No. 51. LIEUT.-COL. TAYLOR, Appellant.—*Knight.*

SIR WILLIAM FORBES and Co., Respondents.—*Lushington, Robertson.*

Executor—Fraud—Trust.—**Where a party who had money in bank executed a will in which he nominated his son executor, who was partner of a company indebted to the bankers; and the bankers, by authority of the son, transferred the money to his individual account, taking a discharge from him qua executor; and thereafter transferred it to an account in name of the company, whereby the debt due to the bankers was extinguished; and the Court of Session (in a question with a party having a beneficial interest under the will) found the bankers not liable to account,—the House of Lords reversed, and remitted an issue to ascertain whether the bankers were in the knowledge that the money was part of the funds of the defunct, and held by the son, qua executor, and subject to the trusts of the will, and that those trusts were not satisfied.**

Dec. 14, 1830.

2D DIVISION.
Lord Cringletie.

THE late John Taylor, soap-manufacturer at Queensferry, transacted his banking-business with Sir William Forbes and Co., Edinburgh. He assumed in January, 1803, two of his sons, Patrick and William, into partnership with him, under the firm of John Taylor and Sons. On this occasion, he desired Sir William Forbes and Co. to transfer a balance due to him on his account-current to the credit of an account to be kept in name of John Taylor and Sons. Taylor and Sons then ordered the bankers to charge them with L.5000, and place it to the credit of John Taylor's personal account. This was done; and on the 16th of April, 1803, John Taylor executed a deed of settlement, by which he appointed his son Patrick to be his sole executor, and provided, 'that in the event of my having not done so during 'my lifetime, the said Patrick Taylor shall immediately on my 'decease, and out of the first and readiest of my moveable 'estate, either deposit in a bank, or lay out on good landed se-'curity the sum of L.5000, and take the bank receipt or bond 'therefor,' in life-rent (under a certain deduction) to his (testator's) widow, and the fee in certain proportions to his children. He afterwards, in 1807, added a codicil, declaring, that no part of the provisions to his sons should be due or payable to them, until they had settled all debts which they might owe to him as an individual, or to the Company, or debts due by them to any of their brothers. He survived above ten years, and at his death, in August 1813, the L.5000 at his personal credit amounted, with interest, to L.6500. The appellant, Colonel James Taylor, was one of his sons, and was at this time in the army and abroad.

The Company continued business as before, but in consequence of an imprudent extension of business, and the state of their account, the bankers remonstrated, and on 14th June, 1814, wrote to them: 'Your account appears to have upwards of 'L.3000 of uncovered advance at present. We therefore beg 'you will, without delay, bring it into order. We should be 'glad to see one or other of you to-morrow, or the first day you 'are in town.' Having made other advances, they on the 30th July again wrote: 'In doing this you must be aware it will 'make the advance on your account greatly exceed the amount 'of your bills—a circumstance we had hoped you would, by all 'means, have avoided. As it must be immediately brought into 'order, we shall expect to see one of you on Monday first.' Dec. 14, 1830.

A meeting then took place between the bankers and Patrick Taylor, the result of which was, that on the 5th of August, he granted a discharge of the balance standing at the credit of his father's account in these terms:—'Considering that my de-'ceased father, by his disposition and deed of settlement, 'dated the 16th day of April 1803, and registered, along with 'a codicil thereto, in the books of Session the 24th day of 'September 1813, gave, granted, assigned, and disponed to and 'in favour of me, his eldest lawful son, whom failing, to his 'other children, in their order; but with and under the burdens 'and provisions therein specified,—generally, all and sundry his 'lands and heritages, with all debts, heritable and moveable, 'and whole goods, gear, sums of money and effects which 'should pertain and belong to him at the time of his death, with 'the whole vouchers and instructions thereof; together with all 'right, title and interest which he had, or could pretend to the 'said lands and heritages, means, estate and effects which 'should belong to him at the time of his death, as aforesaid; 'and he nominated and appointed me, whom failing, his other 'children, in their order, to be his sole executor, and intromit-'ter with his goods, gear, and effects; but for the ends and pur-'poses therein specified, excluding all others from that office, 'as from the said deed of settlement itself will more fully 'appear. And now, seeing that the said Sir William Forbes, 'James Hunter, and Co. have instantly made payment to me, as 'executor foresaid, of the aforesaid sum of L.6751, 8s. 7d. ster-'ling, whereof I hereby grant the receipt, renouncing all objec-'tions to the contrary. Therefore I do, by these presents, 'exoner, acquit, and simpliciter discharge,' &c.

