proved of by the Lord Ordinary, by substituting the word "and" for the word "or" before the word "intimidation."

Agents for Pursuers—J. & R. Macandrew, W.S.
Agents for Defenders—Gifford & Simpson, W.S.

Friday, December 16.

GRAHAM'S EXECUTORS *v.* FLETCHER'S EXECUTORS.

Interest—Agent and Client—Indemnification. An agent having for twenty-seven years paid premiums on a policy on the life of a client, who had gone to Australia—the first two advances being unauthorised, but the subsequent ones continued under an instruction to raise money for the purpose, if possible—*Held* that his representatives were entitled to repayment of the advances, but (*diss.* Lord Ardmillan) with simple interest only at 5 per cent., and not compound; and that this, in the absence of stipulation or well-known practice, constituted full legal indemnification.

This was an action at the instance of the executors of the late Humphrey Graham, Writer to the Signet, Edinburgh, against the executors of Dr Dugald Fletcher, formerly of Dunkeld, and latterly of Port-Eliot, in South Australia; and concluded for payment of a sum of £2017, 8s. sterling, being the amount of annual and extra premiums on a policy of insurance upon the life of Dr Fletcher, advanced, as they became due, to the Standard Insurance Company by Mr Graham, on behalf of Dr Fletcher, with compound interest upon the said premiums, from the dates when the same were advanced to 4th May 1869. There was also a conclusion for £504, 10s. 4¾d., being the amount of certain business accounts alleged to have been incurred by Dr Fletcher to Mr Graham; but these accounts were held, by the Lord Ordinary (GIFFORD), to have undergone the triennial prescription, and the pursuers did not reclaim against that finding. The advances of premiums commenced in the following way:—Dr Fletcher had effected in 1832 a policy of assurance on his own life for the sum of £1000, with participation of profits, with the Standard Life Assurance Company; and the premiums thereon were duly paid until his departure to Australia in 1842. On 3d February 1843 Mr Graham, who acted as Dr Fletcher's agent in this country, received a notice to the effect that an extra premium, in consequence of residence abroad, was due on Dr Fletcher's life policy; and that if the sum of £5, 16s. 3d., the amount of said premium, were not immediately remitted, the policy would be cancelled. In order to prevent the forfeiture of the policy Mr Graham made the required advance, duly intimating to Dr Fletcher that he had done so; and thereafter, on 9th April 1843, he also paid the annual premium which was due on said policy, amounting to £33, 7s. 6d. On 19th April 1843 he wrote Dr Fletcher as follows:—

"*Edinburgh, 19th April* 1843.—My dear Sir,—I wrote you on 4th February. The other day I had another letter from the Perth agent of the Standard Company intimating that £33, 7s. 6d., being the annual premium on your policy with the Standard, was past due, and requiring payment. In order to prevent forfeiture of the policy, I have advanced that sum, and the receipt for it is in my hands. I hope you will remit me immediately these two sums of £33, 7s. 6d. and £5, 16s. 3d. which I have advanced to the Standard, as I cannot afford to lie out of such sums, more especially when other sums are due me, and I have considerable advances to make in the lawsuit with the Fishers regarding John Fisher's succession."

In reply to this letter Dr Fletcher wrote on 21st August 1843—

"*Murrendindy, 21st August* 1843.—My dear Sir,—I have just received your letters of the 24th of January and of 4th February 1843, and lose no time in thanking you most kindly for your *care* and attention to my interest at a time when it was so much required. I can in no way account for the silence of Mr Menzies, as I have not heard from him myself, unless illness be the cause. I shall, however, be very glad if you can continue my life insurance by raising money for that purpose, as I cannot, without manifest *disadvantage*, dispose of sheep for two years at least, as, with all my efforts, I can only make my income meet the heavy expenses of a sheep station at its commencement. If you cannot raise the sum, there is no alternative but for you and Mr Menzies between you, or either of you, as you think best, to dispose of the policy to the best advantage, he having the necessary papers, and transmit me the money through the Union Bank of Australia, Melbourne, Port Philip, the bank I do business with."

In consequence of this letter Mr Graham continued to pay the future premiums on the policy as they fell due until his death. After his death the pursuers, his executors, in order to keep up the policy, paid one more premium, being the only other premium that became due before Dr Fletcher's death in 1869.

