Feb. 17. 1829.

Appellants' Authorities.—(1.) Duncan, June 27. 1809, (F. C.); Omey, Nov. 19. 1788, (6340.); M'Culloch, December 18. 1760, (6349.); Henry, Feb. 19. 1824, (2. Shaw and Dunlop, No. 668. p. 725.)—(2.) Farquharson, March 2. 1756, (2290.); Duke of Hamilton *v.* Westenra, (not reported).

Respondents' Authorities.—(1.) Kames's Law Tracts, No. 4. p. 145.; Trustees of Wellwood, Feb. 24. 1791, (Bell's Reports, and 15,463.); M'Dowal and Selkrig *v.* Crawford, Feb. 6. 1824, (2. Shaw and Dunlop, No. 640. p. 682.); 4. Stair, 42. 21.; Ersk. 1. 50.; Baillie, June 17. 1766, (14,941.); Campbell, Nov. 28. 1770, (14,949.); Murray, June 22. 1774, (14,952.); Hay, July 24. 1788, (3215.); Dykes, June 3. 1813, and Note, (F. C.); Richardson, July 5. 1821; affirmed, April 8. 1824, (1. Shaw and Dunlop, No. 131. p. 185. and 2. Shaw's Ap. Cases.)—(2.) Gordon's Trustees, Dec. 4. 1821, (1. Shaw and Dunlop, No. 221. p. 185.); Laing Weir, Dec. 6. 1821, (1. Shaw and Dunlop, No. 226. p. 192.); 3. Ersk. 8. 20.; Weir *v.* Drummond, Nov. 28. 1752, (4314.); Robson, Feb. 18. 1794, (14,958.); Drummond, July 17. 1782, (2313.)

J. FRASER—RICHARDSON and CONNELL,—Solicitors.

No. 22.

WILLIAM SPENCE, Appellant.

ALEXANDER ROSS, Respondent.—*Lushington—Ivory.*

Locus Pœnitentiæ—Absolute or Revocable—Fiar.—A father having, by missive letter, sold a piece of land, taking the purchaser bound to grant a bond in favour of himself in liferent, for his liferent use allenarly, and of his sons nominatim in fee; and having caused his sons to sign a postscript to the missive, agreeing to allow the money to lie in the purchaser's hands for eight years certain;—Held, (affirming the judgment of the Court of Session), in a question between the father and the creditors of the sons, that although no bond had been delivered, and no disposition prepared, the fee had irrevocably vested in the sons.

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2D DIVISION. Lord Mackenzie.

WILLIAM SPENCE, the appellant, was proprietor of a piece of ground near Musselburgh. He had two sons, William and George. On the 18th October 1814 he agreed to sell the property to Sir John Hope of Pinkie, by the following missive:—'I agree 'to sell you the ground near Musselburgh belonging to me, and 'presently occupied by Government as barracks, for the price of 'L. 2000 sterling; your entry to be Martinmas old style; from 'which term the price is to bear interest. The said sum of L. 2000 'is to be declared by the disposition a burden on the subject, and to 'remain in your hands at interest, on a bond granted to me in life-'rent, for my liferent use allenarly, and to my sons William and 'George, equally between them, and their heirs, in fee, the interest 'being payable to me during my life, and, after my death, the same 'to be payable to my sons, equally between them, for two years 'thereafter; and the principal to be paid them at the elapse of 'two years after my decease. You are to rest satisfied with the

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'titles that they are good, and to be at the mutual expense of con-'veying it over to you.' Sir John having stated his wish that Spence's two sons should consent that the sum should lie for at least eight years certain in his hands, Spence wrote, and the sons signed, a postscript to the missive, in these terms:—'We, Wil-'liam and George Spence, sons of the foresaid William Spence, 'proprietor of the barrack ground, hereby agree, that the above 'sum shall remain in Sir John Hope's hands at least for eight 'years certain after Martinmas first, 1814.' Thereupon Sir John accepted the offer, on condition of his 'agent being satisfied 'with the regularity and goodness of your titles.' A disposition in favour of Sir John was then executed by the appellant, and a bond in terms of the missive was granted by Sir John; but neither the disposition nor the bond was ever delivered. Sir John in virtue of the missive entered into possession, and thence-forth paid the interest to the appellant as it fell due.