At this time, Patrick Taylor had not been confirmed executor, and of course had not found caution; and it was admitted

Dec. 14, 1830. that no actual payment was made to him, but that the bankers transferred L.5000 to a private account, opened for the first time in name of Patrick Taylor as an individual, and the balance (being the interest) L.1751, 8s. 7d., was placed to the credit of the account of John Taylor and Sons. At this date, the balance due by that Company amounted to between two and three thousand pounds. By applying to it the above sum of L.1751, 8s. 7d. it was reduced to that extent, and the bankers held besides bills pledged by the Company.

The banking operations were thereafter renewed; but the Company having again overdrawn their account to the extent of L.5000, the bankers obtained from them in March, 1816, an heritable bond for that amount.

On the 16th July, 1817, Patrick Taylor, pressed by the necessities of his house, and alarmed at the remonstrance of the bankers, directed them to transfer from his private deposit account L.5000 to 'John Taylor and Sons' separate account,' to place L.360 to the credit of John Taylor and Sons' ordinary account, and to apply L.250 to payment of interest due on the heritable bond—these two last sums being the accumulated interest on the principal of L.5000. It was admitted, that the bankers were at this time aware of the approaching insolvency of the Company; and a week afterwards the Company became bankrupt. The bankers did not claim on the estate, but in February, 1818, transferred the L.5000, with interest, from the separate account of John Taylor and Sons, to the credit of the account-current of the Company, and thus liquidated the balance due by the Company to them.

Thereafter the Company settled with their creditors by a composition.

During these transactions Colonel Taylor had been abroad; but on his return, in 1823, he raised an action before the Court of Session, against Patrick Taylor, William Taylor, and Sir William Forbes and Co., founding on the deed of settlement, and setting forth that Sir William Forbes and Co. although fully aware of the nature of the deed, and that the L.5000, and interest thereon, formed part of the trust-fund, had accepted of a discharge without requiring Patrick Taylor, the executor, to make up title by confirmation; and that out of the funds they had paid themselves a debt not due to them by the deceased, but due by the Company; that Patrick Taylor, in granting such a discharge, had acted fraudulently, and that Sir William Forbes and Co. must be held to have participated in the misapplication of the money, and concluding for payment

of L.5000 under certain deductions. Sir William Forbes and Co. maintained in defence, that confirmation was not necessary; that they were unaware of the specific nature of the trust; and that in the manner the funds in question were dealt with, they had not been guilty of any misapplication. Dec. 14, 1830.

The Lord Ordinary sustained the defences for Sir William Forbes and Co., and found them entitled to expenses. And the Court, (June 9, 1827,) after considering writings recovered, condescendence, and answers, adhered.*

---

* 5 Shaw and Dunlop, p. 785.

NOTE.—'The Lord Ordinary considers that the fact on which the pursuer 'founds his argument, in order to subject Sir William Forbes and Company to 'payment of his claim, is void of foundation. It is admitted that the late John 'Taylor, as long ago as the year 1803, put into the house of Sir William Forbes 'and Company, in his account-current with them, L.5000, which stood in his 'own name at his death, and with interest thereon, amounted to greatly above 'L.6000, but that sum was not appropriated by Mr Taylor to any particular pur-'pose whatever—certainly it was not deposited with the Company on a note by 'them, payable to Mrs Taylor in liferent, for her liferent use only, and his sons 'in fee, subject to the deduction mentioned in his will, dated in September, '1813. The money lay as a balance due to him in his account-current, and was 'subject to the call of his eldest son, Patrick Taylor, who was his father's sole 'executor. Accordingly he did call for the money in 1814, when L.5000 of it was 'transferred to the individual account of Patrick Taylor, and the balance to the 'account of John Taylor and Sons, of which company Patrick was a partner. On 'this occasion, the will of John Taylor was shown to Sir William Forbes and 'Company, who remitted it to their agent, Mr Thomas Cranstoun, who advised 'them that they were in safety to pay to Patrick Taylor, as he was one of the nearest 'of kin, and sole executor-nominate of his father. Accordingly, they transferred the 'money in the manner already described, and took a discharge, without requiring 'Patrick to be at the expense of a confirmation. The judgments of the Court 'warrant such a payment, and indeed this point was not disputed at the Bar; but 'it was said that the Company saw the will, thereby knew the purpose for which 'the L.5000 was destinated, and ought not to have paid it without confirmation, in 'which caution would have been found in the Commissary Court, whereby the 'pursuer would have recovered the money. But admitting for a moment that the 'Company had examined the will, all that they would have seen was, that John 'Taylor ordered his executor, if he had not done so himself in his lifetime, to depo-'sit in a bank, or lend on heritable security, L.5000 for the purposes above men-'tioned. But they could not know that he had not deposited money in some other 'bank, or lent it on heritable security on a note or bond, payable to his wife in life-'rent, and his sons in fee. Sir William Forbes and Company were certain that the 'money in their hands had not been so applied, because it just stood as an article 'in John Taylor's current account. The Lord Ordinary, therefore, thinks that 'the basis on which the pursuer founds his charge of error or oversight in that 'Company is wanting, and that the Company were warranted in making the pay-'ment to Mr Taylor's executor-nominate, and are not liable to repay the whole or 'any part to the pursuer.

