

No. 58.

EARL of MINTO, Appellant.

SIR WILLIAM F. ELLIOT, Bart., Respondent.

*Implied Will—Relief—Heir and Executor.*—Circumstances under, which a Scotchman, having sold a part of his landed estate, and invested a portion of the price in the public funds, and intimated to an heritable creditor in London his intention of paying the debt in six months; but having died before the expiration of that period, and consequently before payment;—Found, (affirming the judgment of the Court of Session), That the deceased's residuary legatee was bound to free and relieve the landed estate, and the heir of entail, of that heritable debt.

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2<sup>D</sup> DIVISION.  
Lord Pitmilley.

THE late Right Honourable William Elliot of Wells, born, educated, and domiciled in Scotland, had succeeded to, and purchased considerable landed estates in the county of Roxburgh. He entailed the baronies of Hadden and Ormiston in favour of himself, and the heirs-male of his body, whom failing, in favour of certain other substitutes, binding and obliging himself, and his heirs-at-law, and his executors and successors, to free and relieve the entailed lands, and the heirs of tailie who should succeed thereto, of all debts to which the entailer should be liable at the time of his death; reserving power, at any time of his life, and even on deathbed, not only to alter the order and course of succession as to the heirs of tailie, and to revoke or alter all or any of the conditions, provisions, &c. but to sell, alienate, &c.; declaring, however, that no revocation or alteration should be inferred by implication or construction, but only from an express writing under his hand, or under the hand of a person duly authorized. Of the same date, and on the narrative of having executed the deed of entail, he executed a general trust conveyance of all his lands and effects, heritable and moveable, wherever situated, with power to borrow money, and to sell the unentailed property, and also the baronies of Hadden and Ormiston, if the trustees should find it necessary, for payment of his debts, and for the other purposes of the trust. These purposes were, 1st, Payment of deathbed and funeral expenses, expense of executing the trust, and recording the deed of entail. 2d, Payment of an annuity of L. 400 per annum to the heir of entail in possession for the time, till the expiry of the trust. 3d, Payment of all just and lawful debts then due and owing by the testator, or which should be due and owing by him at the time of his death. 4th, Payment of legacies. 5th, Redemption of the land-tax. 6th, The purchase of the teinds of the barony of Hadden. To prevent the trust lands from being either unnecessarily, or under disadvantageous circumstances,

brought to sale, full discretionary powers were granted to the trustees to determine at all times as to the propriety of bringing them to sale; and if the sale should be judged necessary, to delay and postpone the same for a longer or shorter period, as they should see proper, 'it being my wish that the said lands and  
' others, which my said trustees are hereby allowed to sell, espe-  
' cially the barony of Hadden, may not be sold, in case my  
' trustees shall be of opinion that my debts, and the other bur-  
' dens which may affect this trust, can by degrees be paid off  
' from the surplus rents of the estate, and other funds, in a longer  
' or a shorter time, without any considerable inconvenience,' &c. June 29. 1825.

Thereafter, in December 1809, Mr Elliot executed a supplementary deed, which inter alia limited the annuity of L. 400 to L. 100; and, '2do, In order that my said trustees may be the  
' better enabled to satisfy and pay such debts as shall be owing  
' by me at the time of my death; as also the legacies and annui-  
' ties as I may hereafter appoint to be paid; and, in general, that  
' they may be enabled the more speedily to accomplish the pur-  
' poses of the said trust, without having recourse to a sale of that  
' part of my entailed estate, which, by the said trust-deed, is  
' allowed to be sold, or any part thereof; as it is my most earnest  
' wish and desire, and which, though expressed in the said trust-  
' deed, I here anxiously repeat, that the said debts and others  
' may be gradually satisfied and extinguished out of the rents  
' and profits of my said entailed estate, and any other funds fall-  
' ing under the said trust; and that a sale of any part of my said  
' entailed estate allowed to be sold, if it can without great incon-  
' venience and disadvantage be avoided, may not take place;  
' but at the same time always giving to my said trustees full dis-  
' cretionary powers of judging and acting in this matter as to  
' them shall seem fit.' He then grants certain legacies, and proceeds thus:—'And whereas I am possessed of certain funds  
' and effects situated in England, which I may dispose of by a  
' deed in the English form, therefore I hereby declare, that any  
' such deed executed by me, and unrevoked at my death, shall  
' carry right to said funds and effects situated in England, so  
' far as thereby conveyed, settled, or bequeathed; and the same  
' shall not be held or considered as falling under my aforesaid  
' trust-deed.' And he concludes by ratifying the original trust-  
disposition. Accordingly, in 1816, he made a will in the English form, in which, after certain special legacies, there follows this clause:—'All my books, and whatsoever other pro-  
' perty and effects I may die possessed of in England, I give and

