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The Lord Ordinary and the Court found there was no evidence of the appellant's allegation, and repelled the claim; and on an appeal the House of Lords found, 'That there is no 'agreement binding on the creditors, parties to the Restrictive 'Agreement, to allow the deceased John Taylor ten per cent for 'commission and trouble on the amount of the sums awarded 'or paid to these creditors, defenders in the process of multiple-'poinding: And with this finding it is ordered and adjudged, 'that the said interlocutor, so far as the same is complained of, 'be affirmed; but without prejudice to the claim of the pursuers 'in the process of multiplepoinding, to have credit in the ac-'counting for the different sums alleged by them to have been 'allowed to and retained by the said John Taylor, deceased, for 'his trouble and commission, upon his settling with the credi-'tors respectively: And it is further ordered, that the cause be 'remitted back to the Court of Session, to do therein as shall be 'consistent with this judgment, and as shall be just.'

C. BERRY—A. MUNDELL,—Solicitors.

(Ap. Ca. No. 50.)

No. 37.

JOHN and GEORGE TAYLOR, Appellants.—*Jeffrey—Ro. Bell.*

WILLIAM KEITH, Esq. Factor for the York Buildings Company, and Others, Respondents.—*A. Wood—D. A. Blair.*

Agent and Client—Fraud—Repetition.—An agent having been employed to appear for a client in a submission, and to recover payment of part of a debt due to him, in virtue of bonds under which it appeared to be still resting owing; and having stated his case on that assumption, and obtained a decree-arbitral; and thereafter being made aware that the debt had been fully paid, but having no authority to reveal this, and having received payment of the money, and remitted it to another agent of the client, who paid part of it to the client, and agreed to pay the residue to other parties having interest; and it having been found that the decree-arbitral could not be reduced;—Held, (reversing the judgment of the Court of Session), that the agent was not liable in repetition to those from whom he had recovered payment.

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2D DIVISION. Late Lord Meadowbank. Lord Cringletie.

AMONG other creditors who claimed as creditors upon the estates of the York Buildings Company, which had been sequestrated, and of which a process of ranking and sale had been

brought, was Richard Mackelcan, who founded upon 13 bonds for L.100 each, dated in 1732. These bonds had been issued by the Company, with a view of raising money, at a time in which they were much embarrassed; and they had been pledged to a person of the name of John Lepper, in security of L.610, which he had advanced on the faith of them, with interest at five per cent. These bonds were not redeemed, and being transmitted by blank indorsations, they eventually came into the hands of Mackelcan, after passing through those of one King. In virtue of these bonds, Mackelcan, in 1778, obtained a decree of adjudication against the estates of the Company. By a judgment of the Court of Session in 1786, it was found, in regard to the deposited bonds, 'that in so far as the present holders, claiming on the 'said bonds, are indorsees or assignees for gratuitous causes, or 'representatives of those with whom they were originally pledged 'or issued as a security for money below the amount of such 'bonds respectively, it is competent for the creditors of this 'Company to object, that the present holders of such bonds can-'only be ranked for the money for which said bonds were origi-'nally pledged or deposited, or a proportion thereof, so far as 'still due.' At this time it was understood by the other creditors, that Mackelcan was a singular and onerous successor of the bonds held by him; and, therefore, that he was entitled to claim the full amount, which at this date amounted, with interest, to L.3378. 5s. 4d.; whereas on the supposition that he fell under the above principle, his debt would have amounted only to L.2500. He acceded to the *Crown and Anchor Agreement*, (see ante, No. 34.), and there limited his claim to L.2217. Accordingly, with consent of the Company, an interim warrant was, on the 11th March 1787, obtained in the ranking and sale for payment to him of L.3065. 16s. 6d. and of which there was paid to him L.2586. 16s. 10d. the residue being retained on account of his share of expenses. In this and other matters in regard to his claims upon the York Buildings estates, he employed, in Edinburgh, the late John Taylor, writer to the signet, as his agent; and, in London, Thomas Lloyd, solicitor there. On receiving payment of the above sum, Mr Taylor remitted L.2586. 16s. 10d. to Lloyd, who paid it to Mackelcan, by whom this receipt was granted:—'Received, the 4th day of October 1787, 'of Thomas Lloyd, Esq. the sum of L.2586. 16s. 10d. being 'principal and interest agreed to be accepted by me, for my 'York Buildings Company's bonds, after deduction of expenses; 'and I hereby consent to Mr Lloyd's executing such assignment