'On advising representation for the pursuer, it appears to the Lord Ordinary, 'that according to the principles assumed by the representer himself, he is wrong in 'his conclusions. The great and leading principle of law on which he founds is,

Dec. 14, 1830. Colonel Taylor appealed.

Appellant. (1.) Supposing that the respondents were in bona fide throughout these transactions, still they, having paid to an executor nominate, unconfirmed, paid to a party who was not in titulo to receive or discharge the money belonging to the de-

---

'that it was necessary for Patrick Taylor to have been confirmed executor to his 'father, in order to enable him to grant a valid discharge to Sir William Forbes 'and Company, and this because he was the eldest son and heir of his father, and a 'stranger, in so far as regards the moveable succession. The representer, however, 'admits frequently, that a certain description of executors may, on voluntary pay-'ment by the deceased's debtors, validly discharge them without having confirmed; 'and it has been so decided again and again. But then the executors, to whom the 'privilege belongs, are only the deceased's nearest of kin as heirs in moveables, or his 'general disponees, who as such represent him, and are alone interested in his succes-'sion. Now the fact is, that by the law, an eldest son and heir of a defunct is as 'much nearest in kin to his father as any of the other brothers or sisters, provided 'he choose to collate the heritage; and by the deed executed by the late John Tay-'lor, his eldest son Patrick was made an equal sharer with his brothers and sisters 'in the succession of their father. 2d, Patrick was the general disponee of his fa-'ther, and declared to be the sole intromitter with his estate, property, and effects 'of every sort. The deed declares, "That immediately after my death, the said "Patrick Taylor, whom failing, my other children, in the order of their succession "as aforesaid, shall realize the whole of my heritable and moveable estate hereby "conveyed, and after payment of all my debts as aforesaid, divide the same equally "between him" and his brothers, of whom the pursuer is one; and then by the 'deed, Patrick Taylor is named the sole executor. Thus, Patrick Taylor is one of 'the nearest of kin to his father, named the sole executor; and added to this, he is 'the general disponee directed to realize the whole heritable and moveable estate, in 'which situation the Lord Ordinary has no doubt, that by the law as it stood, when 'Taylor uplifted the money from Sir William Forbes and Company, he was enti-'tled to grant a valid discharge, although he had not been confirmed. The princi-'ple to which the law looks is, whether the money has been uplifted, and the dis-'charge granted by the person truly entitled to receive and discharge—and if these 'have been done by that person, the discharge is valid. Perhaps, in former days, 'one of the reasons for making confirmation necessary was, that the executor found 'security for the faithful discharge of his duty; but these rules (whether rightly or 'wrong is not the question) have been long departed from. In those days, confirma-'tion of the whole succession was necessary to vest it in the executor and transmit 'it to his next of kin; but now, and for a long time past, confirmation of a pound 'out of thousands vests the office, and transmits the right of succession to the 'nearest of kin of the executor. Neither is confirmation at all requisite in many 'cases; *e. g.* it is not necessary wherever actual possession can be taken, whereby 'the whole of a father's personal succession can be laid hold of without confirma-'tion. In the same way, nomina debitorum can be vested without confirmation, 'if the debtor consent, by granting a bond of corroboration of the old debt, or a new 'bill for it to the executor. 20th February, 1751; Spence, reported by Kilkerran, 'Service and Confirmation, No. 9, Fac. Coll. 19th June, 1782; Watson *v.* Mar-'shall. Payment, too, even by the mandate of the next of kin and general disponee, 'though unconfirmed, is an effectual payment. 20th July, 1784; Buchanan and 'Auld *v.* Grant; Morrison, p. 14378. The only purpose, therefore, of confirma-

ceased. They have consequently run the hazard of his misap- Dec. 14, 1830.
plying the money, and must make good the loss which his misapplication has caused to the appellant.