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‘ bequeath unto the Right Honourable Gilbert Earl of Minto;  
 ‘ (on condition of paying certain additional legacies); and I do  
 ‘ hereby appoint the said Gilbert Earl of Minto, and Ambrose  
 ‘ Glover, executors of this my last will and testament; and I also  
 ‘ confirm the entail and trust-deed by me already made of my  
 ‘ Scotch estate, and of my property in that part of Great Britain  
 ‘ called Scotland.’

Mr Elliot was due to the late Arthur Balfour L. 15,000, by heritable bond over Ormiston and Hadden, (payable in London), and which now vested in the person of John Crawford Balfour of Portland-place. Another sum of L. 5000 was due to Sir Robert Preston. In 1818 Mr Elliot sold the estate of Ormiston to Mr Mein for L. 28,000, of which L. 16,000 was, at Mr Elliot’s desire, remitted to London; and the correspondence which took place shews, that his object was to pay off the bond debt due to Balfour. Thus in June 1818 he wrote Mr Ker,—‘ Upon due  
 ‘ consideration of all the circumstances of the case, and of Messrs  
 ‘ Brodie and Imlach’s opinion, I will take L. 28,000 for Ormiston,  
 ‘ provided Mr Mein defrays half the expense of the conveyance,  
 ‘ and consents to pay the whole or L. 16,000 of the purchase-  
 ‘ money in London.’ This condition Mr Elliot repeated to his agent Mr Brodie. Mr Mein’s man of business accepted the offer, (1st July), observing, ‘ Mr Mein will remit to Mr Elliot’s banker in London, as ‘ part of the price of the lands, in fourteen days, ‘ L. 16,000.’ Of the same date Mr Brodie wrote Mr Elliot, ‘ By ‘ the offer you will observe Mr Mein is to pay L. 16,000 of the price ‘ in London, within fourteen days of this date; and he proposes to ‘ pay the remainder at any time he may find convenient for himself ‘ by Martinmas first, by instalments of L. 1000. I presume you ‘ mean to apply the L. 16,000 in payment of Mr Balfour’s bond, ‘ in which case it will be proper, in case a bargain is concluded ‘ with Mr Mein, to give immediate intimation to Mr Balfour.’ In answer, Mr Elliot wrote,—‘ As it was understood between Mr ‘ Balfour and myself that he was to have six months’ notice ‘ whenever it might be my intention to discharge his mortgage, ‘ I shall lose no time in making the intimation whenever I hear ‘ from you that the bargain with Mr Mein is finally settled. You ‘ will recollect that Ormiston is part of Mr Balfour’s security; ‘ but I suppose that this circumstance will not impede the pro- ‘ gress of the disposition, and my final adjustment with Mr Mein. ‘ If the sale is settled on, I wish the L. 16,000 to be placed to ‘ my credit in the hands of Messrs Drummonds, Charing-cross. ‘ When this is done, I shall have to consider in what manner I