Throughout a considerable portion of the time during which these advances were being made Mr Graham was engaged in conducting a lawsuit for Dr Fletcher, in which very considerable pecuniary interests were involved. Dr Fletcher's expectations were however disappointed, and he did not in the event receive any part of the fund in dispute.

The Lord Ordinary (GIFFORD), on 7th July 1870, on the grounds that the fund on which the claim was made had been created, or at all events preserved, by Mr Graham's advances, and that Mr Graham's representatives were therefore entitled to complete indemnification, pronounced an interlocutor in the following terms:—"Finds that the pursuers, as executors of the late Mr Humprey Graham, are entitled, out of the proceeds of the policy on the life of the late Dr Fletcher, to repayment of the premiums of assurance advanced by the late Mr Graham. Finds that the pursuers are also entitled to interest on the said premiums, at the rate of 5 per cent. per annum, and that they are entitled to accumulate the interest with the capital sums once a-year, and to charge interest on the accumulated sums at said rate; and appoints the cause to be enrolled, that the precise sum due to the pursuers may be ascertained, and the remaining points of the case disposed of."

Thereafter, on 12th July 1870, he pronounced another interlocutor decerning against the defenders for payment of the full sum included in the first conclusions of the summons, and finding the pursuers entitled to expenses, but modified the expenses to three-fourths of the taxed amount.

The defenders reclaimed against both these interlocutors.

WATSON and HALL, for them, contended that

this was a debt upon which ordinary interest was alone exigible, no accounts having ever been rendered to Dr Fletcher by Mr Graham. Also that compound interest was never properly charged except in cases of special contract or recognised practice, as in the case of banks.

MILLAR, Q.C., and KINNEAR, for the pursuers and respondents, argued that they were entitled to full indemnification; that throughout the period of twenty-seven years Mr Graham had not only been making advances, but losing the interest thereon, and the defenders were therefore bound to reimburse his estate for such loss.

At advising—

LORD ARDMILLAN—The question here raised is, whether Mr Humphrey Graham, now represented by his executors, is entitled to charge interest at 5 per cent. with annual accumulations of interest with principal, on the sums advanced by him as premiums on a policy on the life of the late Dr Fletcher with the Standard Assurance Company. Mr Graham was the law-agent of Dr Fletcher. The summons also concludes for payment of certain business accounts, and the defenders have pleaded prescription. The only question which the Court can now dispose of is raised by the claim for interest. That Mr Graham is entitled to repayment of the principal sums which he advanced is not disputed; nor can it admit of dispute. That he is entitled to interest on these advances is also beyond all possible question. But the claim made is for annual accumulation of interest with principal, and interest on the accumulated sums.

The point is attended with difficulty. So far as I am aware there is in our own law no direct authority applicable to such a case as this. I agree with the Lord Ordinary, that in a simple case of debt there can be no accumulation of interest. A creditor in an ordinary debt can claim only simple interest. But in banking transactions, it is the practice of banks—a practice understood in business and recognised by law—to accumulate interest annually.

It is not necessary to consider at present the liability for accumulated interest which arises from any peculiar position of the debtor, as a tutor, guardian, or trustee. There is no such question here. That liability depends on principles not applicable to this case. After careful consideration, and recognising fully the delicacy of the question, I have come to the conclusion that, under the circumstances of this case the Lord Ordinary is right in sustaining the claim for annual accumulation of interest at 5 per cent.; and I think that in his clear and able note he has put the case on its proper ground—that of the right of Mr Graham to complete indemnification. Nothing short of complete indemnification is sufficient, under the circumstances here disclosed, to meet the justice of the case.

There is no question as to the facts, which come out very clearly. In 1832 Dr Fletcher effected a policy of assurance on his life for £1000, with participation of profits, with the Standard Assurance Company. The premiums appear to have been paid by another friend of Dr Fletcher, prior to 23d December 1842. On 3d February 1843 Mr Graham received intimation that the extra premium due on 23d December 1842 was unpaid, and that if not paid the policy would be cancelled. Dr Fletcher was then in Australia, and an extra premium was due on account of his being abroad. Mr Graham paid the premium, and saved the policy. He wrote on 4th February 1843 to Dr Fletcher a letter which I need not quote, but in regard to which I must remark, that it is a sensible and friendly letter, in which he distinctly informs Dr Fletcher of his advance to pay the premium in order to preserve the policy. On 19th April 1843 Mr Graham again wrote to Dr Fletcher, informing him that he had paid a second demand for premium, or, in other words, both the ordinary premium and the extra premium on the policy. In the letter from the agent of the Standard Assurance Company to Mr Graham, that gentleman stated, that "the policy having been in existence for several years, it will be hard for the Doctor's family to permit it to be dropped now."

