IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

SIR JOHN CHARLES HAMILTON, BART. *Appellant*;
JOSEPH HOUGHTON - - - *Respondent.*

WHERE a trust is created by deed for the payment of debts; if a bill is filed by one of the creditors to enforce the payment of his debt; that purpose can only be effected by the general execution of the trust. The decree ought to direct such execution and an inquiry as to all the debts owing and payable under the trust, and that they should be paid according to their priorities.

A decree for payment of the debt of one creditor, under a deed of trust, which provides for the payment of other creditors is erroneous.—So if the bill, stating *A.* to have been the survivor of the trustees named in the deed, makes the heir of *A.* a party to the suit, as such supposed survivor, and that allegation proves to be false, the decree made upon such state of the pleadings is erroneous.

A bill to carry such a decree into execution, notwithstanding long acquiescence, cannot be sustained. The original decree may be examined, impeached and varied in a suit to carry that decree into execution. It is not conclusive until reversed by original bill, or bill of review, for error apparent on the face of the decree, and the court may refuse to carry it into execution.

A decree, to carry into execution an erroneous decree, being reversed; the cause was remitted, with leave to amend the bill, by adding parties and making a better case as to the original claim, notwithstanding the lapse of sixty years from the date of the deed by which the debt was secured, and of forty years from the date of the erroneous decree; as between the plaintiff creditor, and the debtor there is no presump-

tion from lapse of time in such a case, and upon such state of the pleadings that the debt has been paid. But other creditors, whose debts ought to have been provided for by the decree, might have a right to raise that question.

A debt by simple contract does not carry interest, because provision for its discharge is made by a deed of trust; such a deed *per se* does not import contract or trust for the payment of interest, especially where the creditors have not signed the deed, and no agreement is made to charge the land and discharge the person.

Interest ought not to be computed from the date of the decree for payment, but from the day when payment is by the decree directed to be made.

An erroneous decree, directing payment of interest cannot give the right to interest; but interest may be due under circumstances.

A party who files a bill in a court of equity to have the benefit of a former decree, must shew (if the case requires it) that such former decree was right. If a decree appears to be erroneous, it cannot be carried into execution.

A decree taken *pro confesso* is the decree of the plaintiff who takes it, and it is his duty to see that it is right.

A decree taken *pro confesso* against one of the defendants in a suit, may be impeached for error by a party claiming under that defendant; and the party claiming under the plaintiff in the suit can have no benefit of that decree, if erroneous.

A bill taken *pro confesso* is conclusive against the defendant only as to the facts within his knowledge; not as to facts which the plaintiff has the same opportunity of knowing as the defendant, *e. g.* as to the survivorship of a trustee, which was alleged in the bill but proved to be contrary to the fact.

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THIS was an appeal, on various grounds, from a decree of the Court of Exchequer (Equity side) in Ireland. The following are the facts of the case, shortly abstracted from the pleadings in the Court below.

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Indentures of lease and release, dated 12th and 13th May 1758.

By indenture of release, bearing date the 13th of May 1758, and made between William Hamilton * and John Hamilton, his eldest son (afterwards Sir John Stewart Hamilton, baronet,) of the first part; the Bishop of Limerick, William Scott, Henry Hamilton, and Galbraith Lowry, of the second part; and Redmond Keane, of the third part; certain hereditaments and premises therein mentioned were conveyed to the parties of the second part, and their heirs, upon trust, that they or the survivor of them, his or their heirs, should, by sale, &c. discharge the debts and incumbrances mentioned in the schedule to the release annexed, together with all interest then due thereon respectively.

Robert Carson was one of the creditors named in the schedule, and opposite to his name is written the sum of 350 *l.* Upon the several debts contained in the schedule, which carried interest, being debts by mortgage, judgment, &c. the interest was computed, and the word "*interest*" was written under them; but the word "*interest*" was not written under the debt of Robert Carson, and no interest was computed on his debt.

William Hamilton died intestate before the 5th day of January 1778, when *Sir John Stewart Hamilton* † became entitled to the premises comprised in the release; and also obtained letters of administration of the personal estate of his father.

* It appears that William Hamilton was tenant for life of the estates conveyed in trust, and John Hamilton was owner of the inheritance in remainder. See p. 184.

† In the printed cases his title is stated as *heir at law* to William Hamilton; but probably it accrued under the limitations of a will or settlement.

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Bill filed, 5 Jan. 1778.