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' shall most profitably employ the money until the period ar-  
 ' rives for the payment of Mr Balfour, to whom, in the mean  
 ' time, I am to give five per cent interest. The question will be,  
 ' whether I had better vest it in the Stocks, or in Exchequer  
 ' bills, or in the Bank of the British Linen Company, who,  
 ' as Mr Ker tells me, continue to take money at four per  
 ' cent. I shall consult Drummond on this point; but perhaps  
 ' you may be able to furnish me with useful counsel on it.' Mr  
 Brodie wrote in answer, 6th July,—' Mr Gray having been from  
 ' home for these two days past, it was only this morning that I  
 ' finally fixed with him about the purchase of Ormiston; and I  
 ' now enclose a copy of his letter, agreeing to the payment of the  
 ' price in the way proposed by you. Although Mr Balfour's se-  
 ' curity extends over Ormiston, it will not impede the final settle-  
 ' ment with Mr Mein at the term of Martinmas, when he will  
 ' get a disposition, as I have no doubt he will be perfectly satis-  
 ' fied with your obligatory letter, engaging to relieve the lands of  
 ' that burden between and the term of Candlemas next. Mr  
 ' Mein is to write to his agents in London by to-morrow's post,  
 ' to place the L.16,000 to your credit in the hands of Messrs  
 ' Drummonds, bankers. I do not consider myself qualified to give  
 ' you advice about the most beneficial mode of investing the money;  
 ' but I would prefer the three per cents, were it my own.' Mr  
 Ker, factor of Mr Elliot, wrote to Mr Brodie, (July 8.)—' I no-  
 ' ticed in your letter to Mr Elliot, that you recommend his invest-  
 ' ing the L.16,000, paid by Mr Mein into Drummonds' house, in  
 ' the funds. It occurs to me, that it might turn out eventually as  
 ' profitable, or more so, if lodged in the British Linen Company,  
 ' provided they still give four per cent, as in that event there would  
 ' be a premium in drawing it from London; and though upon  
 ' remitting it again six months hence would cause a discount,  
 ' still, as investing in the funds is gambling, and to avoid risk of a  
 ' decline there, please give me your sentiments upon this.' On  
 the same day Mr Elliot wrote to Mr Brodie,—' I trouble you  
 ' with a line merely to say, that under the circumstances stated  
 ' in your communication of the 6th instant, I wish you to give  
 ' immediate notice to Sir Robert Preston of my intention of pay-  
 ' ing his mortgage at the expiry of six months from the period  
 ' of your intimation, if you think you cannot sooner discharge it.'  
 On the 14th Mr Mein wrote, that he had ordered the money to be  
 remitted, according to notice, through the British Linen Com-  
 pany. It was so remitted; but having been placed by Drum-  
 monds, bankers, to account with Mr Mein, it was at the desire of

June 29. 1825. Mr Elliot transferred to his credit. As soon as Mr Elliot saw that the transaction was concluded, he had (6th July) written to Mr Balfour,—‘ Having, by a recent sale of land, enabled myself to  
 ‘ liquidate some of the encumbrances with which my property  
 ‘ stands at present charged, I feel it incumbent on me to take the  
 ‘ earliest opportunity of apprizing you, that it will be necessary  
 ‘ for me, with a view to an adjustment of my affairs, to pay the  
 ‘ amount of your mortgage at the expiration of six months from  
 ‘ the date of this letter.’ Mr Balfour answered,—‘ I have the ho-  
 ‘ nour to acknowledge receipt of your letter of the 6th instant,  
 ‘ informing me that it is your intention to pay up your mortgage  
 ‘ at the expiration of six months from the date of that letter.  
 ‘ However much I may regret this communication on account of  
 ‘ those interested, it is satisfactory for me to know, that it is in  
 ‘ consequence of arrangements consistent with your interest.’  
 Thereafter a draft of a discharge of the heritable security was prepared, but Mr Elliot died before it was executed, and within the six months, having a few days before signed the disposition to Mr Mein. Previous to this event Mr Elliot had vested the L.16,000 in the three per cent Cons. Ann.

Mr Mein was desirous of having Ormiston freed of the burden, but Mr Balfour refusing to restrict his security, a Mr Ainslie advanced the money, took a conveyance to the debt, and restricted his security to the other lands burdened along with Ormiston; and thus Mr Mein held Ormiston disencumbered.

