SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

THOMAS GRAHAM, of Kinross, &c.. . *Appellant.*

PAGE KEBLE, a Lunatic, Residuary Legatee of P. K., dec.; R. SAUNDERS, Esq. Comm. of the said P. K.'s Estate; and R. RATTRAY, Esq. Mandatory of the said R. SAUNDERS ..... } *Respondents.*

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K. having left East-India bonds in the hands of a mercantile firm at Calcutta, with directions to apply the interest and principal when received to a specific purpose, by his will appointed G., a partner in the firm, one of his executors. After the death of K., the will was proved by G.; and the firm, acting under his authority as executor, assigned the bonds, and used in their trade the money received upon the assignments.

G. ceased to be a partner in the firm before all the bonds had been assigned.

Upon suit, by the residuary legatee of K. against G., and on appeal, it was held that he was accountable to the residuary legatee of K. for the monies received upon the bonds, with 8 *per cent.* from the time of the deposit to the dates of the respective assignments by the firm; and with interest at 12 *per cent.* (being the current rate in Calcutta) from the time of the assignments and receipt of the monies to the date of the judgment upon appeal in the original suit; and with interest at 5 *per cent.* upon the accumulated sum, composed of principal and interest, from the last-mentioned judgment till payment: but the cost of remittance from India, and the property-tax, were held to be charges on the fund payable.

Upon a general account subsisting between K. and the Calcutta firm, held that G., as partner and executor, was liable for the balances of account, and interest at 12 *per cent.* upon all such balances as should appear to be stated and signed by the parties: such interest to be calculated from the date of the statement and signature of the account to the time of the final judgment on appeal.

Held also that G. was not, as executor, entitled to withhold payment against the residuary legatee until an account of debts, &c. had been taken; and that, as debtor, he was not entitled to require that executors in

England (who had also proved the will of K.) should be parties to the suit in order to give him an acquittance. 1820.

In appellate proceedings interest upon the accumulated sum of principal and interest is chargeable on the debtor from the date of a judgment in the Court of Session to the date of the judgment in the Court of Appeal, although the Respondent has obtained an inhibition against the lands of the Appellant before the date of the original judgment. GRAHAM v. KEBLE AND OTHERS.

Where a matter is, by the pleadings, specifically made the subject of demand, and the judgment is general for the demandant, yet, if a particular part of the demand, as the rate of interest, was not discussed, or specifically decided in the suit, it is not *res judicata*.

PAGE KEBLE, of Calcutta, in the year 1785, deposited certain bonds, due from the East-India Company, in the hands of Messrs. Graham, Crommeline, and Mowbray, a mercantile house at Calcutta, of which the Appellant was a partner. These bonds amounting, in the whole, to 46,428 current rupees, were delivered with instructions as to their application. They were to be appropriated eventually in payment of a debt owing by Mr. Keble to the East-India Company, and which became payable in the year 1796. 1785.

Soon after making this deposit, Mr. Keble quitted India, and died on his passage to England.

By his will, which he had left in the hands of Messrs. Graham and Co. as his agents, the Appellant was named one of Mr. Keble's executors, with certain other persons in Europe. The European executors having proved the will, transmitted powers of attorney to the Appellant and his partners, authorising them to act in the affairs of Mr. Keble's estate. But in the mean time the Appellant had proved the will at Calcutta; and the house of 20th March, 1787.

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Graham, Crommeline, and Mowbray, by a letter dated the 10th of September, 1787, informed the executors in England that they had no occasion to use the power of attorney, as they could act under the authority of the Appellant as executor.

No account of the affairs of Mr. Keble was transmitted to the European executors until the 10th of March, 1791, at which time the Appellant had retired from the firm, and in the November following the house failed. Some of the bonds deposited had been indorsed away by the house, for their own accommodation, between the months of November, 1789, and October, 1790, before the Appellant had retired from the concern: the remaining bonds were disposed of in the same way soon after his retirement.*

There was also a sum due to the estate of Page Keble on a balance of account subsisting between him and the Calcutta firm.

The Respondent, Mr. Keble, as residuary legatee under the will of his father, as soon as these facts came to his knowledge, required the Appellant to account for the funds due from the house of Graham and Co. to the estate of the deceased, and, upon his refusal,† brought an action against

* The particular dates of the assignments of the bonds were not very exactly ascertained in the proofs before the House. The point is not very material, according to the view taken by the Lord Chancellor in moving the judgment.

† The same demand had, in the year 1796, been made upon the Appellant in India, and proceedings against him, in the courts of Calcutta, had been in contemplation; but, after various negotiations and transactions, a case was submitted to the Advocate General by the East-India Company, and that officer, in 1802, gave his opinion that the Appellant was not re-

him before the Court of Session in Scotland. When the action was commenced the Appellant was still resident in Bengal, but having land in Scotland was subject to the jurisdiction of the courts of that country. The summons, in the action, concluded for payment of the amount of the bonds deposited by the late Mr. Keble in the hands of the Appellant and his then partners, with interest, praying that the Court would "decern and ordain the "said Thomas Graham, Defender, to make payment "to the Pursuer of the specific sum of 4786*l.* 8*s.* 6*d.* "sterling, *with interest, at the rate of* 8 *per cent.* "till the bonds were severally cancelled or en- "dorsed away; and with interest *after that period* "*at the rate of* 12 per cent. *being the legal rate of* "*interest in Bengal* to the time of payment; "and interest on the sum of 2426*l.* 13*s.* 8*d.* the "balance of account from the 14th of February, "1788, at 12 *per cent.* and until payment, &c."