On the 5th of January 1778, Robert Carson filed a bill in the Court of Exchequer in Ireland, against Sir John Stewart Hamilton, James Scott, as the heir at law of William Scott, (in the bill stated to be the survivor of the trustees named in the release), and others *. The bill stated, that Robert Carson had been employed for several years before the month of May 1758, by William Hamilton, as attorney and solicitor in several causes; that for the prosecution and defence thereof, after making all fair allowances, there remained due to Robert Carson 400 *l.* for money laid out and expended, and for his fees as an attorney or solicitor, and that William Hamilton being so indebted to him, and at the same time owing several other debts, did, with Sir John Stewart Hamilton, execute such indenture of release as before mentioned; and the bill prayed, that an account might be taken of what was due to Robert Carson, for principal, interest and costs, in respect to the said sum of 400 *l.* and also what was due *to the other creditors* of the said William Hamilton, who should come in and contribute to the expenses of the suit, and that the lands and premises mentioned in the deed of release, or a competent part thereof, might be sold for payment of such demands.

Death of Robert Carson, and revivor.

Robert Carson died, and his executors, filed a bill of revivor; but Sir John Stewart Hamilton having been served with process, and not appearing to the original bill and bill of revivor, process of contempt to sequestration was entered up against him, for want of appearance and answer.

* See the statement, p. 173; and the observations of the Lord Chancellor, p. 185. The statement in the text is from the printed cases.

On the 26th day of February 1779, the cause came on to be heard on sequestration as against Sir John Stewart Hamilton, and *on bill and answer*, as against *the other defendants* *, when it was decreed that the bill should be taken as confessed against Sir John Stewart Hamilton, and that the Remembrancer should state an account of what was due to the executors of Robert Carson, on the foot of the deed of the 13th of May 1758, for principal, interest and costs, and also on the sum of 50*l.* in the pleadings mentioned.

Decree, 26 Feb. 1779.

In pursuance of the decree, the Remembrancer made his report, bearing date the 15th day of September 1779, whereby he certified that there was due to the executors of Robert Carson, for principal and interest on the foot of the deed of the 13th May 1758, and of the said sum of 50*l.*, 835*l.* 5*s.*

Report, 15 Sept. 1779.

This report was afterwards confirmed.

On the 23d day of February 1780, the cause came on to be heard for further directions, when it was ordered and decreed, that the Remembrancer should take an account of interest on the principal sum of 350*l.* from the 3d day of December then last, to which time interest had been computed, to the 31st day of January then last, being the time when the report was confirmed, which (being computed) amounted in the whole to the sum of 855*l.* 19*s.* 6*d.*; and it was further ordered and decreed, that Sir John Stewart Hamilton should, in three calendar

Decree on further directions, 23 Feb. 1780.

* This is so stated in the respondent's case, and in this respect, the observations of the Lord Chancellor, p. 185, seem to point to this passage; but in other respects, they are more applicable to the subsequent suit to carry the decree into execution.

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months, pay such sum to the executors of Robert Carson, with interest from the 31st day of January then last, until paid with the costs of the suit, or in default thereof, that the Remembrancer should sell the premises comprised in the deed of the 13th day of May 1758, and that out of the money arising by such sale, the plaintiffs should be paid the principal money, interest and costs.

Assignment of decree 1785, 1796.

In the year 1785, the executors of Robert Carson, assigned the claim under the decree to George Gordon Carson, who, by a deed executed in 1796, assigned to John Potter.

Bill to carry the decree into execution, 31 May 1800.

On the 31st of May 1800, John Potter filed a bill in the Court of Exchequer against Sir John Stewart Hamilton and others, stating the facts before mentioned, and also that Sir John Stewart Hamilton having been served with an attested copy of the decree in the former suit, and the principal money and interest not having been paid, the hereditaments and premises comprised in the deed of the 13th of May 1758, were, in the month of June 1780, put up to sale, and purchased by one Arthur Hawthorne, in trust for the plaintiffs in that suit, for the sum of 1,000*l.* and that such sale was absolutely confirmed, but that the same was never completed by Arthur Hawthorne, because immediately after the sale, Sir John Stewart Hamilton requested the executors of Robert Carson not to suffer the purchase to be completed, promising that he would shortly pay to them the full amount of the sum so decreed, with interest, and all costs attending the same; whereupon the executors, and George Gordon Carson, assented to postpone the completion of

the sale, in order to give time for payment. The bill further stated, that Sir John Stewart Hamilton having, after the pronouncing of the decree, become greatly embarrassed in his circumstances, took upon himself to *execute* several *deeds of mortgage* of the lands comprised in the decree, whereby John Potter had been obstructed in establishing his rights under the decree; and the bill prayed, that Sir John Stewart Hamilton might be compelled to come to account with the plaintiff, on the foot of the decree, and to pay him what should appear to be due on the foot of such account, for principal, interest and costs, and that the decree might be carried into execution and confirmed.

