in hazard, till on or after the 27th of February, would have been liberated, on its appearing, that the hazard had commenced three days before. *Secondly*, Redfern and Nettleship stated, that the goods had been shipped on board of the "Defiance," which was an armed vessel, whereas they were shipped in the "Kinloch," which was unarmed; and any insurance proceeding on this false information, must have been void. Then information, too, in this particular, was altogether without excuse, because they were not entitled, without previous inquiry, to specify the "Defiance" as the ship by which the goods were to be carried. If they had inquired, they *must* have learned, that the "Kinloch" was to be the ship; one of the two alternatives, therefore, of necessity, follows, either, that they did not inquire, in which case, they ought not to have mentioned the "Defiance," or if they did inquire, they gave false and erroneous information.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,

"Being of opinion, that, if the respondent had insured upon this representation, he could not have recovered from the underwriter, I propose to your Lordships to affirm the judgment."

It was ordered and adjudged, that the interlocutors complained of, be, and the same are hereby, affirmed. And it is further ordered, that the appellant do pay, or cause to be paid to the said respondent, the sum of £50, for his costs, in respect of said appeal. Journals of the House of Lords.

For the Appellant, *Isaac Espinasse, C. Abbott.*

For the Respondent, *John Greenshields, Fra. Horner.*

Lieut.-General SIMON FRAZER, sole surviving acting Trustee under the settlements made by the Hon. Lieut.-General Simon Frazer, late of Lovat, now deceased, } *Appellant.*

ALEXANDER MACDONELL of Glengary, *Respondent.*

House of Lords, 28th March 1817.

JUDICIAL SALE—CONSIGNATION—ADJUDICATION—CALCULATION OF INTEREST.—The appellant's author was the purchaser at a judicial sale of the estate of Abertarff, and the appellant objected to pay or consign the balance of the price, until the debts still affecting the estate sold were discharged. The Court of Session

1817.

FRAZER
v.
MACDONELL.

ordered him to consign £738, 6s. 6d., and to pay the respondent £1776, 8s. 9d. In the House of Lords, this was altered, holding that in the circumstances of this case both sums ought to have been ordered to be consigned, and that the said balance ought not to be paid to any person or persons, without notice to the appellant.

This was an action of count and reckoning betwixt the trustees of Lieut.-General Frazer, and Alexander Macdonell, Esq. of Glengary, for the balance of the price remaining in hands, of the estate of Abertarff, purchased by General Frazer (in whose right the appellant now was), at the judicial sale of the Glengary estates.

After General Frazer's death, his estates were vested in trustees, to whom he had conveyed them; the appellant being the acting trustee on these estates.

The appellant acknowledged a balance in the trustees' hands of the price of Abertarff, of £3514, 15s. 3d. But he stated that he was not bound either to pay or consign that sum, until the debts still affecting the estate sold by judicial sale, and due by Glengary, were discharged, amounting to the sum of £2278, 13s. 4d. And that the £200 over was little more than would cover the trustees' expenses.

A remit was made to an accountant, who reported the following debts as due:—

John Kressau, - - -	£134	13	9
John M'Arthur, - - -	19	17	0
Archibald Macdonell, - -	26	0	0
The Crown Debt, - -	758	15	8
Mrs Gordon of Glenbucket, -	583	15	9
	£1523	2	2

Leaving a reversion of £991, 13s. 1d.

But the appellant objected to this mode of stating the amount. He stated that, in estimating the subsisting incumbrances at £1523, the accountant had calculated erroneously, in so far as he only allowed interest on the principal sums due to the creditors from the dates of their respective debts. Whereas he ought to have calculated interest on the accumulated sums contained in their adjudication. Because it is quite settled in the law of Scotland, and is, indeed, a thing of every day's practice, that when an adjudication is led for payment of a debt, the principal sum and whole interest due thereon, are accumulated into one sum, which accumu-

lated sum bears interest from the decree of adjudication. It has been settled by many decisions, as well as by an Act of Sederunt, that the decree of sale at the instance of an apparent heir has the effect of an adjudication in favour of the whole creditors who are parties to the process. And it has also been settled, that the whole sums due to the creditors at the date of the decree of sale, carry interest from the time from which, by the decree of sale, the price begins to bear interest, the price being deemed a surrogatum for the lands over which the debts extend. This has been settled in a variety of cases, and particularly in the well known case of Brown *v.* York Buildings Company, 17th January 1792 (Mor. 13,339, et Fac. Coll., vol. x., app. 11). The title of this case given in the Faculty Collection of Reports, is this,—"Lands being sold judicially, the whole sums due "to the creditors, interest as well as principal, are held "as a capital at the period when the price begins to bear "interest." If the interest on the above debts, therefore, was calculated according to this rule, there would be debts due to the amount of £2278, 13s. 4d., leaving only £200 in hands, which is quite insufficient to cover the claim for expenses. Besides, there was a special agreement between the appellant and respondent, by which it was conditioned, that these incumbrances should be satisfied and discharged; and the arrestment by Ross and Ogilvy ought also to be discharged. In answer to this, the respondent stated, that General Frazer was not the purchaser at the judicial sale; he purchased Abertarff from Mr Hall, who bought it at the judicial sale. and, therefore, that this mode of calculating interest could not apply.