This action was commenced in December, 1803, and at the same time a diligence of inhibition was executed by the Respondent against the lands of the Appellant in Scotland. After various proceedings in the Court of Session, an interlocutor was pronounced on the 11th of March, 1808.*

sponsible. Whereupon the East-India Company enforced the payment of their debt against the estate of Page Keble, and no proceedings were taken against the Appellant until he became amenable to the jurisdiction of the Scottish courts. The facts, upon this part of the case, are omitted in the text, because, (although pressed in argument,) they do not appear to have been noticed in the reasons given for the judgment.

* The Appellant became resident in Great Britain in the year 1808.

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From this decree, an appeal, partly on the charge of Indian interest, was brought in the House of Lords: on hearing which, in the year 1813, the judgment was affirmed, upon the ground that the Appellant being a partner in a house of agency, where a deposit was placed in special trust, became and acted as the executor of the person by whom the deposit was made; and that having acted in that fiduciary character he could not renounce it, and elect to act under his other character of agent, that he could do no act, in respect of the estate, for which he was not answerable as executor, and could not be discharged of the trust.*

The decree thus affirmed did not ascertain the periods of the different rates of interest. It became necessary therefore to present a petition to the Court below to have the sum due ascertained. With this petition a "state of the debt" due by the Appellant was lodged, in which (*inter alia*) interest was charged at the rate of 12 *per cent.* from the different periods at which the money secured by the bonds had been received by the firm, in which the Appellant was partner, to the date of the judgment in the House of Lords, according to which calculation the debt amounted to the sum of 19,413*l.* 16*s.* 2*d.*

This petition being remitted by the Court to the Lord Ordinary, the Appellant was allowed to put in objections to the state of the debt.

The Appellant thereupon contended that the

* MSS. cases, in D. P. 1813, No. 10; and see a short report of the case up to this point in Dow's Reports, Vol. II. p. 17.

House of Lords, by their judgment, had determined that he, "having taken out a probate as "executor, could not divest himself of the cha- "racter of executor;" and, therefore, that he must pay off and see discharged the debts and legacies due from the estate of the late Page Keble before the amount of the residue could be ascertained: that he had a right to resist payment, or accounting to the Respondents, until he was satisfied what might be the just amount of the residuary estate of the deceased. The Respondents insisted that the House of Lords, having "affirmed "the interlocutors of the Court of Session," and given judgment in terms of the conclusions of the libel, which was to make payment to the Pursuers of a certain specific sum total of principal, with interest due thereon, at certain specific rates, it was incompetent for the Court of Session now to hear the Appellant upon any point or points, save those relating to the mere accuracy, in point of computation, of the "state," exhibited with the Respondents' petition.

The Lord Ordinary, by interlocutor, of the 28th June, 1814, (having repelled the objections by a former interlocutor, and having found the Appellant liable to the costs incurred since the cause was remitted,) decerned against the Defender (Appellant) for the sum of 19,413*l.* 16*s.* 2½*d.* sterling (according to the computation of the Respondent), with the interest thereof, at the rate of 5 *per cent.* from and after the term of Martinmas, 1813, and until paid.

To this judgment he adhered after several representations.

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The Appellant thereupon petitioned the Court of Session (Second Division) against the judgment of the Lord Ordinary, and by the original and various reclaiming petitions, the Appellant raised the following objections:—1. That the claim to interest ought to be restricted to 8 *per cent.* to the year 1796. 2. That British interest only ought to be allowed from 1796, or, otherwise, from 1803; or, from 1806, or, at the utmost, from 1808. 3. That there ought to be no accumulation of interest. 4. That he was entitled to deduct the expense of remittance from Bengal. 5. That he was entitled to make deductions, on account of the property-tax, from 1803. The Court, by five interlocutors, affirmed the judgment of the Lord Ordinary, and over-ruled all the objections except what related to the property-tax, which the Court held the Appellant was entitled to deduct from 1808 to 1813, when the debt is accumulated, and also to deduct the property-tax from the interest of the accumulated sum from Martinmas, 1813, until payment.*

From these several interlocutors of the Lord Ordinary of the 15th and 28th June, 8th July, and 22d December, 1814, and of the Second Division of the Court of 4th July and 15th November, 1815, 13th February, 1st and 8th March, 1816, the appeal was presented.

For the Appellant—*Mr. Wetherell* and *Mr. Brougham.*

Argument for the Appellant, 18th and 21st of June.

