[*25th July* 1838.]

ABRAM WILDEY ROBARTS, Esquire, Banker in London, Appellant and Respondent.—*Pemberton—Wigram—Purvis.*

JOHN COURT, Common Agent for the Creditors of LEWIS CUTHBERT, and THE TRUSTEES of the deceased ROBERT BOGLE and others, creditors of the said LEWIS CUTHBERT, Respondents and Appellants.—*Dr. Lushington—Bailey—Currie.*

Interest.—A party, pending a discussion as to the rate of interest for which he was liable on trust funds in his hand, consigned in Court a sum as the full amount of principal, and interest at four per cent., and he was afterwards found liable in five per cent.:—Held (affirming the judgment of the Court of Session) that he was bound to account for interest on the sum short consigned, and that an objection that this was a charge of interest on interest did not apply, seeing that the consignation was not definite, the question as to the rate of interest being undecided.

Agent and Principal.—A party who held, in trust for himself and another, an heritable security over the estate of his debtor, and was appointed one of his testamentary executors, and at the request of other creditors, agreed, with a view to save expense, to receive the proceeds of the debtor's estate, and distribute the same, without making any stipulation for commission:—Held (affirming the judgment of the Court of Session) not entitled to commission.

2D DIVISION.

Lds. Cringletie and Fullerton.

LEWIS CUTHBERT, resident in Jamaica, purchased in 1780 the estate of Castlehill, in Inverness-shire, at

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the price of about 14,000*l.* sterling. Beside other employments in Jamaica, he farmed and held the office of provost marshal of the island, from Lord Braybrooke, the patentee thereof, at the yearly rent of 2,000 guineas, under a lease which was current till 24th December 1807. Abram Robarts, banker in London, was the consignee and correspondent of Mr. Cuthbert in England, and became his creditor for a large sum of money. He was also bound as his surety to Lord Braybrooke for the rent of the provost marshal's office. For Mr. Robarts's relief of this cautionary obligation Mr. Cuthbert, in 1793, executed in his favour a deed of indemnity in the English form, by which he also became bound to pay to Mr. Robarts 200*l.* per annum during the lease, as a commission or premium for undertaking the risk and trouble of paying the rents, and 'taking the management and charge of the consignments of sugar and other goods which Mr. Cuthbert should make to England for the purpose of paying these rents.

On the 27th May 1795 Mr. Cuthbert, for Mr. Robarts's further security, as well in regard to his cautionary obligation as his engagements in general, executed in his favour a disposition of his Scotch estate of Castlehill, bearing to be ex facie absolute, for a price of 18,000*l.* actually paid, but, in truth, as a security and trust. Mr. Cuthbert was also indebted to Mr. Tierney, and he declared that Mr. Robarts should hold the estate for behoof of Mr. Tierney, as a postponed creditor.

Mr. Robarts was duly infeft, and the instrument of sasine was recorded on the 9th July 1796.

The transactions between Mr. Cuthbert and Mr. Robarts continued until Mr. Cuthbert's death, which

happened in October 1802, at which time the balance upon the accounts between them somewhat exceeded what was due to Mr. Robarts at the time of granting the disposition, and Mr. Robarts remained bound for the punctual payment of the rent of the provost marshal's office till 24th December 1807.

Mr. Cuthbert left a will, under which he appointed his son Mr. George Cuthbert, Mr. Robarts, and others, his executors and trustees, with authority that they should, as soon as conveniently might be after his decease, sell the said estate of Castlehill; and he also "gave and bequeathed all his real and personal "estate in England and in Jamaica, and all his per-"sonal estate in Scotland, to the said George Cuth-"bert, Abram Robarts, and others, their heirs, execu-"tors, administrators, and assigns, upon trust as to "every part thereof, except his Mr. Lewis Cuthbert's "lease of the office of provost marshal of the island of "Jamaica, to sell and dispose of the same as speedily "as possible after his decease, and in the most advan-"tageous manner for his estate, and to lay out and "invest the monies arising therefrom, and also the "monies to arise from the sale of his Mr. Lewis Cuth-"bert's lands and real estate in Scotland, in the public "funds, or on any good security in Great Britain, for "the purposes of his said will." One of these purposes was the payment of his debts. Mr. Robarts accepted, and acted under the deed.

Immediately thereafter Mr. Robarts entered into possession of the estate of Castlehill, and employed Mr. Campbell Macintosh as his agent, and he proceeded to sell the property in lots by public roup. In this way he realised, in 1804 and 1805, 29,170*l.*

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In the latter year Mr. Tierney and other creditors of Mr. Cuthbert charged Mr. Cuthbert's eldest son to enter heir, and took steps for recovering payment of the debts, by executing actions, arrestments, and inhibitions.

In this state of matters a meeting of the agents for Mr. Robarts, the representatives of Mr. Cuthbert, and the whole creditors who had then appeared, was held at Edinburgh on the 1st August 1806; when they declared it to be their opinion,—

" 1st. That Mr. Robarts should proceed with the " sale of those parts of the estate of Castlehill which " remained unsold:

" 2d. That no creditor should take any farther step, " by adjudication or otherwise, to interrupt that mea- " sure, unless some other creditor who has not hitherto " appeared shall proceed to adjudge; in which event, " if possible, one general adjudication for the creditors " who appear by their agents at this meeting would " seem to be the least expensive mode of procedure for " obtaining a pari passu preference for the whole:

" 3d. That it is not the opinion of this meeting that " any of their constituents will object to Mr. Robarts's " claims of preference, or to their amount, if it appears " from the accounts that they are all contracted on the " bonâ fide understanding of the security, by the dis- " position and infeftment in favour of Mr. Robarts, " who will, through his agent, favour the agents for " the other creditors with a statement of his accounts " and claims, and the dates of the different contractions:

" 4th. The meeting are of opinion it would be for " the benefit of the creditors whom they represent, or

" others who may appear and concur with them, to " appoint a proper person, with powers of an arbiter, " to settle the amount of their respective claims, and " their order of preference, and award payment out of " the reversion of the price of the estate, after dis- " charging Mr. Robarts's and the other preferable debts; " and agree to recommend such measures to their " respective constituents, and to suggest Mr. Francis " Farquharson of Haughton, accountant, as a proper " person to act as arbiter:

" 5th. That Mr. Robarts be requested to take the " trouble of receiving the prices of the lands sold and " to be sold, and of paying the same, agreeable to the " awards that may be given by the arbiter, not doubt- " ing that he will allow interest thereon after the rate " of 5 per cent. per annum, so far as the said prices " shall not be exhausted by payment of his own and " the prior preferable debts:

" 6th. That the meeting shall recommend to their " respective constituents not to allow their inhibitions " and other diligence to prevent the sales being made, " or the prices being paid to Mr. Robarts; and for that " end, to concur, if required, in any deeds that may be " thought necessary: And,

" Lastly, That such of the creditors as have not " already constituted their debts may do so, notwith- " standing any thing herein contained."