Death of plaintiff and Sir J. S. H.

Before any further proceedings were had in the cause, John Potter and Sir John Stewart Hamilton died, *and the appellant, upon the death of Sir John Stewart Hamilton,* (according to the allegations of the appellant's case,) *as his only son and heir at law*, became entitled to the hereditaments and premises comprised in the deed of the* 13*th May* 1758.

Revivor, 12 June 1802.

On the 12th of June 1802, the respondent, who is the executor of John Potter, filed a bill of revivor against the appellant as the heir at law † of Sir John Stewart Hamilton, and the cause was duly revived.

* Upon this statement the Lord Chancellor observed, that there was some inaccuracy in the statement of the printed cases, as to the manner in which the appellant became entitled; and that these inaccuracies occurred so often in the Irish appeal cases, that the House of Lords was always in a state of uncertainty as to matters which might form the grounds of their judgment.

† Probably as issue in tail, or remainder man, under a will or settlement. As the case does not turn upon the fact, it is not material to pursue this inquiry; and this observation may be applied to other points of this case.

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On the 29th of May 1806, the appellant put in his answer to the original bill, and bill of revivor, insisting that Robert Carson was not entitled to interest on the sum of 350*l.* or to the sum of 50*l.* which he claimed upon an allegation (not admitted) of a parol promise made by William Hamilton, who died seventeen years before the decree was pronounced; that Henry Hamilton, one of the trustees named in the deed of the 13th May 1758, was alive at the time when the decree was pronounced, and lived several years afterwards, and that although he was the surviving trustee named in the deed, he was not made a party to the original suit; that the decree had not been prosecuted for more than twenty years after the same had been pronounced, and the appellant, by the answer, farther insisted upon the statute made in Ireland for the limitations of suits; and prayed the same benefit as if he had pleaded the statute.

Amended bill, 3 Feb. 1807.

On the 3d day of February 1807, the respondent filed an amended bill against the appellant, stating admissions and acknowledgments by letters and conduct on the part of Sir John Stewart Hamilton, of the fairness of the decree, and the validity of the demand against him, especially as to the interest, and containing allegations of various other facts not material to be stated.

Answer, 5 Dec. 1808.

On the 5th day of December 1808, the appellant filed his answer to the amended bill, representing that the admissions and acknowledgments set forth in the bill might be as therein alleged, but were owing to the negligence and indolence of his father, Sir John Stewart Hamilton, and his consequent ignorance of the facts of the case.

The answer of the appellant having been replied to, witnesses were examined on the part of the respondent, who proved the exhibits, consisting of the deeds in the pleadings mentioned, some letters of Sir John Stewart Hamilton, and a draft, or order, dated the 2d day of June 1781, drawn by Sir John Stewart Hamilton on Francis Vesey, esq. in favour of one of the executors of Robert Carson for 300*l.* &c. The witnesses on the part of the appellant proved that Sir John Stewart Hamilton was a man of indolent disposition, inattentive to his own concerns, and totally unacquainted with business; that Henry Hamilton, afterwards Sir Henry Hamilton, bart. was the survivor of the trustees named in the deed of the 13th day of May 1758, and that he was living at the time when Robert Carson filed the bill against Sir John Stewart Hamilton.

Decree, 14 Feb. 1812.

The cause came on to be heard in the Court of Exchequer, upon the 14th of February 1812, when it was decreed that the respondent was entitled to the sum of 350*l.* in the pleadings mentioned, without interest, and that the appellant should, within three calendar months, to be computed from the day of the date of the decree, pay to the respondent, as executor of John Potter, the sum of 350*l.* with legal interest from that day until paid, together with his costs to be taxed by the proper officer, or that in default of payment, the Remembrancer should sell the lands and premises therein mentioned, or a competent part thereof, and that out of the money arising from such sale, the respondent should be paid his principal, interest and costs, and that if any overplus should remain, the same should be paid to the appellant, or such person as should appear entitled

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thereto, upon the making out a good title to the purchaser.

Decree on re-hearing, 26 June 1812.

By an order dated on the 21st of February 1812, and made upon the petition of the respondent, it was ordered that the cause should be re-heard, and the cause came on to be re-heard on the 26th day of June 1812, when it was declared that the respondent was entitled to the benefit of the decree pronounced in the cause of *Carson* v. *Hamilton*, on the 23d day of February 1780, and that the same should be carried into specific execution, save only so far as related to the sum of 50*l.* therein mentioned; and that the Remembrancer should take an account of what was due to the respondent, as the executor of John Potter, on the foot of the decree of the 23d of February 1780, for principal, interest and costs, deducting therefrom the principal sum of 50*l.*

Report, 6 June 1813.