1. This is not a case where a trustee has made use of the money committed to his charge; it is a

* This part of the judgment below, as the Respondent alleged, was by consent.—See p. 142.

simple breach of trust at the utmost. By the judgment of this House, in 1813, the Appellant is charged as executor: in the summons he is charged both as debtor and executor. The pleas in defence took issue upon both those points, and the Court has decided generally in the terms of the libel, embracing both the *media concludendi*. If the Appellant is charged as executor, the Respondent, suing under the qualified title of residuary legatee, is only entitled to the surplus above debts and general legacies; and before any sum can be finally awarded and paid to him under the authority of the Court, it must be ascertained that all prior claims upon the estate have been satisfied. If the Appellant is charged as a debtor only, the English executors ought to be parties in the suit in order to give a discharge. An executor only has authority to receive the debt and acquit the debtor; and even the authority of the Court could not protect the Appellant from future responsibility, if this money should be required to satisfy creditors of the estate. Considered in the double character of debtor and executor, the Appellant is equally entitled to have it ascertained that debts and legacies are discharged before he pays over any sum as a residue. This claim is not inconsistent with the decree, by which the Appellant is bound to pay, through the medium of the legal representative, what is due to the estate of Page Keble, and those having right to that estate in their order of preference.

2. As to the objection, that it is not now competent for the Appellant to object to the rates of interest, because the summons concluded speci-

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fically for those rates of interest, and the Court below has decided in terms of the libel; and that judgment having been affirmed on appeal, it is now *res judicata*, and no longer questionable; it is an objection founded in fallacy.

If that matter had been *proponed and repelled* in the cause, or *competent and omitted, in foro contradictorio*, both the policy and statutory enactments* of the law would have excluded the Appellant from further litigation. But on this point no question was raised or debated in the former proceedings, no defence was urged, and the judgment, so far as it affects the question of the rates of interest, was virtually a decree in absence, which never was held to constitute *res judicata*. The conclusion of the summons was for two distinct matters, a principal sum and interest at, &c. *to the date hereof, and in time coming till payment*. The defence was, simply, that the Appellant was not responsible, and no other question was considered, or intended to be adjudged in the cause, but that of his general liability. Where defences have been made upon one branch of a cause, and omitted as to another, no presumption can be raised against the Defender as having confessed the matter, and submitted to judgment on the point undefended and undiscussed. Such is the principle and practice upon a decree in absence, where the party has been cited, and even where he has appeared by his procurator. It is said that there has been no denial of the allegations of the summons as to interest; yet, in the petition of the 31st August, 1815, which was presented after the

* Scots Stat. 1672, c. 19.

date of the summons, this passage is to be found :— "It is allowed, on all hands, that from the beginning to the end of the pleadings not a word has been said on the subject of interest."

Moreover, if this be *res judicata*, the Court itself has invaded and disturbed its own judgment. For the original decree, in terms of the libel, was for interest at 12 *per cent. till payment*. But since the cause was remitted from this House, a new judgment has given interest, at 5 *per cent.* from November, 1813; and whereas the summons makes no conclusion for accumulation of interest, the subsequent judgment authorises accumulation to the 12th of November, 1813. The Respondents, after the judgment in 1813, did not sue execution, but proceeded before the Court to settle all the details as to interest. They have, in this and other respects, treated the matter as *res non judicata*. So has the Court below, and no cross appeal on that ground is entered. The plea of *res judicata* has been rejected, in many cases, much stronger than the present. *Millie* v. *Millie*,* *Young* v. *Mitchell*,† *Chirurgeons of Glasgow* v. *Reid*,‡ *Smith* v. *Semple*.§

A foreign rate of interest is a fact, upon which no decree can be made, without proof or express admission. Decrees must be founded upon allegation and proof. Admission of the fact cannot be implied where the question has never been

* Dict. of Dec. Tit. process, No. 318, Nov. 27, 1801.

† Id. ib. No. 320, Feb. 10, 1803.

‡ Id. ib. No. 340, Dec. 17, 1701.

§ Id. ib. No. 341, Dec. 14, 1711.

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raised; at all events, not before the decree is extracted. Such implication is never made against a party unless the matter has been referred to his oath as the medium of proof, and he does not appear, and answer upon oath. Upon a verdict in an action for a promissory note interest follows incidentally by way of damages; but every claim for debt or damage does not, as a matter of course, include interest. In equity proof is required of the employment of the money. The defence, therefore, against the liability for the principal does not comprise a defence against liability for interest. Upon this point, therefore, the judgment is not conclusive against the Appellant. In moving the judgment in this House in 1813 not a word was said upon the subject of interest.

3. Indian interest is not due to the extent awarded. The Appellant has not used the funds, and the Respondents ought not to benefit, by their own delay, from 1791 to 1803. During all that time they might have sued in the courts of Bengal. The House of Graham and Co. were instructed by Page Keble to invest his money in the purchase of bonds, which were to remain in their hands until the joint bond to the Company became due, which happened in 1796. The interest upon bonds so purchased would have been 8 *per cent.* or less, and the purpose of the deposit terminated in 1796. The Appellant, therefore, is not chargeable with more than 8 *per cent.*, nor beyond 1796 at the utmost. From the year 1796, when the bonds ought to have been applied in payment to the Company, the amount became a debt, owing from one British subject to another, upon which,

by the statute against usury,* more than 5 *per cent.* cannot be demanded. 1820.