Certain parcels of land were accordingly sold in December 1807 and in March 1808, and the total prices realised by all the sales amounted to 52,321*l.*

In the meantime Mr. Farquharson, the proposed arbiter, died; and new claimants upon the fund

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having come forward, Mr. Robarts, in January 1808, raised a process of multiplepoinding and exoneration before the Court of Session.

After the usual procedure, the Lord Ordinary, on the 13th June 1808, remitted to Mr. Charles Ferrier, accountant in Edinburgh, to audit and examine the accounts and claims of Mr. Robarts, and his factor and agents, and of the several creditors and claimants on the fund, and to report a state of the whole, with his opinion thereon.

Pending this remit Mr. Robarts proceeded in the recovery of the prices and interest; and it having appeared that the fund in medio would be about equal to the debts, and that it would be advisable to make an interim payment, among the creditors then entitled, and in a situation to receive and discharge, leaving Mr. Robarts's accounts, and those of the factor and agents, to be considered when the business of the trust drew nearer to a conclusion, a minute was given into process, mentioning that there was a fund in medio of 35,305*l.*; and it was therefore craved, that the Lord Ordinary would remit to Mr. Ferrier to make out an interim scheme of division, at the rate of ten, or twelve, or of fifteen shillings, or such other rate per pound as, in his opinion, might be done with safety to the general interest, upon the creditors claims. A remit was accordingly made to Mr. Ferrier, who submitted an interim report and scheme of division, by which, after setting aside a sum sufficient to answer the amount of the debts due to Mr. Robarts himself and Mr. Tierney, there was allocated a dividend of 10*s.* in the pound on the whole other claims lodged, as at 1st September

1809, with interest thereafter, at the rate of 4½ per cent. without deduction of property tax. On advising this report the Lord Ordinary (Cringletie) pronounced the following interlocutor on the 6th December 1809: —" Approves of the said report and interim scheme of " division, and in the meantime ranks and prefers the " creditors therein, in terms thereof, and decerns in " the preference, and against the raiser of the multi- " plepoinding, for payment to such of the creditors to " whom dividends are thereby allocated now to be " paid, of their respective dividends accordingly, and " that against the 20th day of December current; with " interest thereafter at the rate of 4 per cent., without " deduction of the property tax, till payment: But " with regard to the dividends corresponding to the " debts claimed by the other creditors, and proposed " by the said interim scheme of division to be set apart " and retained, finds, that the same must be retained " for the present by the raiser of the multiplepoinding, " bearing interest in like manner at 4 per cent., with- " out deduction of the property tax." This judgment was acquiesced in, and was extracted; and the interim dividends allocated for payment, amounting to 11,182*l.* 19*s.* 1*d.*, were paid to the respective creditors therein.

Various proceedings then took place before the accountant as to the verification of the claims, during which an obstacle arose to any farther payments being made by Mr. Robarts, in consequence of certain investigations set on foot by the House of Assembly of Jamaica. It was discovered that Mr. Cuthbert, while provost marshal of Jamaica, had incurred considerable

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arrears or balances on money deposited in that office. Lord Braybrooke, the patentee, being liable to the suitors for these deficiencies, claimed relief from Mr. Robarts as surety for Mr. Cuthbert. Mr. Robarts therefore declined making any farther payment till a settlement of these claims should be effected. His right to retain the fund in medio was, however, disputed by one of the creditors, Mr. Cruickshank; but both the Lord Ordinary and the Inner House, on the 3d March 1815, sustained the claim of retention, and found that in hoc statu no decree can go out for any farther payment to Mr. Cruickshank, and decerned accordingly.

All farther proceedings in the process were thus arrested till Mr. Robarts should be relieved of the claims made on him for the balances due from the provost marshal's office. In the meantime he died, and in 1816 the process was transferred against Mr. Abraham Wildey Robarts his son and executor. Ultimately an arrangement was accomplished, by which the patentee of the provost marshal's office agreed to accept of the sum of 7,000*l.* in full of all claims under Mr. Robarts's suretyship; and the creditors having authorised Mr. Robarts's son to settle the matter accordingly, and to make payment of the 7,000*l.* out of the funds arising from the sale of Mr. Cuthbert's estate, that sum was paid in 1823, and the cautionary obligation discharged.

Proceedings were then resumed in the multiplepoinding. The interim dividends formerly decerned for in favour of certain of the creditors, but which had remained unpaid, were now paid under a warrant to

that effect; and the Lord Ordinary, on the 10th of March 1824, renewed "the remit to Mr. Charles Fer- " rier, accountant, to make up and report a state of the " claims and interest, and of the trustees accounts, and " those of his factors and agents, and of the balance " of the fund in medio, and final scheme of division " thereof among the claimants, the creditors and repre- " sentatives of the deceased Lewis Cuthbert, according " to their respective rights and interests."

Thereafter on the 21st of January 1825 his Lordship appointed Mr. Robarts's son to give in a condescendence, signed by himself, of the funds in medio, and interest thereon, reserving all questions as to the rate of interest. A condescendence of the fund as at 15th May 1825 was accordingly lodged, which was remitted to the accountant.

In the meantime, besides the prices and rents of the estate of Castlehill, Mr. Robarts about the year 1805 had recovered a sum of 4,879*l.* in England from the sureties of William Welby Vaughan, in the provost marshal's office, on account of deficiencies for which Vaughan was liable; and certain proceedings were adopted by the creditors of Mr. Cuthbert against Mr. Robarts relative to this money in the Court of Chancery in England. Eventually an arrangement was made under which these proceedings were dismissed; and an order having been pronounced in the multiplepoinding for consignation, Mr. Robarts's son, on the 18th June 1828, consigned in the bank of Scotland the balance admitted to be due by him, arising out of the prices and rents of Castlehill; and the Lord Ordinary, on the 8th July, appointed him to give in a condescendence of the amount of the English

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funds, which he did, and it was remitted to the accountant.

The main points in dispute before the accountant related to,—1st, the interest chargeable against Mr. Robarts on his intromissions with the rents and prices of Castlehill; 2dly, the interest on the dividends of which the payment was suspended during the proceedings in Chancery; 3dly, a deduction of property tax for the interest during the subsistence of that tax; 4thly, a claim of commission by Mr. Robarts; and, 5thly, the interest on the English (or Vaughan's) fund.