A question now arose between Lord Minto, the executor under the English will, and the trustees in Mr Elliot’s trust-deed and Sir William F. Elliot, the heir of entail in the Scotch estates. Sir William filed a bill in Chancery, for the purpose of getting the money in the funds transferred to him; but no judgment was pronounced, the Vice-Chancellor having intimated an opinion, that the question was one which ought to be tried under the law of Scotland, and before a Scotch Court. Lord Minto then brought an action against the trustees and Sir William in the Court of Session, concluding ‘ that neither the trustees under the foresaid  
 ‘ deed of trust, and other settlements relative to the testator’s  
 ‘ Scotch property, nor the heirs of entail under the foresaid deed  
 ‘ of taillie of Wells and others, have any right or interest in or  
 ‘ to the said property or funds which belonged to the testator at  
 ‘ the period of his decease, and situated or lodged in England, the  
 ‘ same, by the aforesaid declaration contained in the said supple-  
 ‘ mentary settlement, being specially exempted from the operation  
 ‘ of the said trust-deed: and it ought further to be found and de-

‘ clared, that the said trustees qua such, and the said heir of entail June 29. 1825.  
 ‘ to the estate of Wells and others, and that the Scotch estates  
 ‘ and funds to which they have right respectively, are liable to  
 ‘ free and relieve the pursuer and the said English succession of  
 ‘ and from the payment of all debts, legacies and annuities, due  
 ‘ and bequeathed by the testator, and which by the said Scotch  
 ‘ settlements, as well as from certain of them being burdens on  
 ‘ the Scotch estates, or annuities having respect to a tract of  
 ‘ future time, fall by law to be paid without relief from the Scotch  
 ‘ estates and funds there.’ Sir William raised a counter action,  
 concluding that the sum vested in Government securities did of  
 right belong to him as heir apparent of William Elliot, or at  
 least to the trustees, and ought to be applied in payment of the  
 debts due by Mr Elliot, that his entailed estates might thereby  
 be so far relieved.

Informations having been ordered to the Court, their Lord-  
 ships were equally divided in opinion; but on Lord Robertson  
 having attended, the Court found, by the narrowest majority,  
 ‘ that neither Sir William Elliot, and the heir of entail of the  
 ‘ estate of Wells, nor the trustees under the settlement executed  
 ‘ by the late William Elliot of his Scotch estates, are entitled  
 ‘ to relief from the Earl of Minto, as executor under the  
 ‘ English will, of any debts or obligations which, by the law of  
 ‘ Scotland, are burdens on the heritable estate of the said Wil-  
 ‘ liam Elliot.’ The case was again taken up on petition and an-  
 swers, when the Court being again equally divided in opinion, Lord  
 Pitmilley was called in, and the Court, by the narrowest majority,  
 altered the interlocutor complained of, and found, ‘ that the  
 ‘ Earl of Minto is bound, out of the funds coming into his hands  
 ‘ as executor under the English will, to free and relieve the pe-  
 ‘ titioner, Sir William Francis Elliot, and the heir of entail of  
 ‘ the estate of Wells, of all debts and obligations which burden  
 ‘ or affect the said estate; and to this effect decerned in the decla-  
 ‘ rator at the petitioner’s instance, assoilzied the petitioner from  
 ‘ the whole conclusions of the action at the instance of the Earl  
 ‘ of Minto, and decerned.’ It was afterwards explained, that this  
 decree against the Earl could not, under the libel at the instance  
 of Sir William Francis Elliot, extend beyond the funds vested  
 in the three per cent Cons. Ann.; and the decree was restricted  
 accordingly;\* 4th February 1823.

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\* See 2. Shaw and Dúnlop, No. 166. The opinions of the Judges will be found  
 in the Faculty Report, from which it would seem that the correspondence did not enter

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## The Earl of Minto appealed.