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According to authorities in the law of Scotland, interest, above the domestic rate, is not allowed even upon foreign contracts, *Savage* v. *Craig*,† *Wood* v. *Grainger*.‡ In *Campbell* v. *Hannay*,§ interest was, indeed, finally given at 8 *per cent.* according to contract by bond; but that is a single case not applicable in its circumstances, and the authority is questionable. This is not a foreign but a British debt, not constituted by contract but by law. This distinction is recognised by the text writers: by Dirleton,‖ and by Lord Kaimes.** According to these principles, if the Appellant is considered as responsible for the bonds, the interest which they bore is the proper rate. When it became a debt constituted by law, he is only liable to interest established by the law of the country where the remedy is applied. Upon the same principle it is that the law of Scottish prescription is applied to debts arising upon foreign transactions, when the party sues in the courts of Scotland.†† At all events foreign interest ought to cease, and British interest to commence either from the 13th of December, 1803, when the first step was taken in the action, or from the 14th of November, 1806, which is the date of the first decree. The Appellant, upon the first process,

* St. 12 Anne, c. 16. † Fountain-hall, vol. ii. p. 559.

‡ Fac. Coll. June 24, 1779. § Ibid. Feb. 15, 1800.

‖ P. 227, *voce* process against strangers.

** B. 3, c. 8, s. 1, p. 321, citing Eq. ca. abr. c. 36, (E.) s. 1.

†† Kaimes Sel. Dec. No. 85. March 2, 1761—M'Neil. July 13, 1768—Randal. Feb. 20, 1771—Ker. Feb. 4, 1772—Barret.

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might have obtained security for the amount.* If the commencement of the action did not, at least the judgment of the Court, in 1806, did make it a Scotch debt, carrying Scotch interest. If that judgment should be considered as interlocutory, then the final decree by the Court of Session in 1808 ought to be the period for the computation of British interest. By the judicial proceedings in Scotland, the debt was, or might have been, secured by the Scotch law; and by the execution of the inhibitions, in 1803, against the heritable estates of the Appellant, it became a Scotch debt vested upon heritable security.

4. Foreign interest cannot be due after the year 1808, when both debtor and creditor were resident in Great Britain. Interest, at more than *5 per cent.* is forbidden by law between parties so resident. The place of the original contract, or of the transactions from which the liability arose, cannot alter the law between resident subjects. While one of the parties to the contract is absent in the foreign country, the courts here may apply the foreign law, but not after the parties become resident in this country. Could parties intending to negotiate a loan, by going to Ireland for the purpose, fabricate a bond, which, upon their return, should bear interest at 6 *per cent.*? Could such a transaction be sustained upon a short residence? If so, the statutes against usury are futile. Interest does not depend unalterably upon the original constitution of the debt, but arises from

* He did, in fact, obtain an inhibition against the lands of the Appellant, which operates as an injunction against alienation.

detention of the money due. It is an equivalent for the use of the money; and a change in the rate of interest ought to follow a change in the residence of the parties, by which the use and the remedy are regulated. While the Appellant remained in Calcutta, the place of implied contract, he might be liable to Indian interest: when he came to Great Britain the implication as to interest ceased. The Appellant then became amenable to British laws both in person and estate. He ought not to be injured by delay in the administration of justice.

Whether foreign interest can be given by the courts of Great Britain must depend on the nature of the contract and the residence of the parties, or one of them in the place of contract. Such was the case of *Bodily* v. *Bellamy*.* There was express contract by bond, and the Plaintiff, from the date of the obligation to the time of judgment in the action, had been resident at Calcutta. Under those circumstances the Court gave interest at 9 *per cent.* In *Ekins* v. *the East-India Company*,† foreign interest was given upon the value of a ship and cargo, because it was wrongfully taken from the agent of the owner, and the Court held that the Company (who may be considered as residents of India) had made the usual advantage of money in that country. In *Boddam* v. *Riley*,‡ interest was refused upon the balances of unsettled accounts of a partnership in Bombay, notwith-

* 2 Burr. Rep. 1094.

† 1 P. W. 395.—See the Treat. of Eq. b. 5, c. 1, s. 6, and the notes of the editor.

‡ 1 B. C. C. 239; 2 B. C. C. 2, 3; and see 4 B. P. C. 560, with the abstract preceding the report, and the note at the end.

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standing the custom of the country, stated upon affidavit, to charge and allow interest in all mercantile transactions, and upon debts in general. In that case, *Lord Thurlow* observed, "I am to say, "that although the general rule of law is otherwise, "yet, by reason of this custom, interest is to run "on a debt not carrying interest in this country, "because the original transaction was in India; "I cannot admit such a custom to control the "clear law of this country." In a former stage of the same case, *Lord Thurlow* had said, that interest was not in the discretion of the Court, and could only be given upon contract.*

In *Connor* v. *the Earl of Bellamont*,† Irish interest was given, because the debt, though contracted in England, was charged upon land in Ireland, and the debtor being an Irish Peer executed a bond in Ireland to secure the debt.

The neglect of the Respondent is a further reason for refusing all interest. This claim was raised against the Appellant when he was in India in 1796, and was apparently abandoned, after an opinion had been given against the claim by the Advocate General of Calcutta in 1802. The Appellant might have made arrangements to dis-

* The report, 1 B. C. C. p. 239, supposes the Lord Chancellor to say, "that *nothing* but what arises from contract or *de-* "*mand* of debt can give rise to a demand of interest." This appears both incorrect and deficient. For a demand of debt gives no right to interest, and in equity it is always given upon *breach of trust*. If a trustee sells stock out of the public funds, the Court gives to the *cestui que* trust an option to demand against the trustee the dividends which the stock would have produced, or interest upon the proceeds of the sale.