The policy was valuable. It would have been forfeited if the premiums had not been paid. The fund out of which Mr Graham claims reimbursement is the sum recovered under that policy on the death of Dr Fletcher, on 16th April 1869. That fund was created by Mr Graham's advances, and out of the fund which he so created he is now claiming reimbursement of the cost of creating it.

Dr Fletcher justly felt that Mr Graham had acted a most kind and friendly part in thus saving the policy in 1843. Accordingly, on 21st August 1843 he wrote from Australia to Mr Graham, thanking him for his care and attention to his interest, "at a time when it was so much required," and requesting him to continue to keep up the policy. His words are very distinct, and most important—(*reads ut supra*).

Mr Graham did accede to Dr Fletcher's request, and did accordingly continue to pay the premiums on the said policy up to the date of Dr Fletcher's death. He saved, and maintained the policy.

My friend Mr Kinnear treated the case with much ingenuity and ability, as a case of the nature of *negotiorum gestio*. Perhaps the first advance by Mr Graham, made on behalf of an absent client, and to meet an urgent exigency, may have been a proceeding of the nature of *negotiorum gestio*, and indeed I rather think it was so, and Mr Kinnear's references to the Roman law are not without importance in that view of the case. But, after the notice by Mr Graham to Dr Fletcher, and after Dr Fletcher's reply, which I have just read, the position of Mr Graham, and the claim now made on behalf of Mr Graham, appears to me to rest on grounds stronger than can be found in any law regarding *negotiorum gestio*. He continued to advance the premiums out of his own funds, not only for behoof of Dr Fletcher, but at the request of Dr Fletcher; and, by making these advances, he has saved the policy, and has created this fund. Dr Fletcher's life has been well and securely insured for above twenty-five years; and, on the fruit of that insurance policy, Mr Graham, who sowed the seed, now makes his claim.

In dealing with a fund which would have been lost but for the advances, and which must be considered as created by the advances, the claim of Mr Graham on that fund for complete indemnification of all cost incurred in creating the fund is, in my opinion, a claim eminently just and equitable, and entitled to the most favourable consideration of the Court. A principle of equity, somewhat analogous to salvage, is applicable to this claim; and any deduction from the complete indemnification of Mr Graham would be contrary to equity. He was a volunteer, assisting in distress, and saving by his advances that on which he claims.

Now unless the annual accumulation of interest with principal is sustained, the indemnification is not complete; for the loss of the use of the money is not fully compensated. If Mr Graham had refused in 1843 to pay the premiums, and had thus let the policy drop, he would have acted a most unfriendly part. It is not alleged, and it cannot be suggested, that he ought to have done so. If he had disposed of the policy at the surrender value in 1843, he would have sacrificed the interests of his absent friend and client. It is not said that he should have done so. If he had borrowed from a bank the sums required to meet the premiums as they fell due, interest would certainly have been charged by the bank, and, in accordance with the practice of banks, would have been annually accumulated. If he could have borrowed from a private party, with no other security than an assignation to the policy itself, I have no doubt that the ultimate cost to Dr Fletcher would have exceeded the amount now claimed. I think indeed that it is very unlikely that any private party could have been found willing to advance these premiums as they fell due on no other security than the policy itself; and certainly no private party would have made such advance without heavy charges of interest, bringing the sum up to more than now claimed.

I therefore think that if Dr Fletcher's policy was to be kept up for the benefit of himself and his family, which was his wish, it could not have been done at less cost than what is now claimed, unless he had himself remitted money from Australia to pay the premiums. This he did not do. He knew of the policy and of the advances by Mr Graham. He requested that the policy should be kept up, and I think that he must, in reason and in law, be presumed to have continued that request from year to year, as he never withdrew it or in any way intimated a change of intention. The interest of money in Australia is very high; and it may well be that, rather than send money home, he preferred leaving the matter in Mr Graham's hands. Be that as it may, he did so leave it, and he made no remittance. The money he retained was worth more to him than the interest now claimed.