(2.) But independent of this plea, the respondents, by being made aware of the nature of the trust-deed, and of the destination of the money standing at the individual credit of the deceased, were put upon their guard; and if they paid it away, in any other manner than directed by the deceased, they are liable to the parties injured. It is a settled point, that if a party has had, under such circumstances as the present, the deed in his own or his agent's possession, the presumption arises, that the party made himself acquainted with the contents. It is culpable negligence in the party not to do so. The whole res gestæ prove that the bankers knew they were dealing with the money of the deceased. The necessities of the Company had placed Patrick Taylor in their hands, and the whole system of transferring the principal of the money of the deceased to the credit of Patrick, as an individual, (not as executor,) passing the interest at once

---

'tion, before the late statute, was to vest an universal title in the executor and ge-
'neral disponee, and thereby transmit to his nearest of kin the subjects or nomina
'debitorum, of which he had not obtained possession. But payment to him, or
'bonds or bills granted to him, though unconfirmed, of debts due to the deceased,
'have long been considered to be effectual. What, then, is the matter of fact in this
'case? The late John Taylor had, in 1803, put into Sir William Forbes and Com-
'pany's house L.5000, which, at his death in August 1813, remained in their books
'in his own name alone, without appropriation of any sort, and amounted to between
'L.6000 and L.7000. This sum remained in name of John Taylor for twelve
'months, namely, till the 5th of August 1814, when the defender Patrick Taylor
'uplifted the principal and interest, amounting to L.6751, 8s. 7d., and granted
'them a full discharge, as sole executor and intromitter with his father's goods,
'gear, and effects. This sum of L.6751, 8s. 7d. he might have carried out of the
'house and disposed of as he chose; and he placed L.1751, 8s. 7d. of it in account
'with John Taylor and Sons, and the balance of L.5000 he paid into an account in
'his own name opened in the books of the Company, for which they gave him a
'deposit receipt. And it is admitted, that this sum of L.5000, in name of Patrick
'Taylor, was not uplifted by him, that is discharged, to Sir William Forbes and
'Company, for three years, viz. till 1817. The Lord Ordinary cannot accede to
'the argument, that there was no payment by Sir William Forbes and Company,
'because the money happened to be placed in their hands again. The debt due by
'them to the deceased John Taylor was paid to his sole executor and general dis-
'ponee, and discharged by him, and was as effectually extinguished as it could be;
'and if the Company could not be made liable to pay the money over again if it
'had been carried out of their house, the Lord Ordinary cannot think that they
'are liable for it, because it was at the time lodged with them as bankers. The
'representer has quoted letters from his brothers, and a clerk of theirs, to make
'it appear that these matters were concocted by the late Mr Samuel Anderson, in
'order to cover the advances of Sir William Forbes and Company to John Taylor

Dec. 14, 1830. to the credit of the Company, then passing the principal from the individual account to the Company's separate account, preparatory to its being applied in liquidation of the ultimate balance due by the Company, betrays the knowledge of the Bank: that they were devising a scheme, whereby to pay themselves the debts due by the executor (or his partners) in his private or company character, out of trust-money, which did not belong to the executor, in his private or company character, but belonged to a party who was not in any way, or to any amount, debtor to the Bank. It is a rule in equity, long sanctioned by the practice of the Court of Chancery in England, and equally well known in the law of Scotland, that the rights of third parties are not to be injured by the collusion—even by the negligence, of individuals who deal with executors, or executory effects. 'If a banker concerts with an executor, and obtains the testator's property at an under value, or applies the real value in payment of the debts due by the executor to the banker, or in any other way contrary to the duty of the office of executor, such concert, or even bare knowledge of the misapplication in the banker's favour, will make him liable for the full value. The fact of the property being, or having been trust-

