indemnified; 24th January 1627, L. Waughton against L. Innerweek, No. 57. p. 519. 16th January 1627, Cranston against L. Frendraught, No. 56. p. 519. Creditors of Crichen, No. 72. p. 532.

2. Mr. Riddell claims the preference, not in right of the Duke of Queensberry, or the Edinburgh Friendly Insurance Company. He claims it in virtue of his own infestment in relief, with which the infestment of Mrs. Fergusson was burdened. Had he remained undenuded in her favour, every claim of relief competent to him as trustee, and those in question among the rest, would have been completely secured. But he denuded only under the burden of these claims, so that they must be as effectually secured as if his trust infestment had still remained, and accordingly they are expressly excepted in the clause of warrandice of the very heritable bond which is the title of the objectors to appear in the ranking.

Mr. Riddell's claim is as definite as any debt of relief can be, namely, for the principal sum and interest paid by him, with interest upon the whole sum paid as a new capital. Unless, therefore, this claim is good, it must be conceded, that (contrary to what has been uniformly understood) our law admits of no form by which an heritable creditor in relief can be protected from loss.

Replied: Mr Riddell had a complete security against loss in his own hands, had he chosen to avail himself of the assignation which he obtained from Mrs. Fergusson, and paid the interest as it fell due out of the rents.

The Lord Ordinary "sustained the objection to the accumulation of interest upon the bond of corroboration to the Duke of Queensberry, and likewise to Mr. Riddell's claim for interest upon interest paid by Mr. Riddell as a preferable creditor for the same."

On advising a reclaiming petition, and additional petition for Mr. Riddell, with answers, the Court, (27th February 1801), by a narrow majority, "adhered."

But afterwards, on advising a second reclaiming petition, with answers, the Court, by a considerable majority, and on the grounds above stated, altered the interlocutor, and repelled the objections to Mr. Riddell's claim.

Lord Ordinary, *Armadales*.

For Sir F. Ford, *Hay, Jo. Clerk.*

Alt. *H. Erskine, M. Ross.*

Clerk, *Home.*

R. D.

Fac. Coll. No. 145. p. 552.

1802. *March 3.* CAMPBELL *against* The EARL of GALLOWAY.

No. 4.

In what circumstances a debtor is understood to be

In the year 1744, the late Earl of Galloway purchased from Captain John Stewart of Drummorrell, the lands of Meikle Arrow, and received a disposition to them, which bore *in gremio* a discharge of the price. Soon after,

Stewart's affairs having gone into disorder, he executed a trust-disposition, by which he conveyed the lands of Drummorrell, and others, to trustees, who were empowered to dispose of the subject; to sell such parts as they should think sufficient to defray his debt; and to distribute the remainder among his children. The late Earl of Galloway was named as one of the trustees; he accepted the office; intromitted with the estate, and took a share in the management. Previous to the purchase of Meikle Arrow, the Earl of Galloway had been a creditor of Captain Stewart's to a considerable amount.

As it appeared that the debt exceeded the value of the property, the whole estate was sold, and the price was made payable at Martinmas 1749, and bore interest from the term preceding.

With a view to extricate matters, a process of multiplepinding was raised in the year 1760, in the name of the trustees, against the heirs and creditors of Captain Stewart. After a good deal of procedure in this action, which involved a variety of claims of competing creditors, an interlocutor of ranking was pronounced on the 29th July 1769. In the mean while, the trustees allowed a small balance of the price of Meikle Arrow to remain in Lord Galloway's hands, and also lent him first £37 on a bill, dated 28th November 1763, and afterward £210, for which they received a bill from his Lordship on the 29th February 1764, payable three days after date.

The factor upon the estate brought an action against the Earl of Galloway for payment of these sums, with interest, and upon the 19th December 1789, obtained a decree from the Lord Henderland, Ordinary, in his favour. This interlocutor was ultimately adhered to by the Lord Ordinary, and a petition to the Inner-House against it being advised with answers and replies, was refused, (28th November 1792.) From this interlocutor, the defender appealed to the House of Lords; but afterward passed from his appeal, and the judgment of the Court of Session was affirmed (26th February 1794) by consent of parties.

The cause was thus final, so far as related to the payment of the Bills, and upon the death of Lord Henderland, a remit was obtained to Lord Cullen, to consider the other branch of it, which had been referred in their Lordships interlocutor; and, "The Lord Ordinary having (21st January 1800) considered the petition for the pursuer, and remit thereon from the Court of 4th December 1798, together with the foregoing minutes of debate, former proceedings, and whole process; repels the defences stated for the Earl of Galloway, upon the article of £23 3s. 11d. before mentioned: Finds him liable in payment of that sum to the pursuer, with interest thereof from the 1st September 1745, and till payment, and decerns; and farther adheres to Lord Henderland's interlocutors of 18th December 1789, and 15th June 1791."