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June 4. 1824. 'on the remainder of the debt, as he shall see occasion.' This payment was more than sufficient to discharge the claim of Mackelcan, on the supposition that he was a representative or gratuitous assignee of Lepper, the party with whom the bonds had been pledged; but was not so on the supposition of his being a singular and onerous indorsee. The Crown and Anchor Agreement having been abandoned, the *General Agreement* and submission was entered into, and also the *Restrictive Agreement*, (see ante, No. 34.) to both of which Mackelcan became a party, and under the Restrictive Agreement he limited his claim to L.720. As, however, the claims of the Restrictive creditors were to be made as in competition with the other creditors at their full amount, a claim was lodged for Mackelcan on that principle with the arbiters by Taylor, who there represented, that Mackelcan had purchased them upon the Stock Exchange of London, and consequently, that, being an onerous indorsee, he was entitled, under the judgment of the Court, (which was recognized as the established rule in deciding on the respective claims), to be ranked for the full amount of the bonds, with interest, under deduction of the sum which had been paid to him. This statement, it was not denied, was made by Taylor under the firm belief of its truth. Accordingly, the arbiters, on the 30th of August 1794, proceeding on the footing that Mackelcan was a purchaser, found that his claim was to be sustained at its full amount, so that he was entitled to draw L.2832. 16s. 3d. Of this, however, as in a question with the creditors under the Restrictive Agreement, he could only receive L.720—the balance being divisible among them pro rata. Taylor having communicated this decision to Lloyd, that person immediately wrote that a mistake had been committed, because Mackelcan had acquired the bonds, not as an onerous purchaser, but as the heir and representative of King, who again had acquired them in right of his wife, the daughter of Lepper, with whom they had been orinally pledged for L.610; and, consequently, as he had already got full payment, he was not entitled to receive any thing. The decree-arbitral was signed upon the 9th of September, and Mr Taylor did not receive Lloyd's letter till the following day. Under these circumstances Mr Taylor did not consider himself justifiable in communicating the mistake to the competing creditors, as he had no authority for doing so, either from Mackelcan or from the creditors under the Restrictive Agreement. Mackelcan having at this time died suddenly, Lloyd applied to his heir-at-law, and obtained from him an assignation to the debt

in absolute terms in his own favour, and a power of attorney to Taylor to uplift the money. Under that power Taylor obtained payment of the money, and remitted it to Lloyd, who thereupon paid the L.720 to the heir of Mackelcan, being the sum to which he had right under the Restrictive Agreement. With regard to the residue, he had previously written to Taylor, that June 4. 1824.