None of the authorities referred to appear to me to be precisely in point. The case of *Jollie* v. *M'Neill* is not very satisfactorily reported. No judicial opinion is reported in the Appeal Cases (Wilson & Shaw's Appeals, vol. 4, p. 455), and it is in any view not applicable to the circumstances of the present case. Nor is the case of *Monteith* v. *Douglas' Trustees*, on June 7th 1867, in point. Indeed there is no case which has been suggested to us, or which I have been able to discover, in which we have the circumstances here existing, viz., the combination of these three peculiarities in point of fact: 1st, That the first advance was made by a law-agent for an absent client—made as a *quasi* banker, and to meet an urgent exigency; 2d, that the client acknowledged the propriety and kindness of the advance, and requested its continuance; and 3dly, that by the advances so made the fund was created out of which reimbursement with interest is now claimed. The decision of Lord Ellenborough in the case of *Bruce* v. *Hunter* (13th Dec. 1813, 3 Campbell 466), though not exactly in point, is a recognition of the equity of such a demand as is now made.

I am very strongly impressed by the equity of this claim; and if I am right in holding that a principle analagous to salvage is applicable where a fund has been created by *bona fide* advances, then Mr Graham is entitled to the highest equity, and to the most ample indemnification. Nothing less than what the Lord Ordinary has awarded will, according to my view, meet the true equity of the case.

I am accordingly of opinion that the Lord Ordinary's interlocutor should be adhered to.

Lord Kinloch—I have arrived at a different conclusion from that now expressed. I am of opinion that the interlocutors of the Lord Ordinary are erroneous, in so far as they allow more than simple interest, at 5 per cent, on the advances made by Mr Graham in payment of the premiums on Dr Fletcher's life policy.

The advances in question I consider to stand in no other legal position than any ordinary cash advances made by one individual to or for behoof of another. Undoubtedly they were made in a most friendly spirit, and greatly to the benefit of the late Dr Fletcher. They are on this account deserving of all commendation. But I cannot, on account of their friendly character, attach to them more than the interest legally chargeable. I do not think the law allows any particular rate of interest on friendly advances more than on others.

It is, as I think, undoubted that no agreement was made with Dr Fletcher for the allowance of any particular rate of interest on these advances. Neither were they advances made by a banker, or by any party as to whom there is an invariable usage and understanding that the account shall be balanced annually, and the interest added to the principal. Indeed the case is not one of a current account at all. No account was ever rendered by Mr Graham to Dr Fletcher; and if in Mr Graham's books it was balanced every year (which does not clearly appear), this cannot be held operative against Dr Fletcher, who was no party to the proceeding. Though now an account is produced, balanced yearly, and with the interest accumulated, this cannot, in any question with Dr Fletcher, or his representatives, be considered as anything else than the mere form of the claim as made by the alleged creditor. The account contains no other entries on the debit side except of these yearly paid premiums—it has no entries at all on the credit side. The question, therefore, arises in the purest form, Whether a person making advances for another for a succession of years is entitled in his judicial claim, made at the end of the period, and with no demand ever made before, to charge compound interest on the advances—for this is the result of the process of accumulation gone through.

I am of opinion that such a claim is not admitted by the law. It is only in cases special and exceptional that yearly accumulation of interest with principal is permitted. One of these exceptional cases is commonly considered to be that of bankers, who are known invariably to balance once a year, and must in the general case be dealt with on the footing of annual accumulation. Where accounts are rendered year by year by the creditor, with the balance yearly accumulated, acquiescence in this rendering by the debtor may very reasonably raise an implied contract in favour of such accumulation. But where neither agreement nor usage sanctions the claim, I consider a charge of compound interest excluded; and so I hold it in the present case, which has no exceptional character.

It is said that, so far back as 21st August 1843, Dr Fletcher gave Mr Graham authority to raise money to pay these premiums; and that if Mr Graham had borrowed the amount, and paid the lender the yearly interest of the sum so borrowed, he would have been entitled to charge Dr Fletcher with interest on that payment. The inference drawn is that Mr Graham, or his representative, should be placed now in the same position as if such borrowing had taken place.