In pursuance of the decree, upon re-hearing, the Remembrancer made his report, bearing date the 6th day of June 1813, whereby he certified, that there was due to the respondent, as executor of John Potter, on the foot of the decree of the 23d Feb. 1780, for principal, deducting the sum of 50*l.* - - - - - £. 805 19 6

For interest on 805*l.* 19*s.* 6*d.* from the 23d February 1780, to 23d June 1813, being thirty-three years and four months - - - - 1,611 19 4

For costs of obtaining decree - - 91 15 6

Ditto of defendants, *Scott* and *Emery*, parties thereto - - - - 15 13 4

Total - - £. 2,525 7 8

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Decree on further directions, 20 Nov. 1813.

This report was confirmed, and on the 20th of November 1813, the cause came on to be heard upon further directions, when it was ordered and decreed, that the register should compute interest upon the sum of 805*l.* 19*s.* 6*d.* due to the respondent, as executor of John Potter, from the 23d day of June 1813, being the time to which interest was computed thereon by the report to the 20th day of November; which he having done in court, and the same amounting to the sum of 20*l.* 3*s.* and which being added to the sum of 2,525*l.* 7*s.* 8*d.* reported due, amounted in the whole to the sum of 2,545*l.* 10*s.* 8*d.* it was further ordered and decreed, that the appellant or such other of the defendants as ought so to do, should, within three calendar months, pay to the respondent, the sum of 2,545*l.* 10*s.* 8*d.* with interest from the 20th day of November until paid, together with the costs of the respondent and the said other defendants, or in default thereof, that the appellant should be barred and for ever foreclosed of and from all right and equity of redemption in and to the lands and premises in the pleadings mentioned; and that the Chief Remembrancer of the court, or his deputy, should set up and sell to the public, and to the highest bidder, the said lands and premises, or a competent part thereof; and that out of the money arising by such sale, the respondent should be paid the sum of 2,545*l.* 10*s.* 8*d.* so due to him, as executor of John Potter, with interest and costs, and that the remainder (if any) of the money to arise by such sale should be disposed of as the court

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should thereafter think fit to direct; and that the other defendants in the cause should recover their costs from the respondent, and the respondent should recover the same, together with his own costs out of the monies to arise by such sale.

The appeal was brought to reverse or vary the decrees and decretal order of the 14th day of February 1812, 26th day of June 1812, and of the 20th day of November 1813.

For the Appellant, *Mr. Wetherell* and *Mr. Treslove.*

The decree of the 23d day of February 1780, was made in the absence of Henry Hamilton, afterwards Sir Henry Hamilton, baronet, who was the surviving trustee named in the deed of the 13th day of May 1758, and was then living, and was therefore a necessary party to that suit.

Even assuming the said decree of the 23d day of February 1780, to be valid, yet, twenty-three years having elapsed before steps taken in prosecution thereof, the respondent was barred from recovering the money certified to be due by the report made in the cause of *Carson* v. *Hamilton*; or the same ought, at the time when the said John Potter filed his bill of complaint against Sir John Stewart Hamilton, to have been presumed to have been satisfied.

The debt of 350*l.* due from William Hamilton to Robert Carson, was a simple contract debt, and no interest is provided in respect of that debt by the deed. There was no evidence of any contract to pay

interest. A debt by simple contract is not made special, because the creditor signs a deed of trust, which provides for the payment of that, with other debts bearing interest by contract. That was supposed to have been the opinion of Lord Hardwicke, from the report of the case of *Carr* v. *Lord Burlington*, 1 P. W. 229. But it appears from the decree, as given in the notes of Mr. Cox, that Lord Hardwicke in that case, made an order, referring it to the Master to compute interest on such of the debts as in their nature bore interest; and the case of *Barwell* v. *Parker*, 2 Ves. 363, shows that such doctrine was never intended to be understood as a general proposition of law.

The Lord Chancellor:—That will depend upon the language of the deed. If there be debts with and debts without interest, and the words are general, it must be construed *reddendo singula singulis*. In decrees, the language is guarded with that special view. The Master is directed to compute interest on such of the debts as bear interest.