'I shall hold myself bound to distribute the surplus beyond the 'subscribed sum among the other creditors, parties to the agree- 'ment, who will not draw any thing under the decree of the 'arbiters.' About five years after these matters had occurred, and when some suspicion had been excited, Taylor communicated the circumstance to the common agent under the ranking and sale, who thereupon raised an action of reduction, against Mackelcan's heir, of the decreet-arbitral, in so far as he was interested, and concluding also for repetition of the above sum. At the same time Mackelcan's heir brought an action of reduction of the assignment in favour of Lloyd, and of count and reckoning and relief, both against him and Taylor. These cases having come before the late Lord Meadowbank, his Lordship inter alia found, 'That it is admitted by Mr Lloyd, that owing 'to the failure on his part in communicating to the arbiters the 'fact that Richard Mackelcan succeeded Lepper, the pledgee, 'and King, the claimant in Chancery, for a restricted sum, 'titulo lucrativo, the arbiters were led to sustain that claim, 'which otherwise they would have found to have been already 'satisfied and paid by the transaction of October 1787; and that 'he, Thomas Lloyd, refrained from an immediate application to 'the arbiters on the subject, from the design of exercising the 'trust he held from Mackelcan, so as to distribute the money 'thus obtained in the same way as would have followed had the 'decree of the arbiters been corrected: Finds the pursuer, 'George Mackelcan, is entitled to see that the money recover- 'ed is thus applied by Mr Lloyd: Finds, that owing to the 'funds falling short, the creditors, parties to the agreement 'and submission, draw many per cents less than the amount to 'which the arbiters sustained their claims; and that the whole 'sum allowed by the decree of Mackelcan must fall greatly short 'of affording these creditors full payment of what they were en- 'titled to: Finds, that the common agent has a title and interest 'to see that the money has been applied by Mr Lloyd, by their 'authority, or for their behalf, according to their respective in- 'terests; and that when he has received this satisfaction, he has

June 4. 1824. 'no further interest to insist in the present process: Therefore 'ordains Thomas Lloyd to put in a special condescendence, 'or account, how he has disposed of, or is ready to dispose of, 'the money in question, conformably to the rights of the credi- 'tors interested therein, and that in three weeks; and supersedes 'deciding as to the challenge of the pursuers' assignment to Mr 'Lloyd till that account is considered; as also as to the effect, 'quoad Mr Taylor, of the allegation that he failed to communi- 'cate to the common agent the fact disclosed in Mr Lloyd's let- 'ter, received by him on the 16th September 1794; and hoc 'statu finds it unnecessary to decide on the competency or merits 'of the reduction of the decreet-arbitral, and decreet of ranking 'and division following upon it.' Mackelcan and the common agent having reclaimed, the Court adhered, and refused the petition of the common agent as unnecessary.

The case having then returned to the Lord Ordinary, and the question having been argued as to the liability of Taylor, (who was now dead, and in whose place his son, the appellant, had been sisted), Lord Meadowbank assoilzied him, and at the same time issued the following opinion: 'In the ordinary case of an 'agent, the late Mr Taylor would not only have been justifiable, '(but, had he acted otherwise, been blamable), for concealing 'the nature of Mackelcan's title to Lepper's bonds; and the 'Ordinary has yet to learn, that an agent, who cannot be blamed 'for his pleadings, is, in a civil action, to be sued as a delinquent 'for taking payment or satisfaction, on account of his clients, of 'the decree obtained by his clients in consequence of these 'pleadings, though it seems chiefly on this point that the pur- 'suers argue with seriousness. The Ordinary's difficulty lay in 'another quarter, in there appearing to be a sort of understand- 'ing that Mr Taylor would have disclosed the fact, had he 'learned it in time for the decreet-arbitral to have been adjusted 'to it without delay and inconvenience. But he has not seen any 'thing like evidence of this understanding having been entertain- 'ed by Mr Taylor, far less that he would have acted correctly 'had he conducted himself according to such a view of his 'powers. His general agency in the discussing of questions 'where all were interested, and for the expense of which he was 'paid by all, could not, it is thought, have warranted any such 'proceeding. Some feeling of the influence of the Restrictive 'Agreement, the Ordinary is apt to think, may have operated on 'the minds of the agents, as sanctioning such an extraordinary

'power. But this agreement had not been founded on in judicio, and the parties to it, as such, were unknown to the arbiters; so it plainly gave no authority to Mr Taylor's agency before them, as agent for individuals, to entitle them or competitors to expect or demand communications, otherwise unfit for agents to make. June 4. 1824.