The accountant reported:—1. "That in regard to "the rate and accumulation of interest, Mr. Robarts "acted as trustee for the creditors and holder of the "funds in medio. Had he been acting as consignee "and holder of the fund in medio, under authority of "the Court, he would have been liable for the interest "he received on the monies invested by him, or "employed and placed out at interest; while, as trustee "again, he was not entitled to make profit by the use "of the trust funds, and must be held to have placed "them out beneficially as they came into his hands. "He indeed received the custody of the funds without "the formal intervention of the Court, but in doing "so he must be presumed to have acted on the under-"standing that due attention should be paid to the "interests of the trust estate in the employment of the "money, and ought, therefore, it is thought, to account "for the interest actually received by him, with ac-"cumulations or rests, as observed in like cases. It is "alleged that the funds were de facto (as discovered in "the Chancery proceedings) lodged in the banking

" house of Robarts and Company, and interest allowed " thereon at five per cent., balancing annually; and this " is the usual mode with London bankers in the case " of such accounts. If the money was not so lodged, " and if Mr. Robarts does not choose to state in this " process how it was employed and cared for by him, " he must be charged with interest at five per cent., " balancing annually."

2. " With regard to the interest on the sum retained " for the dividends, it may at first seem that the inter- " locutor of December 1809 should form the rule, " since it was pronounced in particular relation to " them. That interlocutor, however, was pronounced " on the supposition that the dividends were to be " paid, most of them immediately, and the others so " soon as the objections stated to them, and then in " the course of discussion, should be determined, and " it was not contemplated that they were to remain so " long unpaid. Mr. Robarts argues, indeed, that they " were subject to the orders of Court, and liable to be " consigned on the application of any creditor; but it " must be observed that in March 1815 he was still " found entitled to retain all the dividends then unpaid, " till relieved of his cautionary engagements for the de- " ficiencies in the provost marshal's office. In these cir- " cumstances it is thought that interest should be stated " on the sums applicable to these dividends, the same as " on the other funds. It may be very just only to allow " those creditors to draw four per cent. whose claims " had still to undergo discussion subsequent to the period " of division; the other creditors, and the party having " the reversionary interest in the funds, being put to

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" expense in the adjustment of the claims. But this " should not affect the question between Mr. Robarts " and the general creditors, and the party claiming the " reversion, as to the mode of stating the general ac- " counts of the trust. In point of fact, however, on " this branch of the case Mr. Robarts is allowed credit " in the state of accounts now reported for the sum of " 11,182*l.* 19*s.* 1*d.*, being the total amount of the " undisputed dividends as on 20th December 1809, " the day of the division; and as in paying those cre- " ditors as they came forward to him with their dis- " charges he only allowed them four per cent. interest, " he has thus so far got effect given to his plea."

3. " According to a received rule during the ope- " ration of the property tax a person, whether a banker " or otherwise, seeking payment of a debt in a court of " law, or in a competition with creditors, was bound to " allow property tax, and therefore it is proposed to " deduct the property tax on the annual interest charged " on Mr. Robarts's claims."—"As to the property tax on " the intromissions, it is believed that bankers, in the " business done in their houses, neither allowed pro- " perty tax on interest paid them, nor did they deduct " it on interest allowed by them; and probably Mr. Ro- " barts was allowed five per cent. from Robarts and " Company, without deduction of the tax. But as it " is proposed to strike the accounting in this case on " the assumed legal profits of five per cent. per annum, " it is also proposed to allow deduction of the property " tax on all the interest stated against Mr. Robarts in his account of intromissions with the trust fund."

4. " In the outset Mr. Robarts's object was to sell,

" and pay his own debts, and for relief of the obli-
" gations he had come under respecting the provost
" marshal's office. Latterly, however, he became, at
" the request of the creditors, their trustee, and agreed
" to proceed in the sales, and act for them and the
" heirs of Mr. Cuthbert. The profits, or presumed
" profits, therefore, arising upon the employment of
" the trust funds being brought to account, Mr. Ro-
" barts may be allowed a commission of two and a half
" per cent. upon the gross sums received by him, and
" a commission of a half per cent. on the annual pro-
" ceeds and for paying and applying the same, exclu-
" sive of the commission and allowances to the factor
" and agent in Scotland in respect of the lotting of
" the estate, sales thereof, and recovering and remitting
" the rents and prices. But as Mr. Robarts, down to
" August 1806, acted for the recovery of his own debts
" and engagements, and has, in his accounts, a fixed
" commission or allowance of 200*l.* per annum down
" to 31st December 1807, at which time his own debt
" was extinguished, the above commission is only
" allowed on the sums recovered by Mr. Robarts, after
" deducting the amount of his own debts.

And 5. As to the English fund, or Vaughan's money, the accountant stated that " he proposes to follow " the same rule that he has already adopted in the " accounting relative to the funds of the Scotch estate, " that is, to allow Mr. Robarts a commission of " two and a half per cent. on his recoveries, to charge " interest at five per cent., balancing annually, under " a deduction of the property tax while it existed, and " to allow a commission of a half per cent. on th " annual proceeds."

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Agreeable to these principles the accountant reported a state of accounts.

Objections having been lodged by both parties to that report, and a record having been made up, the Lord Ordinary (Fullerton) pronounced, on 10th March 1832, this interlocutor:—" The Lord Ordinary having heard " parties procurators on the objections to the accoun- " tant's report by Abram Wildey Robarts, and having " considered the closed record, Finds, That in the year " 1796 the late Lewis Cuthbert, then resident in " Jamaica, made over to the late Abram Robarts, his " consignee and correspondent in England, the estate " of Castlehill in the county of Inverness by a dis- " position ex facie absolute: Finds, That this convey- " ance was a conveyance to Mr. Robarts in trust, in " order to secure him, first, in the payment of the " debts then due, or which might become due to him " by Mr. Cuthbert; and, secondly, against the conse- " quences of the obligations contracted by Mr. Ro- " barts as surety for Mr. Cuthbert in relation to the " office of provost marshal of the island of Jamaica, " held by Mr. Cuthbert on lease from the patentee " Lord Braybrooke, current till the 24th December " 1807, for the yearly payment of 2,000 guineas: " Finds, That Mr. Cuthbert died in October 1802, at " which time a large balance was due to Mr. Robarts " in account with Mr. Cuthbert, and besides Mr. Ro- " barts remained bound for the performance of the " obligations of Mr. Cuthbert, as lessee of the provost " marshal's office, until the expiry of the lease: Finds, " That on the death of Mr. Cuthbert Mr. Robarts " entered into possession of the estate of Castlehill, " and in 1804 and 1805 sold certain parts of the