William Spence, the eldest son, died in 1819, unmarried and intestate; and his brother George having thereafter become bank-rupt, a sequestration followed, and Ross was appointed trustee.

Ross advertised the bond for sale, as being the property of George, subject to the liferent of the appellant. Of this the appellant brought a suspension and interdict, in which he main-tained, 1*st*, That as neither the disposition nor the bond had been delivered, he was not divested of the property, and there-fore was entitled to the price; and, 2*d*, That the transaction being in relation to the sons mortis causa and gratuitous, he was entitled to resile quoad them. To this it was answered, 1*st*, That although there had been no actual delivery, yet the trans-action was rei interventu so complete, that the appellant could not resile, and could be compelled by legal process to give the disposition on receiving the bond in terms of the missive; and, 2*d*, That the fee was expressly vested in the sons, delivery made to them, and an act of ownership exercised by them, with the consent and full knowledge of the appellant. The Lord Ordi-nary repelled the reasons of suspension, with expenses; adding in a note, 'The Lord Ordinary considers the communication to 'the sons as of the strongest kind; for it not only made them ac-'quainted with the conveyance in favour of the father in liferent 'allenarly and of them in fee, but it required an actual and pre-'sent exercise by them of the right vested in them under that 'conveyance, which exercise did take place accordingly. This 'seems far stronger than putting a conveyance on record.' Spence having reclaimed, the Court, after ordering a note of

March 25. 1829. authorities to be lodged, adhered on the 17th November 1826, but found no expenses due to either party.*

William Spence *appealed;* but having died, the House of Lords, on petition, ordered (8th July 1828) that the case should stand revived in the name of his disponee, William Spence, a minor, and his curator, John Horatio Savigny.

Appellant.—The original appellant was absolute fiar, and could dispose of his property as he chose. By his missive, he merely intended to supersede the necessity of a family settlement, which would have been, as far as destination was in question, revocable at pleasure. This transaction was no doubt onerous with Sir John Hope; but it was purely gratuitous as to the sons. It never was made real, but remained personal. Neither the bond nor the disposition has been delivered; and the records are silent as to both. In dubio, a father is never presumed to part with his property to his children; and here the missive merely imports the indication of an intention to transfer a real right to the sons; but which intention has not been carried into execution. The real right remained with the father. He and Sir John Hope could have departed from the bargain, and cancelled the whole transaction. The sons had merely a spes successionis. The postscript signed by them merely shews, that they were acquainted with the views their father entertained as to the distribution of his estate; but that did not alter the right inherent in the father, nor divest him of it. Besides, that missive cannot be regarded in any other light than a mortis causa deed, which is revocable if not delivered or recorded. To listen to the respondent's claim, would be visiting the father with the most grievous hardship. He never contemplated placing these lands out of his controul, or that the fruit of his industry should be carried away by his son's creditors.

Respondent.—The father, by his own deliberate act, restricted his interest in the lands to a mere liferent, and conferred on his sons the character of fiars. The transaction is complete and indefeasible. The missive has been delivered to a third party to hold for the sons' behoof; and that delivery is equivalent to recording. The missive was thus put beyond the father's controul. Sir John was vested with the absolute right of

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* 5. Shaw and Dunlop, No. 9. p. 17.