'That agreement, however, is extremely material in this cause, comprehending directly so large a proportion of the acceding creditors, and indirectly the principal creditor, Jones, who accepted a guarantee, unquestionably on the faith of it, and entered into a compromise as to that guarantee, contemplating, as it should seem, the very fund produced by Mackelcan's debt. Mr Taylor seems to have been satisfied with Mr Lloyd's promise to apply the fund, as in this view it should have been applied, and the common agent and Mr Swinton to have been equally satisfied, after all had been brought to light by Mackelcan's dissatisfaction. In 1800, when that happened, Mr Lloyd had sufficiency of fund here to ensure the most correct application to the creditors of the award to Mackelcan, and nothing was easier than to attach that fund; but, instead of attaching it, the Ordinary has occasion to know that he was put to much trouble, in March 1804, by the urging him, of all the agents, to get a division accomplished that session, whereby Mr Lloyd obtained very large sums from a division, out of part of which, it is said, the compromise to Jones was satisfied. The Ordinary observes, that the facts of this matter are not disputed in the memorial for the common agent and Mr Swinton; and therefore, since Mr Lloyd's undertaking was then known, and Mr Taylor's reliance on it being declared in Court, it is thought that these gentlemen must also have relied on it as sufficiently satisfactory, otherwise they would have taken the measures of security, instead of taking advantage of it for the benefit of particular clients. In short, as far as acting in judicio, Mr Taylor's conduct does not appear, for aught yet seen, to be actionable; and so far as acting ultra, there seems to have been a knowledge of the Restrictive Agreement, and a reliance on its efficacy, and a disposition to let the machine go on under Mr Lloyd's management, among all the agents, and to make use of it for their clients as occasion served; and to attack Mr Taylor's representatives now, on account of a sort of versans in illicito, and so bound to guarantee Lloyd's engagements, while, if they doubted, they themselves could have taken security at pleasure, can only be accounted for from new views being taken up, after a

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'lapse of years, while the notions upon which all had been act-
'ing had become faint or forgotten.'

To the above judgment the Court at first adhered, 'in respect 'of the former proceedings and interlocutors pronounced in this 'cause;' but thereafter, on the 19th June 1818, they altered, and found, that 'the respondents are liable in payment of the dividend 'in question, with interest thereof, together with the expenses of 'process;' and to this judgment they adhered on the 16th of February 1819. Immediately thereafter a new action was raised at the instance of the respondent, Keith, as factor on the estates of the Company, concluding for payment from the appellant and his brother, George Taylor, of the above sum, which was conjoined with the other actions. On the part of George Taylor it was then contended, that he did not represent his father; and by the appellant, that as the money which his father had recovered had been remitted to Lloyd, the agent in London of the creditors under the Restrictive Agreement, he was entitled to retain such part of the sum as corresponded to their interests. The cases having then come before Lord Cringletie, his Lordship pronounced this interlocutor:—'In the original action, considers 'that, as the Court has by a final interlocutor found that the 'respondents are liable to repay the dividend in question, with 'interest thereof, with the expenses of process, and remitted to 'the Lord Ordinary to proceed accordingly, the present Lord 'Ordinary has no discretion but to decern, in terms of that 'finding, after the sum due under it shall be arithmetically com-'puted and ascertained, and the expenses modified; and conse-'quently, that he has no power to ascertain any claim of deduc-'tion from the sums so found due. *2dly*, The Lord Ordinary 'finds, that there are no termini habiles for trying the question, 'whether the respondents have or have not claims of deduction on 'account of the creditors of said Company who were parties to 'the Restrictive Agreement, as none of these individuals are par-'ties to this suit; and therefore repels the claim of deduction 'made by the respondents, and decerns against the respondents 'for payment of the sum of L.2832. 16s. 3d. with interest 'thereon, at $4\frac{1}{2}$ per cent, from the term of Whitsunday 1794 to 'the 8th day of June in the following year, and with interest 'at 5 per cent thereafter, during the not-payment, to Mr Wil-'liam Keith, accountant in Edinburgh, the judicial factor for 'said Company; reserving to the respondents to claim either 'against the creditors in the Restrictive Agreement, or in any 'other way that they shall be advised, for payment of the sums

'for which he has claimed deduction in this process: Finds 'them liable for the expense of these proceedings, with the ex- 'ception of the summons at the instance of the said William 'Keith, and bringing the same into Court.' On advising a representation, his Lordship adhered, but of consent reserved consideration of the liability of George Taylor in hoc statu; and to these judgments the Court adhered on the 8th June 1821.* June 4. 1824.

