March 1. 1824. Prin. 4. 9.; Campbell, Jan. 17. 1749, (6121.); Findlay, July 29. 1779, (3188.); Crawford, Nov. 17. 1795, as rev. March 14. 1806, (No. 3. App. Deathbed); Batley, Feb. 2. 1813, (F. C.)

J. CHALMER—J. CAMPBELL,—Solicitors.

(Ap. Ca. No. 4. and 5.)

No. 3. JAMES, DUKE OF ROXBURGHE, Appellant.—*Solicitor-General Wetherell—Mackenzie.*

A. SWINTON, W. S. Respondent.—*Warren—Adam.*

Judicial Factor—Bona Fides.—A judicial factor having been appointed on an estate pending a competition, and the widow of the last proprietor having worked quarries in her locality lands, and enjoyed the proceeds, and having been found not liable to repeat these proceeds, as having consumed them bona fide; and another party having, under a title ex facie good, drawn part of the rents of the estate, and been also found a bona fide possessor; and the judicial factor having been authorized to appoint sub-factors; and having paid a reasonable salary to a sub-factor; and (under the above exceptions) having uplifted the rents and feu-duties of the estate.—Held, 1. (affirming the judgment of the Court of Session), That he was not liable to account for the proceeds of the quarry and the rents, nor for the sum given as salary to the sub-factor. But, 2. (reversing the judgment), That he was bound to account for all the interest received by him on the rents and profits uplifted by him.

March 2. 1824.

1ST DIVISION.

ON the death of William, Duke of Roxburghe, a competition having arisen for his estates, the Court of Session, on the 17th December 1805, pending the discussion, found, 'that the Duchess-Dowager of Roxburghe is in hoc statu entitled to the possession

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'history of the case very well. Before it came to be heard at the bar of the House of 'Lords, the parties understood that Lord Hardwicke, then Chancellor, thought that the 'interlocutor of the Court of Session was ill-founded, in consequence of which under-'standing, the matter was compromised by payment of a large sum of money. When 'the counsel were called to the bar, the cause was not argued, but it was stated that 'the matter was made up, and both parties concurred in wishing the decree to be affirm-'ed; upon which Lord Hardwicke observed, "that the respondent had done wisely in 'not risking a judgment;" and then the interlocutor was of course affirmed. In the 'case of Crawfordland, Lord Justice-Clerk Braxfield said, that when the case of Cunning-'ham "went to the House of Peers, it was understood that the Lord Chancellor held it 'to be a bad decision, and the matter was transacted, and a great sum of money paid 'to the disponee. I have always been of the opinion of the Lord Chancellor, that had 'it been brought to trial in the House of Peers, it must have been reversed; and it has 'ever since here been held as an erroneous decision." Lord Eskgrove said, "The case 'of Cunningham *v.* Whiteford always appeared to me a very extraordinary one; and 'to the decision which was pronounced by this Court I could have paid no regard."' The respondent, however, stated that this rested upon no sufficient authority.

'of her locality lands, as contained in her marriage-contract and 'infeftment; sequestrated the whole other lands and estate of 'the dukedom of Roxburghe, to which the late William, Duke 'of Roxburghe, made up titles as heir of tailzie and provision, 'in order that the same may remain in the hands of the Court 'till the issue of the competition which has arisen among the 'different parties claiming right to the said estate in consequence 'of the death of the said late Duke; appointed Archibald Swin- 'ton, writer to the signet, to be principal factor and receiver of 'the rents of the said estate, with power to name sub-factors 'under him, and with the other usual powers, he always finding 'caution before extract, in terms of the Act of Sederunt.' March 2. 1824.

Among the lands, to the possession of which the Duchess of Roxburghe was entitled, were those of Sprouston and Broxmouth, in which there were quarries which had been worked by the Duke.

Certain other lands of the name of Burward and Westergrange, forming part of the Roxburghe estate, had been wadsetted by a former Duke; and in 1764 Duke John (the predecessor of Duke William) redeemed them, after which his Grace conveyed them to Mr Wauchope, W. S. as trustee, who, upon the death of Duke John in 1804, took possession of them, and continued that possession during the life of Duke William.

Mr Swinton accepted of the office of judicial factor at a salary of L.500 per annum; and he appointed as sub-factor a Mr Haldane, who had been employed as such by the late Duke, and who also acted as factor for the Duchess.

From 1805 to 1811 the Duchess worked the quarries, and through Mr Haldane received the proceeds; but in that latter year, it having been discovered by the appellant, (who was on the eve of ultimate success in the competition), that she had no right to do so, an action, on his suggestion, was brought by Mr Swinton against her, in which judgment was pronounced, finding that she had no right to work the quarries; but that she was a bona fide possessor, and therefore was not bound to repeat the bygone proceeds, amounting to about L.2500.