I consider this inference to be illogical. If Mr Graham had borrowed the amount of the premiums, and paid the interest of the sum he borrowed to the lender, he would have been undoubtedly entitled to charge Dr Fletcher, with interest (that is, simple interest, at 5 per cent.) on the amount so paid: but purely in the character of a cash payment, made on account of Dr Fletcher. He would not in that case have had any interest at all to charge on the capital sum represented by the premium, because this he had not advanced. But matters were entirely changed when Mr Graham, in place of borrowing from a third party, took himself the creditor's place, and lent the capital. He then became simply creditor, entitled to the ordinary rights of such, and no more. The interest on the advance was not then a cash payment made for Dr Fletcher out of Mr Graham's pocket. It was the current unpaid interest on a creditor's advance. In the case of borrowing from a third party, the creditor who lent the money would not have been entitled to claim compound interest; and as little, I think, could Mr Graham when taking the creditor's place. The same principle exactly, which would give Mr Graham if advancing interest to a third party lender right to charge interest, but only simple interest on the advance, limits his claim to simple interest when his actual cash advance is of the capital sum of the premium.

It was contended that Mr Graham, or his representatives, are entitled to full indemnification for the loss of the money advanced by him. I think that this is simply to place his claim for interest under another name, without altering the nature of the case. Mr Graham was no doubt entitled to full legal indemnity; but the indemnity which the law grants to a creditor advancing money is, except in certain special cases, simple interest at 5 per cent., and this is, in such a case, full indemnity in the eye of law. I see nothing abstractly inequitable in the claim, considered in itself. The only objection to it is that the law does not allow it. The case not being one resting for an exception either on contract or usage, Mr Graham was just a creditor making a loan of money; and no further interest can be charged than is allowed to any such creditor.

In so finding, I think the question before us is exhausted. No other mode of calculating interest except that of yearly accumulation at 5 per cent. has been submitted by the pursuer.

LORD DEAS—I concur in holding that in this case no sufficient grounds have been made out for annual accumulations. There may be a little of equity in favour of the claim, but if I were to go into the circumstances I might find equities on both sides.

LORD PRESIDENT—I concur with Lord Kinloch. I can find neither principle nor authority to support the finding in the Lord Ordinary's interlocutor.

The judgment of the Court was that the Lord Ordinary's interlocutor of 7th July be recalled in so far as it found the pursuers entitled to compound interest; *quoad ultra* that it be adhered to; that the interlocutor of 12th July be recalled, and in place thereof the defenders be ordained to make payment of the sum of £1688 to the pursuers. and that the defenders be found entitled to expenses from date of interlocutor reclaimed against, and the pursuers to three-fourths of previous expenses.

Agent for Reclaimers and Defenders — James Macknight, W.S.

Agents for Respondents and Pursuers—A. & A. Campbell, W.S.

Tuesday, December 20.

NICOL AND OTHERS *v.* THE TOWN COUNCIL OF ABERDEEN.

Jurisdiction — Corporation — Personal Exception — Homologation. A Town Council having by a majority determined upon the purchase of certain lands lying adjacent to the town, partly as a judicious and profitable speculation, but more particularly with a view to control the feuing plan, and carry out certain improvements in the locality by throwing a bridge across the river, &c., for the general good of the community, a suspension and interdict against their proceeding to complete the purchase, by performing their part of the agreement entered into with the seller, was brought by the opposing minority in the council,—*Held* (1), That this Court has undoubted jurisdiction to interpose for the control of a town council, or other such public body, when their proceedings are either in excess of their powers, or are manifestly opposed to the real interest of the community which they represent. (2) That such town council has very ample powers and discretion in the management of the affairs of the community, and it requires a very exceptional case, and a gross abuse of that discretion, to warrant this Court in interfering. (3) That admittedly there was here no excess of power, and that the circumstances were such that the Court had not the same opportunity of judging of the expediency of the transaction in question as the town council, and that the town council had so judged in the fair exercise of their discretion, and the Court could not therefore interfere.

Farther, where the transaction in question was the purchase of one-half *pro indiviso* of a property, with the avowed intention of afterwards acquiring the other half *pro indiviso*, and where a member of the council who was materially interested in this second half was present and voted, as necessary to make up a quorum at the meeting of town council at which the purchase of the first half of said property was determined upon, and the offer of the seller accepted — *Held* that approbatory and confirmatory acts of the town council at ensuing meetings, at which the said interested person was not present, obviated any objection which might have been taken on the ground of his presence at the first meeting, and that it was not therefore necessary to decide its effect upon the original transaction.