The appellant then brought an appeal, and contended,—

1. That although a man of honour may decline a fraudulent case, or may give it up if he find out the fraud during its progress, yet, without the instructions of his client, he has no right to proclaim to his adversary, or to the Judge, what never would have come to his own knowledge except in the confidence that it was not to be revealed; and therefore, even supposing the fact had been communicated in proper time to Mr Taylor, that Mackelcan was a gratuitous indorsee, and as such had received full payment, still, as the documents on which he founded afforded a title on which to claim as an onerous holder, Taylor could not be rendered liable for not divulging that which, as a confidential agent, he was bound to keep secret; and if so, then the circumstance of his afterwards recovering the money could not fix upon him any responsibility for the debt.

2. That as he had bona fide believed and represented that Mackelcan was an onerous purchaser, and as he was not aware that he was not so till after the decree had been signed, he was not entitled, without the authority of his clients, to make his adversary aware of the mistake; and that as he had not received any such authority, and had, in virtue of a regular power, recovered and remitted the money to Lloyd, who had undertaken to distribute it among the creditors to the Restrictive Agreement, no liability could attach to him.

To this it was answered,—That although an agent is not bound to reveal that which is confidentially communicated to him by his client, yet if he make himself particeps fraudis, a responsibility will attach to him; and therefore, as in this case Taylor, after he was in the full knowledge of the true fact, availed himself of the fraud to uplift the money, he was liable to account to those from whom he had so obtained it.†

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* See 1. Shaw and Ballantine, No. 67.

† In the appeal case for the respondents there is little or no argument upon this general point, but in their pleadings in the Court of Session it was thus stated:— 'The representers believe they may safely admit this position, that an attorney is not

June 4. 1824. The House of Lords 'ordered and adjudged, that the several 'interlocutors complained of be reversed, and that the defenders 'be assoilzied.'

Lord Gifford.—My Lords, This is a case in which the Messrs Taylors are appellants, and Mr Keith, who was factor over the sequestrated estate and funds belonging to the York Buildings Company, and several creditors of the Company, are respondents. I will endeavour shortly to state to your Lordships the circumstances under which this action arises.—My Lords, there was a person of the name of Mackelcan, who being possessed of various bonds of this Company,

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'bound to reveal the secrets of his client, and consequently that an action will not lie 'against him for concealing facts tending to injure his client in the course of conduct-'ing his cause. So far the acknowledged land-marks of an attorney's province and 'duty protect him. But it is humbly conceived, that there he must pause. The privi-'leges of a practitioner, or legal adviser, will not sanction even the most cautious 'approach to an act of connivance. The agent or counsel may conduct or argue his 'client's cause in safety, and in what manner he pleases, but he must not aid and abet 'the client in reaping and securing the profits of a claim unjustly earned, upon state-'ments positively false, and upon a title radically bad. The representers will admit, 'though it is with pain they do it, that an attorney may, without incurring personal 'responsibility, carry on the cause of his client, though that cause should proceed from 'a fraudulent design. To that length he may go, but no farther. If he actually 'receives the money thereby fraudulently obtained, he becomes accessory to a positive 'wrong, and makes himself responsible to the innocent and defrauded party, whose 'property has been unjustly carried off. If so, it would appear that he may be pur-'sued as a delinquent or wrong doer, inasmuch as his liability is founded upon tort, 'which is an established legal ground of responsibility.