*Appellant.*—By Mr Elliot's will the appellant is entitled to the whole effects in England of which the testator was possessed at the time of his death, and inter alia the L. 16,000 in the three per cents, with the single burden of paying the legacies bequeathed. There was no appropriation of this sum during Mr Elliot's life to the payment of Mr Balfour, or any particular creditor; and the rule of law therefore applies, that heritable debts burden the heritage. No doubt a testator may regulate the question of relief between heir and executor; but, in the present instance, there is in the deeds which he executed nothing which can be held to relieve the heir from the liability to which he is subjected by law. Indeed these deeds afford the very opposite inference; nor is there any thing in the situation of parties or the character the appellant holds under the will, to lead to a different conclusion. If, besides these considerations, you look to the conduct of Mr Elliot himself, the best of all authorities in a question like the present, you find that he did not contemplate that the bequest to the appellant should be subject to the claim made by the respondent. On the contrary, his whole conduct is only reconcileable with the opposite supposition. This is not to be shaken by a reference to vague probabilities or surmises what the testator intended to do. For the question is not, what might have been, or really was the view of Mr Elliot in selling Ormiston, and having L.16,000 remitted to London, but what he actually and legally did as altering or confining the rule at law. But here he converted part of his heritage into moveable funds, knowing that they were conveyed to the appellant; and he died without applying these funds to payment of an heritable debt, or imposing that burden on the appellant. The respondent always assumes, that, had Mr Elliot lived, Mr Balfour would have been paid by a transference of this very sum. That, however, is not a necessary inference; and, even if it were, quomodo constat that the instant after Mr Elliot would not have burdened to that very amount the entailed estate remaining in favour of the appellant.

*Respondent.*—1. It was clearly the intention of Mr Elliot, as evinced by his whole conduct with relation to the sum of money in question, that it should be applied in payment of his debts;

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very deeply into the decision of the question. See Earl of Minto, 14th February 1823; No. 40. Fac. Coll.

and not only of his debts, but of the particular debt due to Mr Balfour. This is placed beyond doubt by the correspondence; and this correspondence amounts to a legal appropriation in the debtor's lifetime. But farther, the appellant, as executor and universal legatee under the English will, is bound, in terms of the clause of relief in the deed of entail, to free and relieve the estate of Mr Elliot, and the succeeding heirs of entail, of all the debts to which Mr Elliot was liable at the time of his death. 2. The property in the three per cents was not legally situated in England at the time of Mr Elliot's death, and cannot be considered as carried by his English settlement. 3. If the clause of reservation of a power over the English property in the deed of December 1809, authorized Mr Elliot, a domiciled Scotchman, to make a will in the English form, such power must be construed strictly, and as referring to the property he then had in England; but if it is not so confined, the English will, made only under such a power, cannot be considered as affecting a large sum like the amount in question, transmitted to England with the view to a particular purpose, and in transitu only.

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

LORD GIFFORD.—My Lords, There is the case of Lord Minto v. Sir William Elliot; and I cannot conceal from your Lordships, that this is a case of very considerable difficulty,—that it appeared at the Bar that the Court below, being equally divided in opinion, called in the assistance of Lord Pitmilley,—and that then they held that Sir William Elliot was entitled to the claim he set up.

My Lords,—The circumstances of the case are these:—The late Right Honourable William Elliot was born and domiciled in Scotland, and was proprietor of considerable estates in the county of Roxburgh, consisting of the baronies of Hadden and Ormiston, and various other lands. Several years ago Mr Elliot executed an entail, by which he granted procuratory for resigning his whole lands and heritable estates in Scotland, for new infeftment to himself, and the heirs of his body; whom failing, to the heir whomsoever of the heir-male of his body who might be last infeft; whom failing, to the heirs which were of his own body; whom failing, to Francis Augustus Lord Heathfield, and the heirs-male of his body; whom failing, to Sir William Elliot of Stobs, Bart. and other persons. The deed contained the usual clauses, and he expressly provided, that himself and his heirs-at-law should free and relieve the said lands and estate, and the heirs of tailie who should succeed thereto, of all debts to which he, the party executing the deed, should be liable at the time of his death;—then he reserved to