---

'and Sons. The representer must be sensible that these letters are in no way 'evidence against that Company; nor is it decorous to make such an insinuation, 'when, in particular, it is contradicted by the fact; for if that had been the view 'of the Company, they would have made Patrick Taylor pay the whole L.6751 'into the account of John Taylor and Sons. Instead of which, Patrick paid L.5000 'to an account in his own private name, on which he might have operated to the 'last farthing. The Lord Ordinary remarked in his note, when he pronounced 'the first interlocutor complained of, that Sir William Forbes and Company could 'not know that John Taylor had not lent out on heritable security L.5000, or 'placed that sum in the hands of other bankers or individuals. They probably 'saw, that by his will he directed his son to employ that sum, if he had not done 'so himself; but that was nothing to the purpose, as they could not know whether 'he had done so or not. Certain it was, that the L.5000 in their house was not 'deposited as applicable to any particular purpose; and in conformity to the liberal 'practice of that Company, they did not put Mr Taylor to the expense of a con-'firmation, when it was not legally necessary for their own safety. As to the 'claim of preference urged by the representer on the L.5000, because that sum is 'shown to have been paid to Sir William Forbes and Company, it appears to be 'out of all sight imaginary. It is certain by law, that if a fund belonging to a 'deceased, can be pointed out as still belonging to, or under the administration of 'his executor, a creditor of the deceased's is preferable to the creditor of the execu-'tor; but the Lord Ordinary never heard that a creditor of the executor, who 'seven years before had received payment of his debt, shall be obliged to refund it 'to a creditor or legatee of the defunct, because it can be shown, that the payment 'was made with money once belonging to the deceased, but which for years was 'under the management of the executor.'

funds, is a notice to the party dealing with the executor to be on his guard. Dec. 14, 1830.

LORD WYNFORD.—The question here, then, will be, whether Sir William Forbes and Co. applied this money to the extinction of the debt due to them by Taylor and Co., knowing the money to belong to the deceased. Is this not just a case for a Jury?

Lushington, for the Respondents.—We cannot accede to that suggestion, as we hold that there is proof enough for the respondents' exoneration. There is no evidence that the respondents saw the settlement; and when it was exhibited to their agent who framed the discharge, it was merely to show that the holder had a title to discharge. There was no necessity for a confirmation. That is a point firmly fixed in the law. Neither was there anything in the transactions, which could have justified suspicion on the respondents' part, that the executor was guilty of misapplication. The testator might have previously to his death, and out of other property, fulfilled his intentions as to his family—an event alluded to in the very settlement itself. Or the executor might have paid the provisions under the settlement out of his private funds, and have been consequently entitled to deal with the L.5000 as his own. Although embarrassed, the Company were not so much indebted to the Bank, as even to have made the Bank desirous of a transfer from the private account. Indeed, the first transfer could have done the Bank little good, as it left the money entirely at the private party's disposal, and the second transfer was by the party's free choice; and, when entered, the Bank were justified in making advances on its faith, as a fund of credit.

LORD WYNFORD.—If an executor has money in the banker's hand, he can draw it out, and the bankers are not bound to watch its appropriation. But if the money remain in the banker's hands, and they apply it to the demands of the bank, are the bankers not liable?

Lushington.—But how do bankers know that the executor has not had to pay, out of his own funds, debts due by the deceased? That would virtually relieve, pro tanto, the assets from the trust. When once assets are transferred, (and a banker has no power to refuse to transfer,) the assets become like any other money. They cease to have any distinguishing mark.

Knight, for the Appellants.—In the circumstances, the bankers could have refused to pay to the executor or to his order. Supposing the first transfer were fairly made, it clearly was a transfer under the trusts of the will. The bankers held the sum transferred as trust money, and under notice. In the ordinary

Dec. 14, 1830. mode of doing business, the bankers might have paid; but the transaction of which we complain was not ordinary business.

LORD WYNFORD.—Then you hold, that when, in one sense, by the transfer the character of trust money was gone, the bankers could object to pay; giving as a reason, that they were sure the executor would misapply the money when paid?

Knight.—We do not consider that the money lost its character of trust money; and we think that if the bankers know that the executor contemplated a misapplication, they have not only a right to refuse to pay, but, if they do pay, they pay at their peril. How much more so, where they themselves are to be a party to the misapplication? We offered, but were not permitted, to prove facts very material in reference to this view of the case.

LORD WYNFORD.—If a person proposes to prove a fact, and the other party objects, it has been well said, that that fact must in argument be taken as true. If, then, any material facts have been averred here, and not allowed to be proved, I don't see how we can escape at least sending this case down.