'There is a plain and obvious principle which separates the path of the attorney 'from that of a delinquent. No agent is bound to betray the confidence reposed in 'him. But if the agent co-operate in carrying into effect any fraudulent plan, and 'receive the unlawful spoils, he makes himself a quasi principal, and participates in the 'delinquency of his employer.

'When it is maintained, therefore, that Mr Taylor made himself responsible for 'the money which he drew in Mackelcan's name, it is upon this plain ground, that 'his receiving that money, knowing it to be not due, was a tortious and unlawful 'act. Mr Taylor might have concealed the facts relative to Mackelcan's title, and 'conducted his cause to a successful issue, without incurring any personal responsibility, 'had he either refrained from participating in the receiving of that money, or if he did 'receive it, had he declared to the common agent how the fact stood, in order that the 'money might be restored to the general fund, (which restitution, your Lordships have 'by this time seen, it had been long before finally settled, neither the common agent, 'nor any other person, was entitled to ask). But Mr Taylor, by doing neither of 'these things, placed himself in the hazardous situation of a person knowingly taking 'payment of a debt which he knew had already been paid. In the eye of law that was 'a fraud; and the only mode by which the responsibility thence arising could be avoid-'ed, was by immediate restitution to the party from whom the money had been unjustly 'and erroneously recovered. Where that has not been done, it is submitted, that a 'condictio indebiti lies.'

claimed to be a creditor on these bonds. It turned out that his title was only to this extent—that he had made a loan falling very far short of the total amount claimed, and that in the proceedings which took place anterior to the Restrictive Agreement, Mr Mackelcan had been fully satisfied for the amount of his claim on the York Buildings Company. Notwithstanding that, however, Mr Mackelcan gave in the particulars of his debt. The debt was a large one,—but he agreed, under the Restrictive Agreement, to restrict his demand to, I believe, L. 750, in the first instance. There was then a reference to Mr Blair and another gentleman, who gave what is called in the law of Scotland a decreet-arbitral, defining the persons who were to receive debts; and they, in ignorance of the real situation of Mackelcan, and conceiving him to be a creditor to the full extent of those bonds, directed that his debt should be paid to the very full extent, I believe, of L. 2400. That sum was ultimately drawn by Mr Taylor, and remitted by him to Mr Lloyd, for of that there is evidence,—not of general remittance,—but there is a distinct item in the account handed to him of the remittance of that very sum to Mr Lloyd. Mr Lloyd accounted to Mr Mackelcan for L. 750, retaining in his hands the remainder, which undoubtedly, according to the Restrictive Agreement, supposing Mr Mackelcan's claim to be a bona fide claim, was to be a sum ultimately for the general benefit of the restrictive creditors, supposing there was a balance over and above those sums to which they had restricted their claim. June 4. 1824.

It being discovered that Mr Mackelcan had no claim, several proceedings were instituted; and undoubtedly, my Lords, one is a little perplexed not only by the various proceedings, but by the various interlocutors which have been pronounced in this case. It appears, my Lords, that no less than three actions were brought; one by Mr Mackelcan, who sought to reduce the Restrictive Agreement, and said he was not bound by that, and that he was not only entitled to recover the L. 750, but, at the hands of Mr Lloyd and Mr Taylor, the whole sum they had received: that I understand to have been the nature of this action. Then there was a second action, which was an action of reduction at the instance of the common agent—that is, the person acting for the behoof of all the creditors—to have that decreet-arbitral set aside; and concluding for repetition originally against Mr Mackelcan alone, of the sum he had received. Afterwards, that action was amended by making Taylor and Lloyd joint defenders with Mackelcan in that action. Then there was another action, which was an action concluding for reduction of the assignment.