June 29. 1825. himself ‘ full power and liberty, at any time in my life, and even on  
 ‘ deathbed, to alter the said course and order of succession as to all  
 ‘ the heirs of tailie before specified, and to revoke or alter all or any  
 ‘ of the conditions, provisions,’ &c. Then, my Lords, of the same  
 date, he by trust-deed disposed to Lord Minto, Sir George Shee,  
 Bart. and Gilbert Ker, Esq. the whole estates then belonging to him,  
 and particularly described; ‘ as also, all and sundry other lands and  
 ‘ heritages, and all debts and sums of money, heritable and moveable,  
 ‘ &c. with power to set tacks, &c.; as also, with power to my said trus-  
 ‘ tees, or their quorum, to borrow money, and grant securities therefor  
 ‘ upon the lands, baronies, and others thereby disposed; and likewise,  
 ‘ in case my unentailed property should not be sufficient for payment,  
 ‘ and they should deem a sale of part of the unentailed lands expe-  
 ‘ dient for that purpose, with power to sell and dispose of the lands  
 ‘ and baronies of Ormiston and Hadden particularly before described,  
 ‘ or so much thereof as they may think necessary for payment of my  
 ‘ debts, and answering the other purposes of this trust, by public  
 ‘ roup.’ The purposes of the trust were declared to be, first, For  
 payment of deathbed and funeral expenses, the expense of executing  
 the trust, and recording the deed of entail; secondly, For payment of  
 an annuity of L. 400 a-year to the heir of entail in possession for the  
 time, till the expiring of the trust; thirdly, For the payment of all just  
 and lawful debts; fourthly, For the purchase of the teinds of the  
 barony of Hadden, in case the same should not be sold.

My Lords,—After executing this deed of entail in the year 1806,  
 in the year 1809 he executed a supplementary deed of alteration; and  
 by that deed of alteration he provided, that instead of the annuity of  
 L. 400 to the heir of entail, it should be reduced to L. 100 a-year, and  
 he gave the trustees power to pay that sum instead of the L. 400.  
 ‘ Secondly,’ (his Lordship then read the clause). Then he appoints  
 his trustees to restrict the annuity of the heir to L. 100; and near  
 the end of the deed there is the following clause,—‘ And whereas  
 ‘ I am possessed of certain funds,’ (his Lordship then quoted the  
 clause). Then he concludes by a ratification of the trust-deed.  
 In pursuance of this disposition, he, on the 4th of July 1816, exe-  
 cuted a will, and in that he devises a residuary bequest to Lord  
 Minto: ‘ All my books, and whatsoever other effects and property  
 ‘ I may die possessed of in England, I give and bequeath unto the  
 ‘ aforesaid Gilbert Earl of Minto, on condition that he pays Ambrose  
 ‘ Glover, Esq. of Ryegate, in the county of Surrey, gentleman, attor-  
 ‘ ney-at-law, the sum of L. 100; and unto Mrs Ridgeway, the wife of  
 ‘ Mr William Ridgeway, tailor at Ryegate, servant to my late mother,  
 ‘ the sum of L. 100; and unto my servant, Thomas Young, if he  
 ‘ should be in my service at the time of my death, the sum of L. 50:  
 ‘ and I do hereby appoint the said Gilbert Earl of Minto, and Am-  
 ‘ brose Glover, executors of this my last will and testament; and I  
 ‘ also hereby confirm the entail and trust-deed by me already made of

‘ my Scotch estate, and of my property in that part of Great Britain June 29. 1825.  
 ‘ called Scotland.’