For the appellant:—

There is nothing in the provisions of the deed which shows an intention to give interest, on the contrary, the word "interest," which is subjoined to the specialty debts, is not set opposite to this and other debts by simple contract. In the case of a will, providing for the payment of interest upon debts, it was held not to extend to debts by simple contract, *Tait* v. *Lord Northwick*, 4 Ves. 618. The same construction has prevailed as to arrears of annuities, *Creuze* v. *Hunter*, 2 Ves. jun. 157. 4 B. C. c. 316*.

* See also *Anderson* v. *Dwyer*, 1 S. & L. 301.

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Upon a judgment at law, interest is only given upon the new suit. Here the original decree was erroneous and defective for want of parties, and the assignee cannot have the benefit of such a decree. When a suit is instituted to carry a decree into execution, the court "sometimes consider the direc-"tions, and varies them in case of a mistake, and "it has, on circumstances, refused to enforce the "decree," Mitf. 75 *. Upon this principle the decree was varied on re-hearing in the Court below.

The sum of 805*l.* 19*s.* 6*d.* upon which the decree of the 26th of June 1812, directs interest to be calculated from the 23d day of February 1780, the date of the decree in the cause of "Carson against Hamilton," was in part composed and made up of accumulations of interest upon the original debt of 350*l.* If the respondent is entitled to interest upon the original debt, he is not entitled to interest upon the aggregate of interest and principal.

For the Respondents, *Mr. Hart* and *Mr. Raithby.*

The decree of 13th February 1780, is binding and conclusive on all parties, until reversed by original bill or bill of review for fraud, or error apparent on the face of the decree, and the appellant, claiming as heir at law, is equally bound by the decree as Sir John Stewart Hamilton, his father, and estopped from averring any matter *dehors* the decree, because the decrees of the 14th February 1812, the 26th June 1812, and the 20th November 1813, are decrees

* See the note, and the *Attorney General* v. *Day*, 1 Ves. 218; *West* v. *Skip*, Id. 244; *Johnson* v. *Northey*, Prec. in Chan. 134.

founded on a suit filed merely to revive and carry into execution the decree of the 13th February 1780, which has never been disputed. In bills to carry decrees into execution, the law of the decree ought not to be examined into, or the decree varied, and especially in this case, where the appellant's father, during his whole life, and the appellant himself, have acquiesced in, and submitted to the decree.

Supposing, but not admitting, that the appellant had a right to unravel the decree, as to the question of interest on the principal sum of 350 *l.* the decree is well warranted by the contract of the parties themselves, evidenced by the deed of the 13th of May 1758, whereby the lands and premises therein mentioned are conveyed to trustees, to pay thereout, by sale or mortgage, the sum of 350 *l.* with the other debts mentioned in the schedule annexed to that deed, with the interest due on the debts, and, in the mean time, to apply so much of the rents and profits of the premises as would satisfy the accruing interest. Even without any express direction as to the interest, whenever a trust deed is executed for payment of debts, and a schedule made of such debts, the simple contract debts are then in the nature of specialties, and a specific interest given in the fund out of which payment is to be made.

The case of a trust by deed is distinguished in the case of *Barwell* v. *Parker*, from a trust by will for the payment of debts by simple contract, which are not thereby converted into debts by specialty. In the latter case, it is the voluntary

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act of the testator; in the former, the debts are charged on the land by contract, and the remedy of the creditor by legal process, is stayed for the benefit of the debtor. The doctrine of Lord Hardwicke, in *Barwell* v. *Parker*, is recognized and adopted in *Shirley* v. *Lord Ferrers*, 1 B. C. C. 41. With respect to the construction of the deed, it is said, that interest is computed and charged on the specialty debts, and is omitted as to this and other debts by simple contract. It is not probable that any of the creditors would give up their legal remedy without securing their right to interest.

Lord Redesdale:—The nature of the deed must be observed. It is not one by which the debtor alone charged the estate. He was only tenant for life. The charge was made by the concurrence of the son, who was the owner of the inheritance. There is a clause in the deed to indemnify the son, and that extends only to the principal of the debt *. The decree is at all events erroneous, being made in the absence of the person having the legal estate.

For the respondents:—There is an admission, by inference, from the answer of the appellant, that Scott was the surviving trustee. And where a bill is taken *pro confesso*, the facts stated are conclusive against the defendant.

Lord Redesdale:—Only as to those facts which are in his knowledge. If you take a decree against

* This does not appear by the cases. The deed is not printed either in the body of the cases or in the appendix.

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a person having no interest, what operation can it have? The decree is moreover erroneous, because it directs no enquiry as to the debts owing and payable under the trust, such enquiry should have been directed, and that the debts should be paid according to their priority.