holding the price during the father's lifetime, for the sons in fee. The father clearly could not have called up the principal, or compelled Sir John to alter the destination. In a question with the father, the personal right conveyed to Sir John was effectual, and could be made as feudally complete, as if from the beginning a disposition had been granted, with infeftment and registration. Sir John could, by legal measures, have forced delivery of the disposition, as the sons could of the bond. But, truly, the executing the bond or disposition has no bearing or relevancy on the present question. The delivery of the missive is per se sufficient. It is, therefore, a fallacy to pretend, that, because the right is still personal, the interest, which was passed to the sons, could be now varied either by the father alone, or in conjunction with Sir John. Besides, the sons were made parties to the transaction, and their actual and present exercise of ownership required and interposed. It is irrelevant to say the missive was quoad the sons purely gratuitous; that does not make them less creditors, if the deed constituting the gratuitous right has been delivered. Then the jus crediti is as indefeasibly vested, as if the most onerous consideration had been given. It is also irrelevant to maintain that there has been no registration; for independent of the knowledge which the sons had of the missive, and the actual delivery of it to Sir John, the sons were subscribing parties to the arrangement, a specialty which would have made non-delivery of the mere missive of very little consequence. In short, the father chose to abandon his character of fiar, and gave it unqualifiedly, except as far as it was burdened with the liferent, to the sons; and it is obviously impossible, merely because the surviving son has become bankrupt, to recall that character, in order to disappoint his son's creditors. The argument rested on the nature of mortis causa deeds has no place here. The present is entirely different from a testamentary writing. The trustee never intended to disturb the father in the enjoyment of his liferent; and beyond that he has no interest.

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The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

Appellant's Authorities.—3. Ersk. 8. 35. and 3. 5. 3.; Baird, Jan. 4. 1774, (7737); Hill, July 2. 1755, (11,580.); Monimusk, Feb. 21. 1628, (11,566.); Inglis, Nov. 14. 1676, (11,567.); Simpson, Nov. 16. 1697, (11,570.); Holwell, May 31. 1796, (11,583.); Somerville, May 18. 1819, (F. C.); Miller, July 11. 1826, (4. Shaw and Dunlop, 499. p. 822.)

Respondent's Authorities.—Leckie, Nov. 22. 1776, (No. 1. Ap. Presump.); Turner, Jan. 23. 1783, (11,582.); Fairlie, June 11. 1630, (11,567.); Trotters, Nov. 20.

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. 1667, (11,498.); Borthwick, Jan. 20. 1686, (7735.); Sinclair, June 26. 1707, (11,572.); Hamilton, Jan. 9. 1741, (11,576.); 1. Stair, 10. 5. and 7. 14.; 3. Ersk. 2. 43.; Riddell, Jan. 3. 1750, (11,577.)

J. & A. SMITH—RICHARDSON and CONNELL,—Solicitors.

No. 23. COLIN CAMPBELL, Appellant.—*Pollock—T. H. Miller.*

ALEXANDER ANDERSON, Respondent.—*Adam—Wilson.*

Mandate—Res noviter.—1. Held, (affirming the judgment of the Court of Session), that a mandatary or factor of a person abroad, is entitled to act in that character, until he receive authentic intelligence of the death of his constituent. 2. Circumstances under which a proof of facts alleged to be res noviter refused.

May 1. 1829.

1ST DIVISION.

Lord Medwyn.

ANDERSON was factor for Gordon of Draikies, a landed estate in Inverness-shire. Campbells, Fraser and Company, of Glasgow, were the commercial agents of Gordon in relation to his West Indian possessions. Gordon having occasion to visit his West Indian estates, granted to Anderson, on the 19th September 1808, a factory, inter alia giving extensive powers for the management of Draikies, 'and if he shall judge it for my interest, to borrow such sum or sums of money as he may think proper 'on my account, to the extent of L. 5000;' and for that purpose to grant and subscribe bonds, &c.; 'and likewise to draw bills 'and other drafts in my name, and on my account, on such 'commercial houses as I have, or hereafter may happen to have 'dealings with; and generally, all and sundry other things to 'do in my affairs, which I could do if personally present, or 'which any factor might do in like cases.'

A copy of this factory was sent to Campbells, Fraser and Company, and they agreed to advance what money Anderson might require during Gordon's absence.—Gordon sailed in November; and thereafter various pecuniary transactions took place between them and Anderson.

In the course of their correspondence, Anderson, on the 15th March 1809, wrote to Campbells, Fraser and Company:—'I 'had a letter from Mr Gordon yesterday by the Marywell of 'Liverpool, acquainting me that he had arrived (at Berbice) in 'good health;' and on the 30th of March he wrote to Colin Campbell the acting partner:—'I had a letter from Mr Gordon, 'dated 27th January, when his health continued better than 'when he left home.'