Knight.—If the judgment cannot stand on the facts as admitted, we are anxious, in order to save expense and time, to obtain a judgment of your Lordships, declaratory of your opinion, to be added to the reversal:—That having regard to the facts appearing on the proceedings in this cause, the sum of L.5000 ought still to be considered in the hands of Sir William Forbes and Co., liable to be applied as the assets of the testator, and subject to the legal demand on his assets.

LORD WYNFORD.—The bankers have paid over part of these assets to the account current of the Company, at the desire of Patrick Taylor; for instance, the balance due by the Company on the 5th August,—and you say that the bankers are also liable for that amount?

Knight.—If they have made that payment, they have done so in their own wrong. They were entitled to apply all that stood at the proper credit of the Company to the debts of the Company; but they could not be justified in doing any more. After the notice they had received, if they passed the assets to themselves in payment of a company debt due to themselves, they dealt with the trust money in a way they were not entitled to do. The money could not have reached a company creditor, unless under a manifest breach of trust.

LORD WYNFORD.—What do you say continued to be the situation of the L.5000, after the balance due on the 5th August was deducted?

Lushington.—Of that date there was a transference to the separate account of the Company; and thus the sum transferred became a security fund; a fund for future advances to the Company, and which fund accordingly was drawn upon. Dec. 14, 1830.

Knight.—The amount remained at the credit of the separate account of the Company until after the bankruptcy; and then the bankers transferred it to the Company's current account. But this they did without authority of any kind.

LORD WYNFORD.—My Lords, this is an action brought by the present appellant, as one of the children of a person of the name of John Taylor, claiming against these respondents the sum of L.5000 and interest. This sum of L.5000 had been deposited in the hands of the respondents, who are bankers, by the father of the present appellant, and it remained standing in his name in the books of the respondents at the time of his death, and for some time afterwards. This money had been standing so long in his name in the house of the respondents, that it had produced interest to the amount of L.1700. By a deed of disposition, which was to take effect after his death, John Taylor gave all his property, including the L.5000 and the interest, to Patrick Taylor, in trust; the interest of the L.5000 for his widow, for her life, and the principal at her death for his children. John Taylor had been a partner in the house of Taylor and Sons. The partnership was carried on under the same firm after his death, but his representatives were not partners. At the time of his death, the firm was in a very flourishing state, but afterwards it became embarrassed, and was much in debt to the respondents, who strongly pressed the copartners to reduce their balance. In consequence of these applications from the respondents, Patrick Taylor transferred the L.1700, which was the interest on the L.5000, to the credit of the account of John Taylor and Sons, and thus reduced the balance due from that house to the respondents. He at the same time caused the L.5000 to be passed from the name of John Taylor to that of Patrick Taylor; and afterwards being farther pressed, Patrick Taylor transferred the L.5000 from his separate account to the credit of a new account opened in the name of John Taylor and Sons' separate account. Of L.610 of interest, L.360 was passed to the credit of John Taylor and Sons' ordinary account, and L.250 more was applied towards the payment of the interest of an heritable bond some time before granted by Taylor and Sons to the respondents. In a week after this the firm became bankrupt, and being largely indebted to the respondents, they afterwards passed the L.5000 standing in John Taylor and Sons' separate account to the credit of that company's general account. It will be observed, that all those debts from John Taylor and Sons to the respondents were contracted after John Taylor's death, and that his estate was not responsible for the payment of their debts. The professional adviser of the respondents was in possession of the deed made by John Taylor, and must therefore have known of the trusts upon which