" estate: Finds, That the further sales were inter-
" rupted by measures taken on the part of various
" creditors of Mr. Cuthbert in order to obtain pre-
" ferences: Finds, That on the 1st of August 1806 an
" arrangement was entered into between Mr. Robarts,
" the representatives of Mr. Cuthbert, and the cre-
" ditors, by which it was provided that Mr. Robarts
" should proceed to sell the remaining parts of the
" estate; and, after payment of his own preferable
" claims, should hold the balance as a fund of division
" among all parties concerned: Finds, That the minute
" of agreement contained inter alia the following
" article,—Fifth, That Mr. Robarts be requested to take
" the trouble of receiving the prices of the land sold
" and to be sold, and of paying the same, agreeable to
" the awards that may be given by the arbiter, not
" doubting that he will allow interest thereon after the
" rate of five per cent. per annum, so far as the said
" prices shall not be exhausted by payment of his own
" and the prior preferable debts: Finds, That in con-
" sequence of this arrangement the remaining parts of
" the estate were sold by Mr. Robarts in the years
" 1807 and 1808, and that the price received by him
" on the whole sales amounted to 52,321*l.*: Finds,
" That the arbitration contemplated by the parties
" having failed by the death of the arbiter, Mr. Ro-
" barts, in January 1808, raised a process of multiple-
" poinding, in which a remit was made to Mr. Charles
" Ferrier, accountant, to audit the accounts and claims
" of the raiser and the claimants, and that after various
" steps of procedure directions were given by inter-
" locutor of the 20th day of May 1809 to prepare an
" interim scheme of division to a certain extent on the

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" amount of the debts: Finds, That a report was made " by the accountant, suggesting a dividend of 10*s.* in " the pound on the debts then claimed, with the pro- " vision that payment of the dividend on certain of the " debts to which objections had been started should be " postponed till the objections were disposed of: Finds, " That by interlocutor of 6th December 1809 the " report was approved of, and the dividends, as well " those immediately payable, as those of which pay- " ment was suspended, were declared to bear interest at " four per cent., without deduction of property tax: " Finds, That before any further division took place, " and while a great part of the suspended dividends " remained in the hands of Mr. Robarts, he, by a " minute in December 1811, intimated that claims to " a very large amount had been made against him, as " surety for the late Mr. Cuthbert, in relation to the " office of provost marshal; that he was consequently " entitled to retain the price of the lands of Castlehill " in relief of those claims; and that in these cir- " cumstances no farther division or payment of the " fund in medio could take place: Finds, That " Mr. Robarts's claim of retention was disputed by " Mr. Cruickshanks, one of the creditors holding " right to one of the suspended dividends under the " interlocutor 1809, but that the right of retention was " finally sustained by an interlocutor of the court, of " the 3d March 1815: Finds, That in consequence of " this claim of retention all farther progress in the " division of the fund in medio was suspended until " February 1824, when a minute was given in by " Mr. Abram Wildey Robarts, the representative of " the original raiser, intimating that in consequence

". of the arrangement effected by the patentee of the " office of provost marshal with the consent of the " creditors, his claim of retention was at an end: " Finds, That the proceedings in the multiplepoinding " were then renewed, and that after a farther discussion " consignation was made on the 8th of July 1828 of the " balance of the price of Castlehill as admitted by the " raiser, amounting to 28,117*l.* 15*s.* 5*d.*: Finds, That " on the 24th of February 1829 there was a further " consignation of the sum of 8,933*l.* 8*s.* 11*d.*, being " money recovered in the years 1805, 1806, and 1807 " by the late Mr. Robarts from the sureties of a per- " son of the name of Vaughan who had been indebted " in the character of a deputy or sub-deputy to the " estate of Lewis Cuthbert as holding the office of " provost marshal, which sum had formed the subject " of discussion in the Court of Chancery, and had been " by the arrangement of the parties transferred to this " multiplepoinding: Finds, That the main question " now remaining between the raiser and the common " agent relates to the amount of the fund for which " the raiser shall be held accountable, and that this " question arises from the different views respectively " maintained by them of the interest with which the " raiser shall be charged, and the accumulations to " which, according to the common agent, he should " be subjected: Finds, first, That the interlocutor of " 6th December 1809 is res judicata as to the amount " of interest chargeable on the retained dividends, and " that the said retained dividends having been ulti- " mately paid to the creditors respectively, with interest " at the rate of four per cent., agreeably to that inter- " locutor, no claim for any higher interest on these

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" sums during the time they were retained by the " raiser is now competent to the common agent or " the general body of the creditors: Finds, secondly, " That according to a fair construction of the minute " of 1806 the raiser is liable in interest at the rate of " five per cent. on the sums in his hands, without accu- " mulation, until the giving in of the minute of Decem- " ber 1811, by which he, in virtue of his right of " retention, suspended all measures which might have " been otherwise taken for the consignation of the fund " in medio, and its division among the parties con- " cerned: Finds, thirdly, That from December 1811 " until the giving in of the minute in February 1824, " during which his claim of retention was in force, he, " agreeably to the principle adopted in the case of the " executors of the Duke of Queensberry against Tait " (23d May 1822), was not entitled to derive profit " from that retention; and therefore, and in respect of " the admission of the raiser upon oath in his answers " in the Court of Chancery (No. 266 of process), that " the whole funds in question were blended with the " private funds of the raiser, and employed in trade or " business, Finds, That during the period in question, " while the claim of retention was enforced, the raiser " is chargeable with interest on the sums accumulated " as in December 1811, at the rate of five per cent., " with accumulations yearly, under deduction of the " property tax, unless he can show that he did " not derive profit to that extent from the funds so " employed: Finds, That from February 1824, when " the right of retention ceased, the raiser is liable in " interest on the sums accumulated at February 1824 " at the rate of five per cent., without accumulation,

" unless in so far as any part of the said sum has been " consigned; and therefore sustains the first objection " for Mr. Robarts, in so far as it is consistent with " the preceding findings; quoad ultra, repels the said " objection, and also repels the second objection, and " remits to the accountant to amend the report on " the principles above laid down: And, further, finds " no expenses due."