† 2 Atk. 382.

charge or diminish the debt, if he could have anticipated that the claim would be renewed in Scotland after so great a lapse of time.

5. Compound interest ought not to have been allowed. If, as the Respondent contends, the affirmance of the judgment in this House is conclusive upon the question of interest, then there being no conclusion in the summons for accumulation of interest, the judgment, which is in terms of the libel, does not warrant accumulation.

If the judgment is not conclusive, as the Appellant contends, then it will be necessary for the Respondents to amend their libel (if that can now be permitted) before any judgment can be given for a right, which, as the summons is now framed, makes no part of the Respondents' demand. Independent of all questions of form, interest upon interest is never allowed, but upon adjudication, or a denounced horning upon an extracted decree.

6. The Appellant is entitled to deduct the cost of remittance. If this was a debt contracted, and payable in Bengal, the creditor is bound to receive it there. In *Campbell* v. *Hannay*,* the Court refused the debtor's cost of remittance, because he had compelled the creditor to sue in Scotland; but in this case the creditor has avoided the *forum contractûs*, and selected the courts of Scotland.

7. The Appellant is also entitled to deduct the property-tax from the year 1803. The Respondent was liable to the tax, not being within the exceptions of the statutes; and the circumstance

* *Ante*, p. 136.

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that the Appellant was resident in Calcutta till 1808 is immaterial.

For the Respondents—*The Solicitor General* * and *Mr. Kindersley.*

The Appellant was sued both as partner in the firm of Graham and Co. and as executor: so it appears expressly by the summons. The Respondent, suing as residuary legatee, claims a specific sum as residue against a person filling the character both of debtor and executor; and so he was charged by the judgment below, according to the allegations of the summons, and the defence made by the Appellant.

The argument † of *novatio debiti* is repelled by the fact, that the firm of Graham and Co. rejected the authority and orders of the English executors, upon the express allegation that they had the authority of the Appellant as Indian executor, and he was then also a partner of the firm.

The question, as to the rate of interest was concluded, by the judgment of this House, in 1813. For the decrees of the inferior Court were thereby affirmed, and those decrees were in the terms of the libel, by which interest, at the rates and for the periods in question, was specifically demanded. The very question was argued in the Courts below, and upon the hearing of the appeal.

* Sir Robert Gifford.

† This point was argued in the former stage of the suit. It was then contended by the Appellant, that, by the effect of the transactions between the parties, and the events which had happened, he was released; and that the new firm, after he ceased to be a partner, had been accepted and recognised as the debtors. —See the Lord Chancellor's observations in moving judgment, post, 147—8.

In order to constitute a valid judgment, it is not necessary that the question should be debated. If it be alleged on the one part, and not contradicted on the other, that is sufficient ground for the judgment.* The Appellant might have pleaded, 1. that he was not liable at all; 2. if so, that the rate of interest claimed was extravagant.

The subsequent proceedings in the Court of Session, upon the subject of interest, were merely to ascertain the amount of the sum due by calculation, not to open and re-discuss the general question of liability for the specific rates of interest, and for the times before awarded. The allowance of interest follows as a consequence upon a judgment for the principal.

The allowances for property-tax, since the judgment in 1813, do not operate as an admission by the Respondent that the judgment was open: that was done by consent, and was a gratuitous boon to the Appellant.

If it be admitted that the question is open, this being a claim against a trustee, *ex delicto*, he is liable for the largest rate of interest which might have been made by the use of the money in the country where the breach of trust took place.† If a trustee sells out stock from the public funds, he is chargeable either with the dividends or the profits actually made, or the proceeds, with the usual

* Stair's Inst. 1.

† That 12 *per cent.* is the usual rate of interest in Bengal is recognised, and it is made the legal rate there by stat. 13 Geo. III. c. 33, s. 30. It was not proved in the cause that 12 *per cent.* was actually made: that such advantage might have been had is sufficient to charge a trustee.

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rate of interest at the option of the *cestui que* trust: so even if he represents, contrary to the fact, that he has purchased stock. *Bate* v. *Scales.** In these cases the Court does not consider, as the measure of damages, what would have been gained for the benefit of the *cestui que* trust, if the directions of the trust had been followed, but what has been wrongfully acquired, or might have been acquired by the trustee upon the misapplication of the trust fund. The partners of a firm, to which the Appellant belonged, have abused their trust, and the Appellant being executor has permitted that abuse. Six of the bonds were endorsed away while the Appellant was a partner in the firm, and four a year after his retirement. If he had written or endorsed upon them a statement of the purpose for which they were deposited the loss would have been prevented; but, in gross violation of his trust, he left them in the hands of a firm, which he, as a partner, could not fail to suspect of actual or approaching insolvency.

As to the objection made against the judgment for accumulated interest, it is consonant to the settled principles of law as well as equity, that interest, ascertained and decreed upon a final judgment, should be incorporated with the principal.† From that time the principal and interest

* 12 Ves. 402; and see Harrison *v.* Harrison, 2 Atk. 121; Pocock *v.* Redington, 2 B. C. C. 653, 5 Ves. 794, and Long *v.* Stewart in the note; Treves *v.* Townshend, 1 B. C. C. 384; Newton *v.* Bennett, Perkins *v.* Bayntun, 1 B. C. C. 359, 375; Forbes *v.* Ross, 2 B. C. C. 430; Young *v.* Combe, Piety *v.* Stace, 4 Ves. 101, 620; and Tebbs *v.* Carpenter, 1 Mad. Rep. 290, where the cases upon the general question are collected.