My Lords,—The process of reduction was remitted to Lord Meadowbank, and his Lordship conjoined all the three processes on the 16th of January 1801. I think one of these actions commenced so far back as the year 1800. My Lords, Lord Meadowbank, on the 30th of May 1801, pronounced an interlocutor, by which he found, 'that the pursuers cannot be permitted to defeat the extracted decree, founded

June 4. 1824. 'upon a decree-arbitral to which the pursuers were parties, upon the 'plea of res noviter veniens, or of the doers of the other parties not 'disclosing the secrets of their employers.' And after certain other findings his Lordship repelled the reasons of reduction, and assoilzied the defender, which was Mackelcan. Now, your Lordships will perceive that the effect of that finding was, that the decreet-arbitral could not be reduced, and therefore they could not recover from Mackelcan the sums of money he had received. It then states that Mr Lloyd offered to pay the money.

Then there was a note of the same Lord Ordinary, Lord Meadowbank, in October 1802, in these terms:—'The Lord Ordinary has con-'sidered this case again and again, wishing to save the parties further 'pleading before him, and to form a decisive opinion; but he has not 'been able to accomplish his purpose, either on the pleadings in pro-'cess, or from the long apprenticeship he has served to the York Build-'ings Company cause. He inclines, however, to remain of the opinion 'formerly signified, as to the hazard and incompetency of shaking the 'decreet-arbitral on any supposed error facti afterwards discovered on 'any plea competent and omitted.' Then he states, that he doubts also 'the title and interest of the Company to maintain the reductions; but 'there is no doubt of the interest of the creditors of April 1792 to 'maintain it, unless they are otherwise already paid in full; in which 'case, perhaps, the claims rejected by the arbiters in a question with 'the other creditors, may be brought forward to share this as a surplus, 'having been granted away to them by the Company under the agree-'ment of April 1792, and something on the footing of the bond to 'Abany Wallis. It was necessary, therefore, to commit the concern 'to gentlemen who had made a particular study of the subject, who 'were to be paid first by the creditors in proportion to their interest; 'and whose discoveries of course belonged to the whole, and were to 'be fairly communicated.' With 'respect to Mr Taylor, as Mr Lloyd 'admits that he had the cash remitted to him, and Mr Lloyd seems 'ready and willing to obey any order with regard to it, the Ordinary 'sees no occasion for any memorial being put in on his part. Indeed, 'as there appears to have been no concealment by him from the arbi-'ters, it does not occur that either the common agent or Mr Mackel-'can can have any interest to object to his being assoilzied.'

My Lords,—Various proceedings afterwards took place, and then there was an interlocutor on the 14th of January 1806, to which I will beg to call your Lordships' attention, which, proceeding on the finding that the Restrictive Agreement was not to be reduced, declared that Mr Lloyd was bound to apply the money to the purposes of the Restrictive Agreement:—'Finds, that the common agent has a title 'and interest to see that the money has been applied by Mr Lloyd, by 'their authority, or for their behoof, according to their respective inte-'rests; and that when he receives this satisfaction, he has no further 'interest to insist in this process: therefore ordains Thomas Lloyd to

'put in a special condescendence how he has disposed of, or means to 'dispose of, the money in question, conformable to the rights of the 'creditors interested therein.' June 4. 1824.

My Lords,—There was afterwards an interlocutor of the 19th of November 1806, by which the Court of Session adhered to the interlocutor of the Lord Ordinary of the 14th of January 1806.

My Lords,—Some time after that period proceedings were resumed as against Mr Taylor; and, on the 14th of March 1810, the Lord Ordinary appointed the parties' procurators to give in memorials on the question with regard to the liability of Mr Taylor's representatives, against next calling. Then, on the 12th of November 1813, Lord Meadowbank pronounced the following interlocutor:—'Having con-'sidered the memorials for the parties, sustains the defences for John, 'William, and George Taylor, assoilzies the defenders, and decerns;' and he then gave a very elaborate note, shewing the reasons of his judgment. These interlocutors were adhered to by an interlocutor of the 12th of February 1817; but, there being a reclaiming petition against that interlocutor, the Court of Session, on the 9th of June 1818, pronounced this interlocutor:—'The Lords having resumed 'consideration of this question, together with the relative short peti-'tion for the York Buildings Company, and having advised the same, 'with the answers thereto, minute for the petitioners, and answers to 'that minute, they alter the interlocutors reclaimed against, and find 'that the respondents are liable in repayment of the dividend in ques-'tion, with interest thereof, together with the expenses of process, and 'remit to Lord Reston to proceed accordingly;' and this interlocutor has been subsequently adhered to. The result, therefore, of this interlocutor is this, that the Court of Session have found that Mr Taylor is liable to repay to the common agent, for the general body of credi-tors, the whole sum drawn by him in respect of Mackelcan's debt.