On the same day his Lordship pronounced this other interlocutor: — " The Lord Ordinary, having " heard parties procurators on the objections of the " common agent, bearing reference to Mr. Camp- " bell Mackintosh, and Mr. Robarts, the raiser, " Finds, That the business accounts of Mr. Mack- " intosh must be audited, if that be required by " the objector; to that extent sustains, and, quoad " ultra, repels the objection in regard to Mr. Mack- " intosh; also repels the objection of the common " agent in regard to Mr. Robarts; but remits to the " accountant to consider whether and to what amount " the gross sum of commission to Mr. Robarts is " affected by the interlocutor on the objections of " Mr. Robarts, disallowing, to a certain extent, the " accumulations contemplated in the accountant's for- " mer report; quoad ultra, in regard to the three last " general heads of the objections for the common agent, " namely, Mr. Fraser's accounts, the claim of the " creditors for a higher rate of interest of the con- " signed sum, and the claim of the common agent for " expenses, appoints the case to be enrolled, that the " parties interested may be heard on these points " which have not as yet been the subject of any " argument."

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Both parties presented reclaiming notes to the Inner House against these interlocutors, and on the 20th November 1832 their Lordships pronounced this interlocutor:—"The Lords, &c. adhere to the first "and second findings of the interlocutor first com- "plained of as to the rate of interest on the retained "dividends, and also on the remaining fund in medio; "prior to the month of December 1811: Find, "that whatever rate of interest may be ultimately "found due by the raiser (Robarts) on the said "remaining fund since the said date of December "1811, he shall not be liable for accumulations; "and in so far alter the interlocutors complained "of; but as to the rate of interest during this period, "appoint the case to stand over for further consider- "ation, in respect that the Lords are equally divided "in opinion upon that point."

Thereafter, on the 24th January 1833, their Lordships pronounced this interlocutor:—"The Lords, having re- "sumed consideration of the process on the point reserved "in their interlocutor of November 20, 1832, relative to "the rate of interest chargeable against the raiser on the "remaining fund since the month of December 1811, "find interest due from that date till the dates of con- "signation, at the rate of five per centum per annum, "under the legal deduction of property tax; quoad "ultra, remit to the Lord Ordinary to proceed as he "shall see cause."[1]

On the case returning to the Lord Ordinary he remitted it to the accountant to report a state of the

[1] 11 S., D., & B., p. 314.

fund in the hands of Mr. Robarts, prepared on the principle of giving effect to the interlocutors of the Court pronounced since his former report was lodged in process.

He accordingly made a report, to which Mr. Robarts objected, 1st, that certain accumulations of interest had been stated against him, notwithstanding the interlocutors of the Court; 2d, that, on a particular sum, the accountant had stated interest upon interest; and, 3d, had disallowed commission. The Lord Ordinary on the 10th June 1834 pronounced the following interlocutor:—"The Lord Ordinary having "resumed consideration of the debate, and advised the "process, repels the first objection, in respect that, in "bringing out the balance as at 31st December 1806, "with which the additional report commences, there "are annual accumulations of interest on both sides of "the account, as stated by the accountant at page 30 "of the report; and as the balance was always in the "objector's favour, he has no interest to state this "objection: Repels the second objection, in respect "that the sums consigned having been less than the "sums now ascertained to have been due at the dates "of consignation, the said sums so consigned are to be "applied, in the first place, to extinguish the interest "due, thus leaving the whole balance unpaid a princi-"pal sum upon which interest is due, so that interest "upon interest is not charged: Repels also the third "objection as to commission: Finds no commission "due, in respect that being the friend and executor "and disponee, with a power of sale, of the late "Mr. Cuthbert, and much interested as a creditor in

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" winding up his affairs, the late Mr. Robarts under-
" took the duty of trustee, without any stipulation for
" commission being made by him or on his behalf, at
" the meeting of 1st August 1806, when the Bishop of
" Rhodez stated, that the object of the arrangement
" was with the view of yielding a reversion to the family
" of his brother, and that this be done at the least
" expense possible; and that the duty of managing the
" sales, and recovering the price was devolved on
" Mr. Campbell Mackintosh, the factor, who has
" charged and been allowed a commission for this
" trouble, the trouble of Mr. Robarts having been
" confined to receiving the proceeds in remittances
" from the factor, which to a large amount he was
" allowed to retain in his hands for unsettled claims,
" and for which he has been held bound to account
" only for simple interest: Therefore, on the whole,
" approves of the report; and having considered the
" claim of Mr. Robarts for expenses of process, which
" the Lord Ordinary holds to be open before him,
" finds no expenses due, and decerns."

Mr. Robarts having presented a reclaiming note to the Inner House, their Lordships, on the 10th December 1834, pronounced this interlocutor:—" The Lords,
" &c. adhere to the interlocutor complained of, and
" refuse the desire of the note; with this explanation,
" that as the accountant's report contains alternative
" views of the state of the funds the interlocutors of
" Court are meant to apply to the first view of state,
" No. 6., bringing out a balance of 2,632*l.* 18*s.* 2*d.* due
" by Mr. Robarts as at 31st December 1833: Ap-
" prove of said view; quoad ultra, remit to the Lord

" Ordinary: Find the respondents entitled to ex- " penses of process since the date of the said inter- " locutor," &c.[1]

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Both parties appealed against the above interlocutors, in so far as prejudicial to them.

Appellant (*Robarts*).—1. By the interlocutors complained of the appellant has been found liable in interest at the rate of 5*l.* per cent. per annum upon all the funds remaining in the hands of his father (with the exception of the dividends retained under the interim scheme of division) down to the dates of the consignation; and for interest at the rate of 5*l.* per cent. upon unascertained balances of interest which remained in his hands during the discussion; whereas he ought not to have been found liable for any higher rate of interest than simple interest at the rate of four per cent. upon any part of the principal sums in the hands of his father or of his executors after the 20th of December 1809, nor for interest at all upon the balances exhibited by the accountant's additional report as arising out of interest remaining unconsigned at the 18th of June 1828 and the 24th of February 1822, the dates of consignation. This he maintains, because neither he nor his father were guilty of any breach of trust, either express or implied, in respect to any of the funds which were retained by them; and the whole actings in relation to the estate were subject to judicial control after the action of multiplepoinding was raised, and the proceeds were placed at the disposal of the Court by the insti-

[1] 13 S. D. 173.