† Bodily *v.* Bellamy. *Ante*, p. 138.

become an entire sum bearing interest. The right to interest upon this aggregate sum arises from the delay of payment caused by the appeal. The accumulation, they say, is not asked by the summons; nor is it necessary. In actions upon bills of exchange interest is not demanded by the declaration; yet it is given by the judgment, or upon motion: and upon writ of error, if the judgment below is affirmed, interest is calculated, not on the principal sum for which the action was brought, but upon the whole amount recovered by the judgment below up to the time of the judgment in the Court of Error.* The result is,

* Upon writs of error interest is given by way of damages, for which provision is made by the statutes for preventing delays in suits of law, 13 Car. 2, s. 2, c. 2, s. 8, 9, 10. The Plaintiff, upon suing his writ of error, is, by that statute, compelled to give security for *damages* as well as costs, otherwise execution may issue, without stay or supersedeas, notwithstanding the writ of error. See also, 3 Jac. 1, c. 8, made perpetual by 3 Car. 1, c. 4, s. 4, 16 and 17 Car. 2, c. 8, s. 3. Upon affirming a judgment in the Exchequer, the Chancellor personally (who, with the treasurer and judges, are, by the 31 Edw. III. constituted a court for examining erroneous judgments in the Exchequer), gives interest, computed according to the *current* (not the legal) rate, from the day of signing judgment below to the day of affirmance in that Court of Error. In the Exchequer Chamber, which is a court established by 27 Eliz. c. 8, to rectify errors in the judgments of the King's Bench, if no direction is given by the court, the officer (under the authority of 13 Car. 2, s. 2, c. 2, s. 10,) in taxing costs, allows double the money out of pocket, but gives no interest. In the King's Bench, upon writs of error from the Common Pleas, interest is usually given, by way of damages, upon the sum recovered in, and from the time of signing the judgment below until the affirmance. Bishop of London, &c. *v.* Lewen, 2 Strange, 931; Bodily *v.* Bellamy, 2 Burr. 1094. By stat. 3 Hen. 7, c. 10, upon all writs of error

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that, as long as the bonds were held by the firm, they and the Appellant as partner, trustee, or executor, are responsible for the amount of interest paid upon them, which appears to be 8 *per cent.* From the time when the bonds were assigned and converted into money, which they used, or might have used in Calcutta, and up to the date of the final judgment, the common interest of the country, which is 12 *per cent. per annum*, has been rightly charged against the Appellant; and, after the date of the final judgment, the Respondent is entitled to English interest upon the whole sum ascertained and awarded by the judgment.

The Lord Chancellor, in the course of the argument, made the following observations:—

Laying the rule of law out of the case altogether, is not this, upon the special circumstances of the case, a continuing trust?

If I intrusted a person to lay out money for me in government bonds, and if, instead of doing so, he had laid it out for himself, or for his own partnership, would he not be liable to pay

sued, in delay of execution, to reverse judgments "if they be "affirmed, or the writs discontinued in default of the party, or "the Plaintiffs be non-sued in the same, the Defendants in Error "shall recover costs and damage, for delay and vexation, by dis- "cretion of the justice before whom the writ is sued." This is re-enacted by 19 Hen. 7, c. 20. The Plaintiff, in the Court below, has also the option to bring an action of debt upon the judgment, in which action he may recover interest, by way of damages, for detention of the debt constituted by the judgment.

The House of Lords, in deciding appeals and writs of error, exercise a discretion as to costs and damages: to answer which, security is taken, by requiring the Appellant to enter into a recognisance, in the sum of 400*l.* before he is permitted to prosecute his appeal.

me the common rate of interest? For this reason, it becomes material to be considered whether the interest, as payable on the bonds, ought to be continued after 1791, or whether it ought to cease. It is contended, by the Appellant, that the interest, as on the bonds, ought not to cease after 1791, if a larger rate of interest is to be charged, when the interest, as on the bonds, ceases. On this point the questions to be settled are whether the former interest is to go up to 1791 only, or to 1796; and whether the larger rate of interest is to go on till 1813, or to cease in 1803; or when to commence, and when to cease. On this point there is a difference in the statements of the parties as to the facts. The Appellant states in his case that all the bonds were uplifted after he had left the partnership. The Respondent, on the other hand, in his case states, that, in respect to six of them, they were indorsed away between the months of November, 1789, and October, 1790, and that the remaining bonds were disposed of soon after the Appellant had taken leave of the concern. As a question of fact considered material in arguing this case, it may easily be ascertained, with respect to these bonds, whether they were disposed of by the partners of the house after Mr. Graham had left the concern, or whether he is to be considered as having been a partner in the house when the bonds were actually disposed of. But whether he was a partner in the house or not, he was at least bound, both on account of the residuary legatee, and on his own account, to have taken some little care that no improper use was

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made of the bonds, and to have taken that care, more especially, on account of his own character of executor.

* * * * * * * *

There may be a great distinction to be made, in point of fact, with regard to the insolvency of the partnership, and with regard to the periods at which they took the bonds to themselves; but if I had put my money into the hands of the house of Graham and Co., while Mr. Graham was a partner in it, whether the other partners had continued solvent or not—whether they had continued in the country, or had left it, I should have looked to Mr. Graham, and should have expected to call upon him, according to the terms of the contract, to have that contract fulfilled to me.