Now, my Lords, there is this singularity in the present state of the proceedings:—First of all, the decreet-arbitral is not reduced—the decreet-arbitral therefore stands, by which it is found that Mackelcan is entitled to a sum of between L.2000 and L.3000: It has been found that Mackelcan is not liable to repay the L.750 he received, because that decreet-arbitral stands: Mr Taylor remitted the whole money to Mr Lloyd: Mr Lloyd is out of the field at present, but the Court of Session have decreed, that though the decreet-arbitral is not reduced, and no remedy can be had against Mackelcan for the L.750,—that from the supposed concealment of Taylor of the real circumstances of the case—from the concealment made, as it should seem, just at the very time when they were about to sign, or had actually, according to Taylor's representation, signed the decreet-arbitral, his representatives are called upon to repay the whole of this dividend of two thousand and odd pounds received by him, though he had remitted to Mr Lloyd the L.750, and that had been paid to Mr Mackelcan, and

June 4. 1824. though the decreet-arbitral remains unreduced by which it was found that L.750 was due to Mr Mackelcan. My Lords, I must confess, that after all the attention I have been able to give, going most carefully through the interlocutors in this case,—though I agree with the Lords of Session in the other cases, I cannot agree with them in this. I do not think that Mr Taylor, under the circumstances of this case, is subject to be called upon to repay this two thousand and odd pounds. If that decreet-arbitral could be reduced, it ought to be reduced: when it was reduced, it would become a question, whether that sum could be recovered from Mr Taylor, he having remitted it to a person who has been found competent to receive it—Mr Lloyd. If Mr Lloyd has the money, which, undoubtedly he has, except the L.750, the party from whom it ought to be recovered is Mr Mackelcan, the principal party to the fraud, who received the money with the full knowledge that he had been satisfied; and yet here the Court of Session have fixed on one of the agents the whole sum he had drawn from the Court in Scotland under the decreet-arbitral, though he had accounted for it to Mr Lloyd; and though Mr Lloyd had accounted for a portion of it to Mr Mackelcan; and though, as I have already stated, the decreet-arbitral remained unreduced, by which it was found that Mackelcan was entitled to this sum; and though the Lord Ordinary, so long ago as the year 1806, or before that, had determined that that decreet-arbitral could not be reduced. There has been no attempt to disturb that decision. I must confess I cannot concur in the opinion the Court of Session have expressed; and therefore, upon this case, it will be my humble duty to propose to your Lordships that this latter interlocutor should be reversed. But in the multiplicity of these interlocutors, though I endeavoured last night accurately to go through them, in order to see what judgment your Lordships should pronounce,—in matter of fact I must request your Lordships' indulgence till we next sit, to propose to your Lordships the proper form of your judgment. I expect the result will be, that the last interlocutors, subsequent to the interlocutor of the 12th of February 1817, shall be reversed, and that thereby the preceding interlocutors which that interlocutor reversed will be affirmed; the result of which will be to assoilzie Mr Taylor, in this action, from the demand made against him by the pursuers, (the respondents here)—altogether from any demand. I now move your Lordships, that the further consideration of the case be postponed till I have the honour of attending your Lordships again.

BERRY—J. CAMPBELL,—Solicitors.

(Ap. Ca. No. 51.)