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tution of that action.[1] It was known to the creditors and representatives of Mr. Cuthbert that the appellant and his father retained the funds in the character of bankers. Such retention was not only sanctioned by the creditors and representatives, but also by the Court; and it was understood and agreed that his father should give the same rate of interest for the monies in his hands that could be obtained from a respectable banking house in Edinburgh. Besides, as bankers, he and his father were at all times liable to be called upon to produce the fund, and were ready to do so, and did, in fact, produce it when called upon. Indeed, the creditors and representatives well knew that the appellant and his father (being under an obligation to pay some interest) must be compelled to use the money in the manner which they thought best calculated to enable them to perform their obligation, precisely as any Scotch bank would have done if the money had been consigned in it. And it is a fact of public notoriety, that had the money been consigned in the Bank of Scotland, or any other Scotch bank, no higher rate of interest than simple interest at the rate of three and a half per cent. could have been obtained for the first six months after consignation; and although the Scotch banks would have allowed four per cent. for some time, they would have reduced that rate to three, two and a half, and two per cent., and only these reduced rates could have been obtained by the creditors and representatives. In regard to the minutes of the 1st of

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1 Newton v. Bennett, 1784, 1 Brown's Chancery Cases, 358; Perkins v. Baynton, 1784, 1 Brown's Chancery Cases, 375; Tebbs v. Carpenter, 1816, 1 Madd. 290.

August 1806, referred to by the Lord Ordinary in his interlocutor of the 10th March 1832, they ceased to have any effect, as respects the rate of interest, after the process of multiplepoinding was raised, and the interlocutor of the 6th December 1809 pronounced, up to which time the appellant's father paid interest at the rate of five per cent. in conformity with the minutes, and thereafter at the rate of four per cent. in conformity with the terms of the interlocutor of the 6th December 1809. Further, it was in the power of the creditors to crave consignation of the funds in a bank in Scotland at any time,—the claim of retention having been stated in answer to an application not for consignation but for payment. In fact, no application was ever made for consignation which was not immediately complied with. But if any doubt existed as to the rate of interest to be paid, it was more reasonable for the appellant's father to conclude (after the interlocutor of the 6th December 1809, which fixed the rate of interest at four per cent.) that it would not be raised, than for the creditors and representatives to assume that, without any previous notice, he would pay five per cent., and which question it was competent for the creditors and representatives to have set at rest by application to the Court.

2. Commission ought to have been allowed to the appellant, because his father was entitled to a fair and equitable remuneration for the trouble he had in the business transacted by him for Mr. Cuthbert or his representatives, in receiving the rents of the Castlehill estate, in selling it, and receiving the proceeds thereof, and Vaughan's money. Indeed Mr. Cuthbert agreed with him that he should have commission allowed to

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him for his trouble in the business he should transact, and a commission had been charged by and been allowed to the appellant's father by Mr. Cuthbert for the business transacted during the life-time of Mr. Cuthbert.

Respondents.—1. In so far as Mr. Robarts received money belonging to Mr. Cuthbert's estates in Scotland, or elsewhere, beyond what was requisite for payment of the debts due to himself and to Mr. Tierney, he acted as trustee or executor, and accountable to others, and he was not entitled to make any profit for himself on the trust money; but as the money was kept by him and by his representatives, and used by them in trade, they are liable to make payment to Mr. Cuthbert's creditors and representatives of all the profits actually made by them. More particularly they are under such an obligation by the trust under which they acted in regard to Castlehill, as Mr. Robarts was expressly taken accountable to Mr. Cuthbert's executors for any residue of the price of that estate, and as by Mr. Cuthbert's will (of which Mr. Robarts was an executor) the executors were directed to invest all monies received from the heritable estate, or from other real or personal estates, in the public funds, or on other good security in Great Britain.[1]

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[1] Trevis v. Townsend, 1784, 1 Brown's Chancery Cases, 384; Littlehales v. Gascoygne, 1790, 3 Brown's Chancery Cases, 73; Franklin v. Frith, 1792, 3 Brown's Chancery Cases, 433; Forbes v. Ross, 1788, 2 Brown's Chancery Cases, 430; Sammes v. Rickman, 1792, 2 Vesey jun. 36; Massey v. Davis, 1794, 2 Vesey jun. 317; Piety v. Stace, 1799, 4 Vesey jun. 620; Rocke v. Hart, 1805, 11 Vesey jun. 58; Raphael v. Boehm, 1805, 11 Vesey jun. 92; Ashburnham v. Thomson, 1807, 13 Vesey jun. 401.

If Mr. Robarts and his representatives have mixed the money with their own, so that the former cannot be distinguished from their own, and if the profits actually derived from the money cannot be ascertained, they are liable for interest at five per cent. with annual rests. In fact it appeared from a production made in the Court below, that Mr. Robarts had admitted upon oath, in certain answers for him in the Court of Chancery, that the funds in question were mixed with his private funds, and employed by him and by his representatives in trade or business, and profit made of them; and the appellants offered in the Court below to prove that the clear profits thence derived amounted to ten per cent. and upwards, that the profits derived in each successive year were in like manner mixed, and employed in each following year, and produced clear profits to a corresponding amount; and no answer was ever made to the calls made by the appellants in the Court below on Mr. Robarts to give specific statements of the actual employment of the money and of the profits thence derived, as appearing from the books and vouchers kept by Mr. Robarts, by his son, and by the houses of which they were partners.

Farther, as Mr. Robarts, in the contraction of the debts claimed by himself against Mr. Cuthbert, charged and received interest at five per cent., with annual rests, while the balance was in his favour, and a course of dealing has been thus established, he was not entitled to alter that course of dealing to the prejudice of Mr. Cuthbert's estate when the balance turned against him.

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It is at all events clear that as to the period from December 1811 (when Mr. Robarts gave in a minute, by which he, in virtue of his right of retention afterwards sustained, suspended all measures which might have been otherwise taken for the consignation of the fund in medio, and its division among the parties concerned,) till February 1824, he was not entitled to derive profit from that retention, which, however, he will derive to an immense amount under the interlocutors appealed against.[1]

2. As Mr. Robarts acted as a trustee and executor without having made any stipulation for remuneration for his own trouble, he is not entitled to demand any[2]; indeed the circumstances in which Mr. Robarts accepted the trust show that no charge for his own trouble was contemplated; and, besides, a commission has already been allowed to Mr. Mackintosh his factor, who had the trouble of superintending the sales and recovering the prices, while Mr. Robarts, himself a banker, had no trouble as to these matters beyond receiving bank drafts from Mr. Mackintosh.

LORD BROUGHAM.—The appellant by the conveyance and the bank letter obtained a right over Castlehill in security,—a security, that is, for debts due to him and engagements undertaken by him, with a power of sale, on the condition, however, of accounting to Cuthbert's executors for the balance of the price after satisfying

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[1] Duke of Queensberry's Executors against Tait, 23d May 1822.