* * * * * * * *

The elder Page Keble died in 1786, when his son, the residuary legatee, was about five years old, since he did not attain the age of twenty-one till the year 1802. Now Mr. Thomas Graham was in a situation in which he ought to have acted both for himself and the infant.

* * * * * * * *

Mr. Graham might have relieved and protected himself; and if he had considered the matter for a moment, he must have been convinced of his liability for interest, if there were no special circumstances in the case; and can he press special circumstances against an infant for whom he was trustee?

July 17, 1820. *The Lord Chancellor.* There was a cause heard some time ago, in which Thomas Graham was the Appellant, and Page Keble, a lunatic, and others, were Respondents.

In the year 1803 an action had been brought in Scotland against the Appellant, upon his succeeding to the estate of Kinross, in Scotland. When he became entitled to that estate, and the possession of it, he became amenable to the jurisdiction of the courts in Scotland. The action was commenced by Mr. Page Keble in the Court of Session against the Appellant, while he was resident at Calcutta, and the summons stated a variety of transactions, in which Mr. Graham, the Appellant, had been engaged with Mr. Keble, the father of the Respondent. It represented that the Appellant was a member of the house of Messrs. Grahams and Mowbray of Calcutta; that Mr. Keble, the father, before leaving India, in 1786, had executed a power of attorney in favour of that house for managing all his affairs, and uplifting the debts and the effects due to him; that besides this power of attorney, he left a letter of instructions with this firm, and a duplicate of his will in the hands of the Appellant, who was his confidential friend, and who was one of the executors named in the will; that, upon receiving accounts of the death of Page Keble, the Appellant proved his will and codicil, obtained letters of administation from the Prerogative Court of Calcutta, and had extensive intromissions with the estate and effects of the said Page Keble as executor, or as a partner of the company of Graham and Mowbray, in virtue of which, it was stated, that he was justly indebted to the pursuer (Respondent, P. K.), as residuary legatee of his father, in a great variety of sums, which are stated and set forth in the summons, and which amount to

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4768*l.* 8*s.* 6*d.* sterling, and interest thereon: "Therefore" (the summons concluded that) "the "said Thomas Graham ought and should be de- "cerned and ordained, by decree of the Lords of "Council and Session, to make payment of the "principal sum of 4768*l.* 8*s.* 6*d.*, and interest "thereon as follows, viz. interest of the said seve- "ral bonds, from their respective dates, till the "same were paid or discharged, or indorsed away, "and value received therefrom, at the rate of 8 "*per cent.*, being the rate of interest which these "securities bore; and, afterwards, at the rate of "12 *per cent.* of the principal sums contained in "the said bonds, being the ordinary rate of in- "terest exigible in Bengal to the date thereof, "and in time coming during the non-payment; "and interest of the sum of 2426*l.* 13*s.* 8*d.* ru- "pees, the balance of the said account, from the "said 14th of February, 1788, at 12 *per cent.* "to the date hereof, and in time coming during "the non-payment, deducting always from the "said principal sums and interest all partial pay- "ments, which the said Defender can instruct to "be (have been) made, if any such there were."

The defence against this original action was this: that, although he had taken out probate of the will, in which he was named executor, yet he did not act; he did not possess the character of executor, and did not incur any legal responsibility: and, in the next place, that, after he had ceased to be a member of the company of Grahams and Mowbray, and was by public notice separated from it, the executors in England recognised the new company as their debtors, and had

intrusted the funds to the new and not to the old company, which created, what they call in Scotland, *novatio debiti*.

By interlocutors of 1806 and 1808 the Court of Session declare their opinion against the Appellant.

An appeal was then brought to this House, which was heard in November, 1813. Upon that appeal it was ordered and adjudged that the petition and appeal should be dismissed, and that the interlocutors therein complained of be, and the same were thereby affirmed.

After the dismission of the appeal from this House, a petition was presented to the Lord Ordinary to apply the judgment. A great variety of proceedings appear to have taken place; and it is upon the judgments pronounced in the course of these proceedings by the Lord Ordinary and the Court of Session that this new appeal is brought, praying that these interlocutors may be reversed, and assigning several reasons which are stated.

The Appellant says he has been made liable as executor, and that he ought not to have been so made liable; and, as this action was brought against him by the residuary legatee, that it was necessary to ascertain whether all the debts and legacies had been paid before the amount due to the residuary legatee could be determined. In the next place, he objects to the rate of interest awarded, complaining that it is higher than the law authorises.

The Appellant contends also that the judgment of this House, in November, 1813, did not form a *res judicata*. As to the charge of Indian interest, he says the action was brought against him in 1803, in the Court of Session, without any intimation to

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him, when he was resident in the East Indies. Now, the Scottish courts had jurisdiction by reason of his having property in Scotland, but the debt was not contracted in Scotland but in India.

He further insists, that, supposing the Court to be right as to the mode of calculating interest, he is entitled to have the charge of remitting the money from Calcutta to England deducted, and that an allowance ought to have been made for the property-tax: that it ought to have been deducted from the interest.