After the competition was terminated by a judgment in favour of the appellant, he farther discovered, that the lands which John Duke of Roxburghe had disponed to Mr Wauchope, formed part of the entailed estate; and having brought an action for repetition of the bygone rents which had been drawn by Mr Wauchope since the death of the Duke, he was assoilzied as being a bona fide consumer.

March 2. 1824. Pending the competition, large sums came into the hands of Mr Swinton, which he deposited in bank, with the exception of L.9200, which was lent upon heritable bonds to persons suggested by the agent of the appellant.

In the meanwhile the sequestration had been recalled, and an accounting having been gone into between the appellant and Mr Swinton, the former objected to the accounts of the latter:—

1. That as it was his duty to have protected the rights of all concerned pending the competition, he ought not to have allowed the Duchess to work the quarries, and therefore he was bound to charge himself with the L.2500 which she had been allowed to retain on the ground of bona fides.

2. That in like manner he ought to have investigated the titles, to ascertain what the lands were which fell under the entail, and consequently under the sequestration; but that by his failure to do so, the rents of the lands possessed by the trustee of Duke John had been lost, and therefore he was bound to charge himself with the amount.

3. That he was not entitled to take credit for the L.300 of salary to Mr Haldane the sub-factor, because it was his duty to have paid it out of his own salary. And,

4. That as there was no evidence that Mr Swinton had lodged the money received by him in bank, he was bound to account for the legal interest of it, with periodical accumulations, and, at all events, for that of the sums which had been lent on heritable bonds.

To this Mr Swinton answered,—

1. That as, by the warrant under which he had been appointed, the Duchess had been found entitled to possession of the lands of Sprouston and Broxmouth, whereby they were excluded from the sequestration, it was not incumbent on him to disturb that possession; and that he only did so at the requisition of the appellant, and for his behoof; and besides that, as she had been found to be in bona fide, there were no grounds for holding that Mr Swinton was in mala fide, or liable for these rents.

2. That as the sequestration was limited to the lands to which Duke William had made up titles, and as those possessed by the trustee did not fall within that description, he had no right to interfere; and besides, as it had been found that the appellant had no right to recover these rents from that trustee, so there was no principle upon which he could be entitled to restitution of them from Mr Swinton.

3. That power was granted to him to appoint sub-factors,

and the salary which had been given was perfectly reasonable. And,

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4. That it was proved by bank receipts, that the money had been deposited in bank, with the exception already mentioned, for the legal interest of which he was willing to account.

The Court, on the report of an accountant, and on advising informations, 'repelled the four objections stated by his Grace 'to Mr Swinton's accounts, and reported upon by the accountant; 'and of new remitted to the accountant to proceed accordingly.' And to this interlocutor they adhered, on the 23d of November 1819.*

The Duke having appealed, the House of Lords 'ordered 'and adjudged, That the interlocutors complained of, so far as 'the same repel the three first objections stated by the Duke of 'Roxburghe, (since deceased), be affirmed: And it is declared, 'That the said Archibald Swinton ought to account to the trus-'tees and executors of the said Duke for all the interest made 'and received by him upon the rents, feu-duties, and profits of 'the said sequestrated estate, received by him as judicial factor: 'And it is therefore ordered and adjudged, That the said Archi-'bald Swinton do account for the same accordingly: And it is 'further ordered and adjudged, That the said interlocutors, so 'far as the same are inconsistent with this declaration, be re-'versed: And it is further ordered, That the said cause be 'remitted back to the Court of Session, to do therein as shall 'be just.'

Lord Gifford.—My Lords, in the case in which the Duke of Roxburghe is appellant, and Archibald Swinton, writer to the signet, is the respondent, which was heard before your Lordships a few days ago, I will now take the liberty to offer to your Lordships my opinion.

It appears, that during the competition for the Roxburghe estates, the respondent, Mr Archibald Swinton, was appointed, by interlocutor of the 19th December 1805, principal factor and receiver of the rents of the estate which the Court of Session had sequestrated. The interlocutor finds, 'that the Duchess,' &c.

My Lords, after that competition had ended, the respondent, Mr Swinton, had to render his accounts, and they were accordingly remitted to an accountant, who, after having examined them, made a report to the Court of Session, in which he stated, that several objections had been made by the Duke of Roxburghe to the account so rendered by Mr Swinton; first, as to the quarry rents of the estate, both of Sprous-

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* Not reported.