Dec. 14, 1830. Patrick Taylor held that money. The respondents must know that this money originally belonged to John Taylor. It was paid into their house by John Taylor. They would not have allowed Patrick Taylor to transfer this money, without enquiring what authority he had to make such transfer. It appears that they did make that enquiry, and that their law-agent was furnished with the deed. He must have known, and the respondents must be presumed to have known, that Patrick Taylor's right to deal with this money was only as a trustee. If they did know that he was only a trustee, they could not be permitted to assist him to act in violation of his trust. They could not take it from him in satisfaction of a debt due from Patrick Taylor and his partners to themselves. Patrick Taylor was committing a fraud on those for whom he was a trustee, by thus disposing of the trust property. The respondents, by accepting this money from him, if they knew for what purpose it was given to him, were accessories to his fraud. Erskine, Bell, and many other Scotch writers, have said that the property of a deceased person must be applied according to the disposition made of it by him, and must not be made use of to pay the debts of the persons to whose care the deceased commits it. The manner in which this money was transferred from one account to another, until, after several shifts, it was brought within the reach of the respondents, showed, I think, that their legal adviser was aware that it required very dexterous management to make this money applicable to the payment of the debts of Taylor and Sons. Such management may render it difficult to get at the true state of the case; but when it is ascertained that this was John Taylor's money, and was only in the hands of Patrick upon trust, and that such trust was known to the respondents, or their legal adviser, no contrivance of that legal adviser can enable the respondents to keep that money for a debt due to them from Taylor and Sons, and for which John Taylor was not responsible. I therefore move your Lordships that the interlocutors of the Court of Session be reversed, and that this case be sent to a jury to ascertain whether the whole of the L.5000, and the interest due on that sum, or what portion of such principal and interest has yet been detained by the respondents in satisfaction of debts that became due to them from John Taylor and Sons after the death of John Taylor. Secondly, Whether at the time this money was taken by the respondents in payment of the debts of Taylor and Sons, the respondents did not know that it was part of the estate of John Taylor, and was held by Patrick Taylor only as a trustee.

The House of Lords accordingly ordered and adjudged that the several interlocutors complained of be reversed. And it is farther ordained that the cause be remitted back to the Lords of Session in Scotland of the Second Division, with an instruction to them that they do direct a trial by jury to be had upon the following issues:—Whether any, and what part of the L.5000 transferred by John Taylor to a separate account in his own name in 1803, subsequently transferred in 1814 into the name

of Patrick Taylor, and again in 1817 transferred into an account called the separate account of John Taylor and Sons, has been received by the respondents in payment of a debt due to them from the firm of Taylor and Sons? Whether, when the respondents received such money, they knew that it was part of the estate of John Taylor, and that Patrick Taylor was possessed of that money as the executor of the said John Taylor, and held it subject to the trusts declared by that will, and that the said trusts were not satisfied? And that after the trial of such issues, the said Lords of Session of the Second Division do proceed further in this cause as shall be just. Dec. 14, 1830.

Appellant's Authorities.—3 Ersk. 9. 27, and 33. Creditors of Murray, Nov. 27, 1744, (Elchies, No. 15, voce Executor.) Alison, Nov. 1765, (15,132.) Tait, Feb. 12, 1779, (3142.) Bell, Nov. 28, 1781, (3861.) 2 Bell's Com. p. 96. Andrew *v.* Wrigley, (4 Brown, p. 124.) Scott *v.* Tyler, (2 Dickens, p. 712, and 2 Brown, p. 431.) Hill *v.* Simpson, (7 Vesey, p. 152.) M'Leod *v.* Drummond, (14 Vesey, p. 353.) Keane *v.* Robarts, (4 Maddocks, p. 434.) Watkins *v.* Cheek, (2 Stuart and Simons, p. 205.)

Respondents' Authorities.—Minorman, Nov. 24, 1630; Cliftonhall, Jan. 1687, (1 and 2 Brown's Sup. 316—99.) Dobie, July 8, 1707, (14,390.) Dickson, Nov. 22, 1711, (14,392.) Buchanan and Auld, July 20, 1784, (14,378.) Smith, May 27, 1801, (App. voce Sub. and Cond., Inst. No. 1.)

E. J. SCOTT,—SPOTTISWOODE and ROBERTSON,—Solicitors.

MALCOLM M'NEILL, Appellant.—*Wetherell—Stewart.* No. 52.

MRS M'NEILL, OR JOLLY, AND HUSBAND, Respondents.—*Pollock—Robertson.*

Interest.—Circumstances in which it was held, (reversing the judgment of the Court of Session,) that a party was not liable for compound interest on an heritable bond granted in 1787, and for payment of which action was raised in 1814, but not proceeded in till 1824, although the delay was alleged to have been caused by the improper acts of the debtor.

On the 20th of August, 1787, the late Daniel M'Neill, Esq. of Gallochilly, granted to the late Dr James M'Neill an heritable bond for L.1000, payable at the first term of Whitsunday, with the lawful interest to that term, and yearly during the non-payment payable at the usual terms, together with penalty in common form. Sasine was taken in December, 1787, and the instrument recorded in February, 1788. The interest was paid Dec. 22, 1830.

1ST DIVISION.
Lord Eldin.