In my opinion the Appellant has not a right to call on the residuary legatee for an account of all the estate and effects of the testator; I do not think there is any pretence for it.

In the next place I state, as my opinion, that the decision upon the cause in this House in 1813, did not amount to a *res judicata*, so as to fix the Appellant with a demand to the full extent of the conclusions of the summons in the Scottish court.

The next question is, how the interest ought to be calculated; and recollecting the circumstances of this case, the place where the debt was contracted, and the judgment obtained, the party will be chargeable with interest on the different bonds, according to the interest they carried, until they were paid off, or indorsed away, at the rate of 8 *per cent*. By the receipt of the money due upon these bonds, a debt was constituted as an Indian debt; and being so constituted, it must, upon principles of law, bear interest at 12 *per cent*. from the time when the bonds were paid off until it became a British debt. When this House dismissed the appeal in this cause in November,

1813, it became a British debt, and therefore from that time it can only carry British interest, that is to say, interest at *5 per cent.*; and that interest at *5 per cent.* is to be calculated on the sum constituted, by consolidating the principal sum, with interest at 8 *per cent.* on the different bonds from their dates till they were paid off, and 12 *per cent.* from the time when the bonds were paid till it became a British debt, and from that moment *5 per cent.* on the aggregate, composed of this consolidated sum of principal and interest. That consolidated sum should bear interest at *5 per cent.*

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The next question is, whether the Appellant is entitled to any thing *for remittance.* I think he will not be entitled to remittance for the whole sum due, as it will stand after it bears British interest at *5 per cent.*, and up to the day of payment; but he will, in strictness, be entitled to the cost of remittance, on the amount of the debt, as it was estimated on the 10th of November, 1813.

The last thing which I am to consider in this case relates to the deduction of the property-tax. I think he ought to be allowed a deduction of the property-tax, between the year 1803 and the time when the property-tax ceased to exist, on all sums which he can show that he paid during that period.

What I have stated, and mean to propose as the minutes of the judgment on Wednesday, is to this effect:

With respect to the bonds, the interest on them shall be calculated at the rate *per cent.* which they respectively bore from their dates till the time when they were discharged; and the party shall be charged with 12 *per cent.* after that time till

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November, 1813, when it became a British debt. Then 5 *per cent.* only became chargeable on the consolidated sum of the former principal and interest. An allowance is to be made for remittance on the sum, principal, and interest, as it stood in November, 1813; and an allowance is also to be made for the property-tax between the year 1803 till the time when it ceased. With these findings, I shall propose to remit the parties to the Court of Session to do therein as may be just.

As to the sum which is due on the balance of an account, not being sure whether I rightly apprehend that part of the case, I shall consider whether it may be necessary to say any thing further upon it.

Minutes of order, July 19, 1820.

It is declared that the Appellant is to be charged with interest at the rates following, viz. with interest, at the rate of 12 *per cent.* upon the balance of any account which shall appear to have been *stated and signed,* and which is mentioned in the summons in this action, such interest to be calculated from the date of the account so stated and signed to the 10th of November, 1813; and with interest of the several bonds in the proceedings mentioned, at the rate *per cent.* which they respectively bore, until the times when they were respectively paid and discharged, or indorsed away; and value was given for the same, and with interest, at 12 *per cent.* from and after such times respectively to the 10th day of November, 1813, when the former appeal was dismissed this House. But that the Appellant is to have proper and just allowances, and deductions made, in respect of

partial payments, if any, which he can instruct to have been made, and in respect of interest thereof, and also a deduction of the charge of remittance to Great Britain of the consolidated amount of the debt which shall be constituted against him up to the said 10th of November, 1813; and it is further declared that the Appellant is chargeable with interest, at *5 per cent.*, upon such consolidated amount of debt from the said 10th day of November, 1813, until payment thereof: but with a due deduction of the property-tax upon the amount of the interest of such consolidated amount of debt so long and at such rates as the same were chargeable upon the Appellant's property in Great Britain; and it is ordered, that, with these declarations, the cause be remitted back to the Court of Session in Scotland to do therein as is just and consistent with these declarations.*

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* Upon the questions of foreign interest and remittance, see the case of Lansdowne *v.* Lansdowne, *ante*, p. 60 et seq. and the notes to that case.

In 1 Eq. Cas. Abr. c. 36, (E.) an authority is cited, in which it is laid down generally, that, "in all cases, interest must be "paid according to the law of the country where the debt was "contracted, and not according to that where the debt is sued "for." Instances are quoted, in which Turkish interest, although both parties had been long in England, (pl. 1,) East Indian and Irish interest, (pl. 1,) and West Indian interest, at 10 *per cent.* (pl. 3,) were awarded by courts of equity upon contract and breach of trust. In the same place a doubt is expressed as to the accuracy of the report of Lord Ranelagh *v.* Sir John Champant, 2 Vern. 395, where it is said, upon a debt contracted in Ireland, and a bond given in England to secure it, English interest was awarded; and, in contradiction to Vernon's Report, it is stated that Irish interest was allowed by the Court. So the same case is stated in Prec. in Chancery, 108.

But as to the general doctrine that interest, *in all cases*, is regulated by the law of the place of contract, without regard to the place where the security is given, the residence of the parties, or other circumstances, *quære*, and see the cases collected in the note to the foregoing case in Mr. Raithby's edition of Vernon.