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ton and Broxmouth; and he stated, that these quarries were upon the locality lands of the Dowager Duchess, and appear to have been considered by the factor as falling under her locality till 1811, when an action was commenced against her Grace, in which it was found, that her Grace had no right under her locality to work these quarries; but the Court ultimately found the Duchess entitled to retain the bygone proceeds thereof, as bona fide consumpti. The Duke of Roxburghe alleges that, in consequence of the negligence of the factor from 1805 to 1811, he sustained a loss to the amount of above L.2500, which he considers entitled him to insist should be made up to him by the factor, who ought to be charged with the proceeds of these quarries from the commencement of his factory, so long as the same were drawn by the Dowager Duchess.

The Duke then made another objection with respect to certain rents of a property called Wester-Grange; and the accountant reported, that 'those lands had been wadsetted by the family at an early period, but 'were redeemed by Duke John in 1764, and an absolute discharge and 'renunciation of the wadset taken, by which it was fully extinguished, 'and the lands free and disburdened came to be possessed under the 'entails. Notwithstanding of this, Duke John's trustee, Mr Wauchope, 'was allowed to possess these lands, and draw the rents thereof: the 'lands are said to have yielded a rent of L.212 at the commencement 'of the factory, and to have since considerably increased; all of which 'were paid over to Mr Wauchope, in place of being accounted for by 'the factor; and the Duke of Roxburghe contends, that he is entitled 'to insist that these be annually charged against Mr Swinton with 'the other rents of the estate.'

The third objection was to the sub-factor's fee. It appears that Mr Swinton had appointed Mr Haldane his sub-factor, and had allowed him L.300 a-year: the Duke contended that he ought not to be allowed that sum.

Then there was another objection in respect of interest. 'Mr Swin-'ton considers that he was not to be charged with interest upon his 'accounts according to the general mode of accounting of judicial 'factors; and states, that as it was supposed the competition for the 'Roxburghe estate would not be of long continuance, it was therefore 'understood, at the time of his appointment, that the rents were not to 'be lent out upon permanent securities bearing the legal interest, but 'were to be deposited in a bank.' The Duke contended, therefore, that Mr Swinton must charge himself with bank interest on every sum of interest.

My Lords, on these objections thus reported coming before the Court of Session, the Court, on the 25th February 1819, pronounced this interlocutor:—'The Lords having advised this information for 'Archibald Swinton, with the counter-information for his Grace the 'Duke of Roxburghe, they repel all the four objections stated by his 'Grace to Mr Swinton's accounts, and reported upon by the accoun-

'tant; and of new remit to the accountant to proceed accordingly.' Against this interlocutor there was a reclaiming petition; and their Lordships, on the 23d November 1819, 'having resumed consideration 'of this petition, and advised the same with the answers given in there-'to, they refuse the desire of the petition, and adhere to the interlocu-'tor reclaimed against.' The result was, that the Court of Session disallowed all those four objections made by the Duke of Roxburghe to Mr Swinton's accounts. My Lords, against these interlocutors an appeal has been brought before your Lordships' House; and with respect to the two first objections, those relating to the quarry rents of the estate, and the rent of this estate of Wester-Grange, I would state to your Lordships that the quarries are situated in the lands of Sprouston and Broxmouth, which were part of the locality lands of the Duchess. She worked those quarries until the year 1811, and was permitted to receive the profits; but at that time it was thought she had no right whatever to the profits of those quarries, and a suit was instituted against her, the result of which was, that from that period those profits were adjudged to belong to the Duke of Roxburghe; but it was found by the Court of Session, 'that she was not bound to repay bygone 'profits, because it was held that she had acted optima fide in uplifting 'the rents and profits of all these subjects, and that she enjoyed the 'same for several years without the slightest interruption or challenge.' My Lords, the effect of that judgment appears to me to have been, that it was thought by the Court of Session, that though the Duchess of Roxburghe was not the true proprietor of those quarries, and therefore justly entitled to those profits, there was probable ground at least for her continuing in possession, and that upon that ground she was not bound to repay this rent. Now, under these circumstances, it appears to me that it would not be just to say, that the judicial factor is to account to the Duke of Roxburghe for these profits. It appears that a suit was instituted against her, and that certainly the opinion of the Court of Session was, that there was a probable ground for her retaining possession, and therefore that she was not bound to repay those profits. It seems to me, therefore, that the Court of Session have done right in saying, that the factor has not done any thing to make him liable for those profits, which they had held the Duchess not liable to repay. With respect to the estate of Wester-Grange, the case is still stronger: for though undoubtedly that estate was part of the lands in right of which, and upon which, the Duke of Roxburghe had made up titles, it appears that Mr Wauchope, the trustee, had been permitted in the lifetime of the late Duke to retain possession of the lands, and that he continued in possession during the sequestration. It appears that, strictly speaking, they were part of the entailed lands; but it was the intention of the Duke to have taken them out of the entail if he could have done so: he conveyed them in trust, and, in consequence, they remained in possession of Duke John's trustees until the sequestration was recalled. It was there again held, although Duke

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John's trustee was not entitled to those lands, yet he had held them on the probable ground of title, and that, therefore, he was not subject to pay the bygone rents to Duke James. Now it appears to me, that it is a stronger case than the other. It was contended in the Court below, that the judicial factor was bound to institute a suit to recover these lands, although at that time they were possessed by another person, they being held, as it is alleged, under a fraudulent ground of title. It appears to me, therefore, that the Court of Session have determined right in repelling that objection also.