This interlocutor was acquiesced in by both parties, but the question came to be, from what period the interest on the sums due should be accumulated, so as to bear interest? After hearing parties as to this point, the Lord Ordinary (8th

No. 4.
in mora, to
the effect of
making him
liable in accu-
mulation of
interest

No. 4. July 1800) “ finds, with regard to the two principalsums of £37. 18. 1d. and
 “ £210 14s. 6d. both Sterling money, and annual-rent of both, for payment
 “ whereof decree was pronounced by the late Lord Henderland in his interlo-
 “ cutor bearing date the 18th December 1789, which has been ultimately ad-
 “ hered to, and become final, that said two principal sums, and annual-rent
 “ thereof foresaid, are to be accumulated as at the date of said interlocutors ;
 “ and finds the Earl of Galloway liable to the pursuer for such accumulated
 “ sum, as the said two principal sums and annual-rent shall amount to, as at
 “ said period, and for the annual-rent of that accumulated sum from and since
 “ the said period, and in time coming during the not-payment : And with re-
 “ gard to the other principal sum of £23. 3s. 11d. Sterling, and interest there-
 “ of, for which the present Lord Ordinary, in his interlocutor of 21st January
 “ last, pronounced decree, which is become final ; finds, That said last-men-
 “ tioned principal sum and interest are to be accumulated only as at that date ;
 “ and finds the Earl of Galloway also liable to the pursuer for such accumu-
 “ lated sum, as the said last-mentioned principal sum and interest shall amount
 “ to as at said last-mentioned period, and for the annual-rent of that accumulated
 “ sum from and since the said 21st day of January last, and in time coming dur-
 “ ing the not-payment, and decerns.”

The Earl reclaimed to the Court against this interlocutor; and

Pleaded : *1st*, The sentences of the Court of Session, and of the House of Lords, with respect to the amount of what is due by Lord Galloway, have been long since final, and it is not competent to decern for a greater sum than was awarded by these sentences. The amount of the debt, so far as arose from the two bills, was finally fixed by the judgment of the House of Lords, and so far as related to the balance of the price of Meikle Arrow, by the interlocutor of the Lord Ordinary, January 21, 1800, both of which judgments are final.

2d, But although it were competent, the claim for accumulation of interest is contrary to the law of Scotland, which expressly excludes interest upon interest, except in the case of an extracted decree and horning; Stair, B. I. Tit. 15. § 8. : nor is there any case authorising a contrary doctrine. In the case, Creditors of Scott against Wilson, February 2, 1773, No. 27. p. 14189. there was no retrospective accumulation; and in the case of Campbell against Hathorn Stewart, though there was an accumulation of interest awarded, it was because there was doubt of the verity of the debt, which was constituted by bond, and a charge of horning had been given.

3d, There would be peculiar hardship in this case to find accumulated interest due, for the defender is also a creditor to the estate of Drummorrell to a considerable amount; and if the sums due by him are to be accumulated for the purpose of bearing compound interest, the sums due to him ought to be accumulated also.

Answered: *1st*, The claim of the pursuer is competent; for the interlocutors which are final related merely to the verity of the debt, and by these judgments, certain sums were found at their date to be due by the defender. It would have been premature to demand accumulations before the debt was established. These accumulations have only been found due from the date of Lord Henderland's interlocutor; and the pursuer cannot be in a worse situation by having his judgment in his favour affirmed on appeal.

2d, Accumulated interest is due by the law of Scotland, if the debtor be *in mora*; and the defender has clearly been *in mora* ever since the interlocutor of the Lord Ordinary, by which the sums were awarded. Accordingly, in other cases of debts due to this same estate, accumulation of interest has been granted. Lord Henderland, Ordinary in the process with Captain Hathorn, found "Captain Hathorn, in respect of the long time during which the price of the lands of Drummorrell, and the interests due thereon, have remained in his Captain Hathorn and his predecessor's hands, bound to accumulate said principal sum and interest in one sum, and that said accumulated sum ought to bear interest from the date of the execution of the summons against him in this process." (*viz.* 20th December 1783); and this judgment was ultimately adhered to by the Court. The same judgment was given in the case of Mr. Hathorn Setwart, with this variation only, that the accumulation was only carried back to the date of the Lord Ordinary's first interlocutor.

3d, There can arise no argument from the circumstances of the case in favour of Lord Galloway, whose father was himself a trustee, and in that character ordered other debts due to the estate to be accumulated. It is true, Lord Galloway is also a creditor, but he was merely a creditor of the late Captain Stewart's, before his estate was vested in trustees; and as he is debtor to the trustees to the amount of the sums which were lent him, it can make no difference with respect to their claim, that he had previously been a creditor of Captain Stewart.

The Lords (17th November 1801) altered the interlocutor of the Lord Ordinary, and restricted the sums decerned for, to the principal and interest concluded for in the pursuer's libel.

But, upon considering a reclaiming petition with answers, "They alter the interlocutor reclaimed against, so far as to find, the pursuer entitled to have the debts due by the respondent, accumulated as at 8th July 1800, when he applied to the Lord Ordinary for having the interest accumulated, and remit to the Lord Ordinary to proceed accordingly."

The Court were very much divided in this case. Some of the Judges thought, that annual-rent upon annual-rent was contrary to the law of Scotland, and that no accumulation of interest should be awarded; while others were of opinion, that, as the debt was clearly proved, and as the defender was the son

No. 4. and representative of one of the acting trustees, whose duty it was to settle the accounts from time to time, and lend out the balance, the judgment of the Lord Ordinary should be affirmed *simpliciter*, and the debt accumulated from the date of Lord Henderland's interlocutor in 1789. But the majority of the Court adopted a middle course, and held, that accumulation should be awarded from the date of Lord Cullen's interlocutor in 1800, when the demand was made, and when his Lordship might have allowed an interim decree to be extracted for the bygone interest.

Lord Ordinary, *Callen*.

Act. *Hay, Gillies*.

Agent, *T. Adair, W. S.*

Alt. *Campbell*.

Agent, *A. Young, W. S.*

Clerk, *Horne*.

J.

Fac. Coll. No. 32. p. 64.