The Lord Chancellor:—The decree does not direct that the scheduled creditors should be called in. If the charges in the bill, that the trustees entered and received the rents, but did not pay, are to be taken as true; the suit is defective for want of parties. The representatives of the tenant for life should have been before the Court *. He was bound to keep down the interest of the debts until the execution of the trusts.

In the subsequent decree nothing is said of the mortgagees or other parties mentioned in the bill. The respondent states in his case, that the cause, as against all the other parties, was set down on bill and answer †. Should not the Court have made some deliverance as to those other defendants? The subsequent incumbrancers raise questions, which they had a right to have decided. How far can the decree be considered as valid against them? In the decree of 1813, as stated in the case, it is only directed, that the appellant, or such other of the defendants as ought so to do, should pay, &c. or otherwise, the premises should be sold. This is a defect in the decree. But the parties interested do not appeal.

Lord Redesdale:—It seems that the decree on rehearing does not order a sale of all the estates, or

* See p. 171. † See p. 173.

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do more than direct that the plaintiff shall have the benefit of the former decree.

In reply:—Lord Hardwicke, in *Creuze* v. *Hunter*, does not decide what precise species of deed shall be sufficient to convert a debt by simple contract into specialty. As to *Shirley* v. *Lord Ferrers*, it is an authority in favour of the appellant.

The mere direction by deed to pay debts, does not infer either contract or trust to pay interest upon debts by simple contract.

Where creditors do not execute a deed, there is nothing to prevent their suing the debtor. They do not contract for specialty, and no consideration is given to to the debtor by charging the land and discharging the person.

The *Lord Chancellor*:—The decree in that case, at least, is not adverse. The mere direction by deed to pay a debt, does not infer either contract or trust to pay interest upon debts by simple contract. As to contract, the creditors did not execute the deed. There was nothing to prevent their suing the debtor after the execution. They did not contract for specialty, and no consideration was given to the debtor by charging the land and discharging the person. The debt, after the deed was executed, remained as before, a debt by simple contract.

Practice in Ireland, where where money is not paid according to an order of Conrt, to give interest from the date of the order.

Lord Redesdale:—It is the practice in Ireland, where the Court orders money to be paid, and it is not paid, to give interest from the date of the order. But the great difficulty is, that the decree is erroneous for want of proper parties to the suit, and proper directions in the decree.

Mr. Hart:—There is no appeal against the original decree.

The *Lord Chancellor*:—That brings it to the question, whether the assignee can have the benefit of a decree which is erroneous.

When a plaintiff takes a decree *pro confesso*, it is his duty to see that it is right.

Lord Redesdale:—It is the decree of the creditor, and taken upon sequestration *pro confesso*.

In such a case it is the business of the party taking the decree to see that it is right.

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The *Lord Chancellor*, on moving the judgment, in the course of stating the facts and pleadings of the case, censured the general inaccuracy of the Irish cases, and remarked, that whether the bill filed by Robert Carson was on his own behalf, or for others also, was not very material, considering that he was thereby demanding the execution of the trusts of a deed: that if Hamilton was the surviving trustee, to sell and mortgage for the payment of debts, the surviving trustee or his heir was not before the court to sustain the interests of the person for whom he was trustee; that the trust was not for the payment of the individual person of the name of Carson, but for the payment of "all and singular the debts and incum-"brances in the schedule to the release annexed, "together with all interest then due thereon respec-"tively;" that the decree carrying into execution the trusts of such a deed, should not have made provision for the debt of Carson only, but should have called on the Master to enquire what debts and incumbrances remained to be paid under the effect of that trust; bringing before the Court all persons interested in that enquiry, and then paying and satisfying them proportionally, if the funds would not pay all the creditors; paying them entirely, if the fund would pay them all; paying interest to such of them as were entitled to interest, and not paying interest to such of them as were not entitled to interest: that by the original decree, which was

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taken *pro confesso* against Sir John Stewart Hamilton, the officer of the Court of Exchequer was to do no more than to audit and state an account of what was due to the executors of Robert Carson alone, on the foot of the deed of the 13th of May 1758, for principal, interest and costs: and whether this decree as to the title of Carson to interest, meant to leave that question to the officer of the court, when he was to take the account on the footing of that deed, to take an account of principal, interest and costs, if, according to the true construction of that deed, interest was due, or whether it was meant to determine that interest was due, and to call upon the officer of the court to take an account on the footing of the deed of the 13th of May 1758, of principal, interest and costs as due, did not distinctly appear.