The third objection related to the limited fee paid by the judicial factor and receiver of the rents of the estate, who, with a power to name sub-factors, had allowed Mr Haldane L.300 a-year during the time these estates were under sequestration. It is not contended at the Bar that it was an exorbitant sum paid to Mr Haldane, but they rely on a letter of Mr Swinton, after the discussion had taken place, from which they infer that he might have obtained the services of Mr Haldane at a less rate; but, inasmuch as the Court of Session held that he was entitled to have the nomination of his sub-factor; and there is no pretension at the Bar that this was an unreasonable sum, it appears to me that the Court of Session have done right in repelling that objection.

The question, however, of the interest, stands on a very different ground. Mr Swinton contends, that it was understood at the time he was appointed, that he should have only a limited sum paid him, and that he should not be paid at the usual rate of factor; that at that time it was thought that the competition for the succession would not be of long endurance, and that therefore the rents were not to be lent out on permanent securities, bearing the legal interest, but were to be deposited in a bank ready to be paid up to the successful candidate, as soon as the competition should be over,—an event which, it is stated, was looked for every Session of Parliament from year to year for the last five years that the respondent held the office. In particular, he states, that that was his Grace's understanding, and that he availed himself of it, which can, if necessary, be shewn in the most satisfactory manner; and therefore he contends, that it would be too much for the Duke now to say, that he was liable for interest at a rate which he never received; and that, although that was understood at the time, and he had confided in that understanding, he may now come upon him for such interest as might have been made, if otherwise employed. But, my Lords, Mr Swinton himself admits, that a very considerable sum of money had not been deposited in the bank, but had been lent out on permanent securities, and had produced more than the interest which he allowed by a sum of L.318, which he offers to account for, and which it appears to me strange the Court of Session have taken no notice of. I do not find in the Judges' notes that that was brought before the Court; but in the manner in which it was stated at the Bar of this House, it was admitted by the Counsel for Mr Swinton, that it

was impossible to contend that he was not subject to that sum, nor did they seem very strenuously to resist that they were bound to account for all the interest that this factor had really made of this sequestrated property; for, undoubtedly, it cannot be contended that he was entitled to any additional profit arising out of this administration, he being allowed a very handsome salary for the administration of this estate. The Duke contends, that he is either to account for the interest he has made, or that he ought to be charged the legal interest; and it is agreed by the Counsel for the appellant, that if he will consent to account for the profits he has made, they shall be satisfied. It appears to me, therefore, with respect to the fourth objection repelled by the Court of Session, that it ought to be allowed, and that the case ought to go back, in order that an inquiry may be made as to the real interest this gentleman has made of the sequestrated estate. And I should propose, therefore, that your Lordships should order that the interlocutors complained of, so far as the same repel the three first objections stated by his Grace the Duke of Roxburghe, should be affirmed; but that it should be declared by this House, that the said Archibald Swinton ought to account to the trustees and executors of the said Duke for all the interest made and received by him upon the rents, feu-duties, and profits of the said sequestrated estate received and to be accounted for by him as judicial factor. And that the several interlocutors, so far as the same are inconsistent with that declaration, be reversed, and that the cause be remitted back to the Court of Session in Scotland, to do that which is consistent with this finding.

March 2. 1824.

SPOTTISWOODE and ROBERTSON—A. MUNDELL,—Solicitors.

(Ap. Ca. No. 6.)

YOUNG, ROSS, RICHARDSON and Company, Appellants. *Adam—John Campbell.*

WILLIAM MUIR, Trustee of JAMES AUCHIE and Company, Respondent.—*Stephen—Whigham.*

No. 4.

Bankrupt—Statute 54. Geo. III. c. 137.—Repetition—Proof.—A creditor of a Company under sequestration having adopted legal proceedings for recovery of his debt against one of the partners in Jamaica, (whose estate had not been sequestrated); and the Provost Marshall of the island having incurred a liability for the debt, by suffering the partner to escape, and having paid the debt; and the trustee on the estate of the Company having brought an action against the creditor for repetition of the money, alleging that the debt was paid out of the proceeds of the Company's estate delivered to the Provost Marshall; and having produced a correspondence between himself and his attorney to prove that fact.—Held, 1. (reversing the judgment of the Court of Session), That the creditor was not bound to repeat; and, 2. That the correspondence was evidence against, but not in favour of, the trustee.