Creditors of Bonhard, July 24, 1739; Mor. p. 16453. Maxwell, *v.* Irving and Rome, June 20, 1747; Mor. p. 13349. Murray *v.* Blair, Nov. 7, 1793; Mor. p. 13344. Act of Sedt., July 11, 1794. Drummond *v.* Angus, 1754. Blackwood *v.* Hamilton, July 31, 1767. Mor. p. 13359; *et* Kilkerran, No. 4, Ranking and Sale; *et* Fac. Coll., vol. iv., p. 118.

The Lord Ordinary pronounced this interlocutor:— "Repels the objection of the sexennial prescription which "constitutes the first, second, third, and fourth objections "stated for Glengary, namely, the mode of calculating "interest, and of imputing payments of bygone interest, and "which forms a counter objection on the part of Lovat's "trustees; upon the whole, on this point, finds that the "rule adopted by Mr Hay in his report, ought to be followed "out to an end in the settlement of these accounts, 1st, As "being a rule which Mr Hay has stated in his report, was "agreed to by the parties before him, and, according to "which, the computation of the interest, and the application "of partial payments, was made in regard to that part of the "price of Abertarff paid by Mr Hall; and 2d, As Lovat's

Dec. 2, 1803.

1817.

FRAZER v. MACDONELL.

" trustees stand in the place of Mr Hall, a different mode of " computation, though more strictly legal, would demand " an alteration of what cannot now be effected, in regard to " that part of the account which has been adjusted, while " Mr Hall was the party; and, therefore, upon this point of " the cause, approves of the rule adopted by Mr Hay, the " accountant: Finds in regard to Glengary's gift from the " Crown, and of the final interlocutor sustaining the validity " of said gift, in competition with Lovat's trustees, that " Glengary is in full right of the debt contained in said gift, " and that any claim by Lovat's trustees thereon, cannot be " sustained in the present accounting, sustains the claim of " Lovat's trustees, for the articles of feu duty and duplicand " thereof, amounting at Whitsunday 1799 to £77, 15s. 6d., " and finds that Lovat's trustees are entitled to credit for the " sum as of that date: Finds that there are no sufficient " grounds for sustaining *in hoc statu* the alleged claims of " John Kressau,* John Macarthur, and Archibald Mac- " donell, reserving to them or to any who can show they are " in their right to claim upon the price, and against the " cautioners for the price, of that part of the estate of Glen- " gary, purchased at the judicial sale by Glengary himself; " sustains the application of the partial payment of £200 " sterling to Mr William Macdonell, upon 9th October 1784, " in extinction, 1st, Of the interest due at that date, of " £89, 5s. 7d., and the residue to account of the principal " then due, and decerns upon these points accordingly."

Dec. 22, 1810. After further discussion, the Lord Ordinary of this date pronounced this interlocutor:—" Having considered this " report with the objections thereto for the trustees of Lovat, " and answers for Glengary, and having resumed considera- " tion of the former reports and proceedings in the cause, " and heard parties thereon, ordains the trustees of Lovat to " consign in the hands of the Bank of Scotland £738, 6s. 6d. " for answering claims not yet adjusted in the ranking, " subject to the orders of Court; and, in the meantime, " decerns and ordains the trustees of Lovat to make pay- " ment to the said Alexander Macdonell of Glengary of the

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* The objection to this person's claim of £75 was, that the bills constituting the same, were granted by a married woman, and, therefore, null and void. The objections to Macarthur, and Macdonell's claims were objections in point of form, but they formed no part of the question here appealed.

" sums of £991, 13s. 1d., and £784, 15s. 8d., mentioned on " page 15 of this report, both amounting to £1776, 8s. 9d. " sterling, being the remainder of the balance ascertained by " the report to be due by them, of the price of Abertarff; " and if these sums are not *paid* and *consigned* as aforesaid " by the term of Candlemas next, allows an interim decree " to go out and be extracted at the instance of the said Alex- " ander Macdonell of Glengary, against the trustees of " Lovat, for payment and consignation as aforesaid, and " decerns accordingly, reserving to the parties to be further " heard on the question of interest and expense, and upon " the claims of Archibald Macdonell, Kressau, and the heirs " of John Macarthur, as accords."

June 12, 1811.

On two several reclaiming petitions to the Court, the Court adhered, and afterwards decerned for expenses, of this date.

July 5, 1811.

July 11, 1811.

Against these interlocutors, the present appeal was brought to the House of Lords by the appellant.