[2] Erskine, b. iii. tit. 3. sect. 32., and b. iii. tit. 9. sect. 26; Montgomery against Wauchope, 1816, 4 Dow, p. 109; Brocksopp against Barnes, 3d July 1820; 5 Maddocks, p. 90.

those debts and liabilities in the event of his executing the power by selling the estate. There seems no accuracy in the view of the case which considers him as thus becoming a trustee for creditors,—the contention of the respondents on which mainly the claim is grounded to carry back the accounting. He was rather a debtor to the estate of Cuthbert and to those who were interested in it. He became such debtor by having availed himself of the right he had to sell, and he thus received money, the balance of which he was bound to account for and to pay over whensoever the parties entitled should appear,—those parties who could give him a valid discharge. Upon becoming executor he had a double character;—as representing the estate,—against himself as holding the balance of the price. But even now the portion of the estate was not such as enabled him to settle all claims at once and pay over the balance; nor, indeed, could he be discharged from his own engagements for which he had taken the security,—a large debt, originally stated at 20,000*l.*, hanging over him. He might indeed have consigned the money; but if he did not insist on doing this, it was the business of the creditors and others interested to make him do so; and no doubt at all is made of their title to require the consignation. Now, observe what they did in these circumstances. Instead of requiring consignation they resolved by the minute of 1806, regularly intimated to Mr. Robarts, that the money should remain with him, stipulating for interest at five per cent., without one word being said, or any understanding come to, respecting accumulation.

In fact there can be no doubt that the security of the great house of Robarts and Co. was deemed equi-

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valent to consignation by a formal deposit in any other bank; and it is also to be observed that this leaving the money with Robarts and Co. secured them five per cent., whereas had the money been consigned formally, and lodged under the orders of Court in any other bank, certainly not more than four per cent. would have been obtained, perhaps not so much, besides the payment of the dues of the consignation. The correspondence, independent of Robarts's judicial statements in 1829, shows that he distinctly refused to hold the money for the suspended dividends at more than four per cent. Unquestionably down to 1811 at least, the general fund left in his hands in 1809, not by his own act, but by the act of all who stipulated for the five per cent. interests in 1806, was so left by them on no other undertaking than his allowing that rate of interest to be charged against him.

It therefore appears that the Court below were warranted in holding that agreement binding as long at least as the money was retained through no difficulty or objection proceeding from Mr. Robarts himself.

Next, as to the suspended dividends. The interlocutor of Lord Cringletie in 1809 fixed the interest on sums retained for those suspended dividends at four per cent., and this appears plainly to be res judicata. The minute of that year, in which Mr. Robarts makes the statement whereupon the interlocutor was given, expressly raises the question for the Lord Ordinary's decision, by stating most distinctly that he, Mr. Robarts, must not be expected to hold the money waiting for the result of the multiplepoinding at any higher rate than four per cent., and assigns the reason for this

refusal with a statement that four per cent. was one quarter or one half more than could for six months at least be obtained elsewhere should the money be consigned. In this interlocutor the parties acquiesced; and if it proceeded on the point,—that is, if the question now raised was then raised, as the minute shows it to have been,—it is clearly res judicata, and excludes the contention now.

But the principal question remains, over which it is impossible to deny that considerable difficulty and some doubt hangs; nevertheless, upon the whole, I am not prepared to say that the Court below has miscarried, although it is impossible to feel the same confidence in the decision which I have not any hesitation in expressing upon the other parts of the case.

In 1811, when affairs were, as it were, ripe for a distribution of the fund, a heavy debt, the amount of which could not be ascertained, was due on the provost marshal's bond. The estate, and the creditors as interested in it, were liable to relieve Mr. Robarts of this obligation; and thus the difficulty of ascertaining the amount rested primarily upon them, and their business it was to remove that difficulty. His right to retain the price of the Castlehill estate, in security or indemnity, was at least clear, and was not contingent upon his stating the amount, and claiming the security of the retention; it was a right of indemnity absolutely, to whatever extent his liability might expose him eventually, to a loss. He did not propose to consign for the contingent balance, and no demand of consignation was made by them. The Court have apparently thought that in these circumstances the original arrangement of

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1806 must be, as it were, considered to continue; at any rate, they have taken the terms of that arrangement as their guide or canon, and regarded five per cent., without rests, as alone due; while Lord Fullerton, having regard to Mr. Robarts's admission in the chancery suit, that the funds had been mixed with his own as a banker, gave annual rests against him.

It must however be remarked, that when the fund is said to have been mixed with Mr. Robarts's funds in his bank, the meaning is this,—as a banker he uses all the monies deposited with him by his customers, but he is liable at a moment's notice to repay every shilling so deposited by each customer. If any customer dies he (the banker) is liable to repay to the executor or other personal representative,—to whoever can show a title,—that is, to whoever can give a valid discharge. In no other position did Mr. Robarts here stand in relation to the estate of Cuthbert. He was liable to pay to the persons representing that estate the instant that they appeared, and appeared in such a shape and position as enabled them to give a valid discharge. They might have obtained an order of Court for consignation if they could not clear up the difficulties which prevented them from demanding to have the balance paid over to them by disabling them from giving an effectual acquittance. In these circumstances, as they did not take such steps the Court below appear to have acted rightly in not allowing them to share in the profits of Mr. Robarts as a banker. He did not, however, make any protest, as in the case of the suspended dividends, to protect him against five per cent., and limit the charge to four.

There is a mistake in the appellant's statement regarding consignation.

He speaks of the rate of interest allowed merely. But when the fund is long in the Court's hands the practice always is to take it up, and re-deposit with the accumulations of interest, by the authority of the Court, once in a year at least, sometimes half-yearly. Now, the bank interest being four per cent., this would be the rate upon the funds consigned, and therefore, nothing could be more evident, than the fitness of charging Mr. Robarts with this interest, and yearly rests at the same rate. But then it is equally clear that the fund and the creditors would by this proceeding gain less than if five per cent. interest were allowed without rests, at least during the term of the actual debt and interest, in this case, and a great deal longer. Even if half-yearly rests were allowed it would not exceed five per cent. without accumulation; and it is evident that the possibility of the Court ordering half-yearly upliftings, and re-deposits in the event of consignation, would not authorize half-yearly rests in a case like the present.

The appellant grounds upon the refusal to pay more than four per cent. on the suspended dividends, and upon the interlocutor of 1809, pronounced on the question then raised by his refusal, and now taken as res judicata,—an argument that he should only have been held liable for simple interest at the rate of four per cent. on account of the respondents never having required consignation. This circumstance of no demand having been made may be sufficient to exclude rests in case five per cent. is allowed; but the appellant might himself have consigned, and he was retaining, on an objec-

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tion taken by himself, a fund which, whatever uncertainty might hang over the amount at first, proved eventually much beyond the liability to cover which it was retained. It seems therefore quite right that he should be held liable for as much as the estate would have got, had the consignation taken place; which consignation he might have made (observe) without any detriment to his security. Had that step been taken the fund would, on the one hand, have been forthcoming to answer his demand of indemnity, whensoever the extent of his liability should be ascertained, so as to liquidate his claim on the fund; and it would have been lying, on the other hand, for the benefit of the estate, at four per cent. interest, with upliftings and re-deposits under the Court's authority,—that is, with the benefit of yearly rests at least,—all the while that the extent of his liability remained unascertained.