After these observations, which were intermixed with statements of the facts and pleadings, the *Lord Chancellor* proceeded thus:—The appeal complains, that the decree was taken in the absence of Henry Hamilton, afterwards Sir Henry Hamilton, bart. who was the surviving trustee named in the deed of the 13th day of May 1758, and was then living, and was therefore a necessary party to that suit. This is the objection made to the decree of the 23d of February 1780, which is sought by the subsequent proceedings to be carried into execution, and the benefit of which is sought thereby. If that decree was an erroneous decree, they were not entitled to have it carried into execution. It appears upon the evidence, that Henry Hamilton was the surviving trustee, living at the time when this decree was

made, he was therefore the proper person to represent the *cestui que* trusts. 1820.

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This ought not to have been the decreé made in the cause, even supposing Henry Hamilton, or the other trustees to have been dead, because, as this was a deed to pay all creditors, it should have been made in the ordinary course in which decrees in such cases are made, viz. providing for the payment of all creditors, and not merely a decree for the payment of this particular creditor: in that respect also it is wrong. In the next place, the appellant, by his case, insists upon length of time, as a bar to the right claimed under the decree; but as that point is now abandoned, it is unnecessary to discuss the question. He then further insists that the debt of 350 *l.* was a debt which ought not to have carried interest. That would be a reason for setting up the decree on the original hearing of the 14th of February 1812, which declared that the 350 *l.* was a debt of that kind, which ought not to have carried interest, except from the date of that decree. Then is stated the objection to the accumulation of interest upon interest.

The questions here, are really these: In the first place, it has been suggested at the bar, that there is a presumption, from lapse of time, that this 350 *l.* must have been paid, and that neither principal nor interest can be claimed after so long an interval. It does not appear to me, from these pleadings, that we can take that for granted; but if there were other creditors, whose demands ought to have been provided for by this decree, they might have had a right to insist upon that proposition. The

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original decree appears to me, to be a decree, the benefit of which cannot be had in this suit. That original decree is at least wrong in these respects, viz. First, that the surviving trustee was not before the Court; Secondly, that it was not a species of decree which ought to have been made to carry into execution the trusts of such a deed as this. If I were asked which of these decrees, that giving interest or that not giving interest, was right, I should certainly say, it is my opinion, that the decree which did not give interest, was correct. The meaning of that deed was not to give interest on debts not carrying interest, and the state of the accounts tends to that opinion; but under the circumstances of this case, it appears to me, that we can do no more than displace all these decrees, with liberty to the party to go before the Court again, and to amend these pleadings, if he shall be so advised.

Lord Redesdale:—I perfectly concur in the opinion already expressed upon the merits of the case, and upon the construction of the deed under which the sum of 350*l.* was claimed by this suit. It appears to me perfectly clear that the deed has not given interest; the deed does not alter the nature of the debt, but merely provides for the payment of the debt. It expressly provides for the payment of interest on debts, which did carry interest, and it is silent as to any interest upon this debt. I am therefore of opinion that the deed itself does not give interest upon that debt. Whether under any circumstances interest ought to be calculated upon that debt is another question, which may come to

be decided when there are proper parties before the Court for that purpose. The decree of the 14th of February 1812, considers the person filing that bill as entitled to the 350*l.* principal sum, with interest from the date of that decree. Whether that is correct or not, and especially as there were not the proper parties before the Court, I will not venture to say. It appears to me that nothing should be said upon the subject of the interest in the order of the House, but that the question should be left perfectly open. That decree proceeded, I suppose, on the ground that when the Court decreed the sum of 350 *l.* to be due, it was considered as the judgment of the Court, upon which interest ought to be calculated; that is not quite according to the course of a court of equity. The usual course is to direct the payment of the sum at a certain day, and then, in case of non-payment at that day, interest to accrue from the time appointed for payment. Such, however, is the form of this decree. Upon that subject I should rather wish to leave the question open.

The decree of 1780 could only be sustained under the authority of a deed, by which the estates were vested in trustees in trust for the payment of certain debts. Subject to that charge they were limited to William Hamilton, (who was the debtor) for life, with remainders over. The charge was introduced upon the estate, by an agreement between the father and the son, that the son should suffer a recovery and charge these debts of his father upon the estate. The interests therefore which were taken under that deed were the interests of all the creditors who were specified in that deed. The

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trustees hold the estate in trust for these creditors, and, subject to the claims and rights of these creditors, were trustees for Mr. Hamilton, the father, for his life, and after his death for the several persons who were entitled in remainder under the deed.