Pleaded for the Appellant.—By the law of Scotland, an onerous purchaser is not obliged to pay the price of lands, so long as real incumbrances affecting the same are undischarged. A decreet of adjudication, with the recorded abbreviate thereof, adjudging the lands in security of a debt, renders the debt heritable, and a real lien and incumbrance over the lands contained in the decree, in virtue of which the creditor may enter into possession and levy the rents; and after the expiry of the legal, and declarator to that effect, he may transfer his right into one absolute and irredeemable. General Frazer was an onerous purchaser of the lands of Abertarff from Mr Hall, in 1778. These lands Mr Hall had purchased at a judicial sale of the bankrupt estate of Macdonell of Glengary in the year 1769, and the appellant has been decerned to pay to the respondent the far greater balance of the price, and to consign in bank the remainder beyond his control, notwithstanding that adjudications for debts to the amount of that balance or nearly so, remain undischarged. The decree of sale at the instance of an apparent heir having, by law, the effect of a general adjudication for behoof of the whole creditors whose claims and interests are produced in the ranking, and having also the effect of accumulating their respective debts, whether consisting of principal, interest, or of sums not bearing interest by law at the time, into one capital or accumulated sum bearing interest from the term of Whitsunday 1769, the appellant is not bound to pay or consign until these incumbrances are discharged.

1817.

FRAZER v. MACDONELL.

2. Besides, it was here specially covenanted and agreed between the appellant and respondent, that before making payment of the balance of the price of Abertarff, the appellant and General Frazer's cautioner are "entitled to be "satisfied that the debts and incumbrances affecting the said "purchase, shall be fully extinguished and discharged."

3. The question as to the accumulation of interest, and the question in regard to the debts of Macarthur, Kressau and Macdonell having been reserved in the judgment for future discussion, there appears to be a manifest inconsistency in ordering the greater part of the fund to be paid over to Glengary, and the lesser part to be consigned. Besides, this fund is ordered to be paid over to Glengary and not to the creditors whose debts are still outstanding upon adjudication affecting the estate undischarged.

Besides, the arrestment used by Messrs Ross and Ogilvy in the hands of the appellant, ought also to be legally and effectually loosed to the full extent of the same.

Pleaded for the Respondent.—The appellant does not dispute the extent of the balance against him, which amounts to £2514, 15s. 3d. The appellant maintains that he cannot with safety pay or consign in terms of the judgment of the Court; but this plea is wholly unfounded, for he may with entire security make payment and consignation agreeably to the interlocutors of the Lord Ordinary and the Court. 1st, The appellant is in perfect safety to make consignation. This is so clear that, in arguing against it, he pleaded not that he was exposed to any hazard by consignation, but that it was more expedient that the money should remain in his hands, than be lodged in a bank. But if he be safe, it is no concern of his where the money shall be placed, since it neither does, nor ever can, belong to him. To the plea of expediency, the statutory provision and the practice of the Court in multiplepoindings, afford a sufficient answer. And certainly there has rarely any case occurred in which it has been more evidently the object of a debtor to retain money by means of wanton litigation, than the one under appeal.

2. The appellant is in safety to pay the £1776, 8s. 9d., because the order of the Court is a sufficient exoneration to a purchaser in a judicial sale with regard to the price, if he pays in obedience to such order; and, secondly, because the debts due to the Crown and Mrs Gordon, and to Archibald Macdonell, are now out of the question, because neither the Crown nor Macdonell have made any claim, and Mrs

Gordon's debt has been proved to be extinguished. The only other debts are those of Kressau's or Macarthur's representatives. It has been shown that they are groundless, but supposing them good, their amount, according to the accountant's report, is only £154, 10s. 9d., and the sum ordered to be consigned, is sufficient to meet it.

1817.

FRAZER
v.
MACDONELL.

After hearing counsel,

The Lords find, that under the circumstances of this case, the whole of the balance due from the trustees of Lovat, of the price of Abertarff, ought to have been consigned in the same manner as the sum of £738, 6s. 6d., is by the interlocutor of the 22d of December 1810, ordered to be consigned; and that such balance, when so consigned, ought not to be paid to any person or persons, without notice to the trustees of Lovat. And it is further ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to review the several interlocutors complained of, and to do therein as shall be just.

Journals of the House of Lords.

For the Appellant, *John Clerk, J. S. More.*

For the Respondent, *Sir Saml. Romilly, J. H. Forbes.*

ROBERT TOWART, Victualler, Glasgow, . *Appellant;*

ALEXANDER SELLARS, sometime Weaver in Glasgow, afterwards in Kirkintulloch, . *Respondent.*

1817.

TOWART
v.
SELLARS.

House of Lords, 16th May 1817.

INSANITY—PROOF—ADMISSIBILITY OF DEPOSITION OF AN AGED TESTAMENTARY WITNESS—OBJECTION TO WITNESS—INTEREST—AGENCY.—(1) Circumstances in which deeds were reduced, on the ground of insanity. On appeal to the House of Lords, the interlocutors reversed. (2) A deposition was taken before a Magistrate *ex parte* from an aged testamentary witness, eighty-three years of age, in anticipation of an action being raised to reduce the deed; this was refused to be received in evidence after his death. (3) Held the deposition of a witness was not to be opened up, whose testimony had been objected to on the ground of interest, and acting as agent for the appellant.

James Maitland was owner of some heritable subjects situated in Glasgow; and having become embarrassed in his cir-