Nothing can be more equitable, therefore, than that he in whose hands it was held unnecessarily for the security of himself, who, though he could not pay to the estate, could at all events have consigned so as to benefit that estate, without injuring his own security, should repay to the estate what it had thus cost,—that is, four per cent. with yearly rests. So far, then, full justice appears to be done to the appellant, and a fair measure meted also to the respondents. But it must be added that even if the respondents are right in their claim of five per cent. with rests, and the judgment now under review is erroneous, the claim is wholly untenable beyond the month of March 1826, when Mr. Robarts gave in a minute to the Court, stating his desire to get rid of the fund by consigning it to a bank in London,

so he was released from the Chancery proceedings. Now, though this condition annexed to his tender is such as would prevent a plea of tender of payment from being supported by the strictness and the nicety of our common law pleadings and practice, probably also by that of Scotland, yet still it must materially affect the discretionary question of rests, which always depends upon the whole circumstances of the case, and the whole conduct of parties, where the question arises upon the difference between retaining the fund and consigning it, as it is here alleged he should have done. Let us see, then, what reception an offer so fair in itself met with from the respondents. They resisted the reasonable proposition formally and judicially made, and they craved consignation of the whole fund in medio, without any regard to the Chancery suit.

The Lord Ordinary's opinion of this proceeding, in which I incline to concur, is shown by his interlocutor upon the minute, and the discussion arising out of it. He ordained the respondents to produce evidence of the Chancery suit being finally settled or ended, and only authorized consignation by the appellant after such evidence should be produced. It was not for two years and more that the respondents produced such evidence, and yet they seek to charge Mr. Robarts during that time also with interest at five per cent., and accumulations. Even upon this extreme view of the respondents right to rests at five per cent., there might be ground for restricting the claim to the period which elapsed before February 1824, the date of the appellant's minute, stating his readiness to pay the retained dividends; but in no view whatever can the accumulations be

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claimed at five per cent. after March 1826. Therefore, even if your Lordships should have differed with the Court below as to the principle on which the rests and rate of interest should be awarded, the application of that principle would be very far from carrying the respondents the whole length of their contention; but I have already said that I am not prepared to advise your Lordships to differ with the Court below upon the principle adopted, for the reasons which I have assigned.

There remains to be disposed of the question of commission, forming mainly the subject matter of the cross appeal.

The accountant's reason for refusing commission is manifestly untenable. The Court differing with him upon the principle which ought to govern the allowance of interest is not a ground of refusing commission, if on other grounds commission was due. But I do not consider it to be due upon any good grounds. In no capacity in which Mr. Robarts, and those he represents, stood, can it be due by law without express stipulation,—and stipulation there was none in this case. As executor he plainly can have no such right. The old act 1617, c. 24. has not been relied on; and if it were, would most likely not avail him. As factor he has no locus standi in the question at all. Then has he any such claim as holder of an heritable security with a power of sale, and as a party executing that power by bringing the estate to a sale, and retaining the price for his indemnity, subject to account for the balance whensoever this should be ascertained by his liabilities being at an end? I think most clearly not. He was holder for his own

security in respect of actual advances, and for his own indemnity in respect of future liabilities; he was donee of the power in the same capacity of creditor and part liable; he was vendor in the same capacity; in the same capacity he was receiver of the purchase money; and in the same capacity he retained that price until his liabilities being at an end, their extent, and the equal extent of his claim on the fund for indemnity, could be ascertained. In all this acting, and in this capacity, he was merely acting for his own security, that is for his own benefit. Foreseeing trouble and even expense, he might have bargained for commission in consideration thereof; but he made no such stipulation, and he can have no such claim. In truth he sells for his own behoof, to advance his security, probably by preventing any injurious fall in the price of the estate. The allowance, apparently ample, of about 1,000*l.* to Mr. Mackintosh, Mr. Robarts's factor, who sold the estate and received the price, appears sufficient, and perhaps more than sufficient, to cover any possible demand of Mr. Robarts's on account of that transaction.

He manifestly then can have no claim for commission as vendor and receiver of the purchase money. In all the rest of his proceedings he is an accounting party merely,—that is, a debtor either actually or contingently to the estate; and surely in that quality he can claim no commission, although in that quality a question has arisen how far he is liable to the estate for his retention of the price and the profits, which question has been finally disposed of in deciding upon the original appeal.

The question of costs below, which is made one

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ground of the cross appeal, is virtually decided by affirming the interlocutors appealed from.

In consideration of the doubts which I entertained, as I have already stated, upon the principal question in the original appeal, I conceive that how laborious soever for the House the cause has proved, and how burthensome soever for the parties, it was a fit subject of appeal.

In affirming the judgment below, I therefore am clearly of opinion that no costs of that original appeal should be allowed; nor must it be forgotten, that though a party by styling himself trustee repeatedly may not make him one, yet it leads his adversary naturally to treat him as such.

But I do not at all view the cross appeal, and the question of commission raised by it, in the same light. And I have but one doubt as to giving the costs of that cross appeal; namely, that but for the original appeal we might possibly never have had the refusal of commission disputed here. It would, however, be a dangerous principle to hold, that a groundless if not a frivolous cross appeal might always be safely presented against one part of a judgment merely because the résidue of the judgment had not been acquiesced in by the party against whom it was given; and I therefore, having no doubt at all upon the merits of the cross appeal, recommend your Lordships, in affirming the judgment, to give the costs of that cross appeal.

The House of Lords ordered and adjudged, That the said original and cross appeals be and are hereby dismissed this House, and that the interlocutors, so far as therein

respectively complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant in the said cross appeal do pay or cause to be paid to the said respondent John Court and others the costs incurred in respect of the said cross appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered and directed, That the costs incurred by the respondents in the said cross appeal in the proceedings in the Court below, occasioned by the said Abraham Wildey Robarts disputing his liability to pay five pounds per centum per annum without annual rests, and by his claim of commission, or in relation thereto respectively, shall be paid by the said Abraham Wildey Robarts, the appellant in the said cross appeal, if any such costs remain unpaid: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with this direction, to do therein as shall be just and consistent with this judgment and direction.

BAXENDALE, TATHAM, UPTON, and JOHNSON—DAY and HUGHES, Solicitors.