It is perfectly clear that no proper decree could be made for the purpose of raising any sum of money under that deed, without having before the Court all the persons who were interested in the property. The parties before the Court upon the original suit in which the decree of 1780 was made, were the claimant of this sum of money of 350*l.* and a further debt, a person who was represented to be the heir of the surviving trustee, and the person who was then entitled as tenant in tail to the property, subject to the payment of those debts. If Henry Hamilton, who appears by the evidence in this suit to have been at that time living, and the surviving trustee, had been a party to the suit, the decree should have directed the trusts of the deed to be carried into execution; that an account should be taken of all the debts remaining unpaid; that the amount of those debts should be raised by sale or mortgage of the estate; and that the surplus, whatever it might be, should be settled to the uses contained in that deed. The decree, instead of being to that effect, is a decree providing for this particular debt, and directing a sale to take place in consequence of non-payment of the debt, and as I observed, having before the Court not the surviving trustee, but the heir of a person who was represented to be the heir of another trustee then dead, and which heir of that trustee had no estate vested in him, for the estate

had vested at that time in Henry Hamilton, the surviving trustee.

It is clear that the decree was erroneous in every respect; it was erroneous, unquestionably, in decreeing the party to that deed entitled to that which it then gave him; it was erroneous in decreeing that he was entitled to any thing, without giving the same benefit to the other creditors entitled under the trust; it was erroneous in proceeding to a sale without having the surviving trustee before the Court; and therefore it is a decree which the Court can never carry into execution. The party who comes into a court of equity to have the benefit of a former decree, must show that it was a right decree, if the decree appears to be erroneous, the Court cannot carry it into execution.

In the present suit, Mr. Houghton claims as assignee under different assignments, and so far may be considered as the assignee of the debt of 350 *l.* charged by the trust deed. The decree obtained by him in the Court of Exchequer on the 26th of June 1812, by which he was declared entitled to the benefit of the decree of 1780, proceeding upon that ground, and giving him the aggregate sum which that decree provided, (except as to a sum of 50 *l.* which was so manifestly erroneous that the Court of Exchequer altered so much of the former decree); but declaring that the aggregate sum, with subsequent interest calculated upon it, should be paid to Houghton, is throughout erroneous. The Court of Exchequer had, on the 14th of February 1812, made a decree, by which only 350 *l.* with interest from the date of that decree,

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was given to the appellant. That decree is also erroneous, because that decree had not the proper parties before the Court.

The order which ought to be pronounced is, that the decree of the Court of Exchequer of the 26th June 1812, and that which followed upon it of the 20th November 1813, on further directions, should be reversed, they being manifestly throughout erroneous, and that the decree of the Court of Exchequer on the 14th of February 1812, should be also reversed; but observing that decree to be confined to the 350 *l.* to order that that decree should be also reversed, inasmuch as although the respondent may be entitled to the sum of 350 *l.* we cannot assert that he is entitled, because there are persons who ought to have been before the Court, who might have disputed whether he was so entitled or not. Although the respondent may be entitled to the sum of 350 *l.* under the provisions of the deeds of the 12th and 13th of May 1758; yet the former decree, the benefit of which was sought by the respondent, and the decree of the 14th of February 1812, do not provide for the due execution of the trusts of the deeds of the 12th and 13th of May 1758, and as there were not in any of the suits in which such decrees were made, the proper parties before the Court, the cause should be remitted to the Court of Exchequer in Ireland, with leave to the respondent to amend his pleadings, by introducing parties thereto, or otherwise, as he shall be advised. The amendment to this bill may be not only by making proper parties to it, but by framing his bill according to the rights of the parties, namely, to

have the proper trusts carried into execution. The minute which I have drawn out will comprise all these particulars.

Die Veneris, 21° Julii 1820.

It is ordered and adjudged, by the Lords, &c. That the decrees of the 26th of June 1812, and the 20th of November 1813, complained of in the said appeal, be and the same are hereby reversed. And it is hereby declared, that although the respondent may be entitled to the sum of 350*l.* under the trusts of the deeds of the 12th and 13th of May 1758, yet inasmuch as the former decree, the benefit of which was sought by the respondent, and the said decree of the 14th of February 1812, did not provide for the due execution of the trusts of the said deeds of the 12th and 13th of May 1758, and there were not, in any of the suits in which such decrees respectively were made, proper parties before the Court for such purpose, It is therefore ordered and adjudged, that the said decree of the 14th of February 1812, also complained of in the said appeal, be and the same is hereby also reversed; and it is further ordered, that the cause be remitted back to the Court of Exchequer in Ireland, and that the respondent be at liberty to apply to the said Court for leave to amend his bill by making proper parties thereto, or otherwise as he shall be advised.