My Lords,—Your Lordships perceive that the effect of this trust-disposition was to entail all the estate of Hadden, and to set apart his other property for the payment of the debts which might be owing at the time of his death, reserving to himself the right of disposing of his English property by will, unaffected by this deed. I should state to your Lordships, that one of the three debts he owed was an heritable bond for L.16,000 sterling, which had been given over the lands of Ormiston and Hadden in favour of the late Arthur Balfour, Esq.—the right to which bond was, in the year 1818, vested in John Crawford Balfour, Esq. of Portland-place; another sum of L.5000 being due to Sir Robert Preston. I should also state to your Lordships, that the sum for which the heritable bond was given was, by the form of the bond, payable in London. Mr Elliot resolved to sell the lands of Ormiston; and your Lordships will see, by the correspondence that follows, that one object of his disposal of the estate of Ormiston was to get rid of this debt, which was a charge upon the entailed estate. A negociation took place with a gentleman of the name of Mein, who offered L.27,000 for the estate; but in the month of June 1818 he writes to Mr Ker, ‘ Upon due consideration of all the circumstances  
 ‘ of the case, and of Messrs Brodie and Imlach’s opinion, I will take  
 ‘ L.28,000 for Ormiston, provided Mr Mein defrays half the expense  
 ‘ of the conveyance, and consents to pay the whole, or L.16,000 of  
 ‘ the purchase-money, in London.’

My Lords,—The matter was ultimately concluded that L.16,000 should be paid in London; and I would just read to your Lordships the correspondence, for these letters are very important in the consideration of this case. (His Lordship then read the whole correspondence already quoted in the report). Your Lordships perceive by those letters his object was to have the L.16,000 in London to pay Mr Balfour; and in the mean time he thought it right to make such interest as he could of the money, until the time arrived that he could pay Mr Balfour, he being to have six months’ notice before he could be called upon to receive the money. Upon the 6th of July Mr Mein’s agent wrote to Mr Brodie, that his employer would that day give orders to place the L.16,000 in the hands of Messrs Drummonds in London. Of the same date Mr Brodie accepted the offer in name of Mr Elliot, and (also of the same date) wrote to that gentleman as follows:—(his Lordship then read the letter). My Lords, on the 12th of July Mr Ker instructed Mr Brodie to give notice of payment of the debt of L.5000, and on the 14th Mr Mein wrote that he had ordered the money to be paid in to Messrs Drummonds. On the 11th of July the agent of the British Linen Company at Jedburgh had written to his principal in Edinburgh, stating, ‘ At request of William  
 ‘ Mein, Esq. who holds a deposit-account here, I have to solicit you  
 ‘ would have the goodness to direct Messrs Smith and Company to

June 29. 1825. 'pay over the L.16,000.' Then it was paid on the 18th of July 1818 into Drummonds, on account of Mr Mein, and then it was transferred from Mr Mein's credit to the credit of Mr Elliot. Then, on the 6th of July 1818, Mr Elliot wrote to Mr Balfour as follows:—(his Lordship then read the letter). There was a deed prepared to discharge the mortgage; but on the 26th of October 1818 Mr Elliot died, before the six months had elapsed, at which time the money was to be paid off. After his death it appears the purchaser of Ormiston became anxious to have the estate disburdened of the claims which existed at the instance of Mr Balfour, and that gentleman having refused to renounce his security over Ormiston, and restrict it to the other lands included in the bond, Mr Mein, or the Earl of Minto, found a gentleman, a Mr Ainslie, who was willing to advance the money upon the restricted security of the barony of Hadden, and the security was transferred to Mr Ainslie. On the 2d of June 1819 he executed a deed, whereby he restricted his security accordingly, and discharged Mr Mein, and the estate of Ormiston, of all claims for the payment thereof.

Now, my Lords, under these circumstances, the question is, Which part of the estate is liable to pay this L.16,000? By the will which I have stated, there is a bequest to Lord Minto, of 'all my books, and whatsoever other effects and property I may be possessed of in England;' therefore he says, that the L.16,000 passed by the will. And, on the other hand, Sir William Elliot says, under all the circumstances of the case it was clear, that Mr Elliot intended to apply that L.16,000 to the debt due upon the estate to Mr Balfour, and that the correspondence I have stated shews the intention of Mr Elliot, that this L.16,000 should be appropriated to the payment of Mr Balfour.

That under the English will the L.16,000 nominally passed, there seems to be no doubt; for although the word 'effects' is coupled with the word 'books,' and does not seem to have been used with reference to any such large property as this, I apprehend, strictly speaking, the property clearly passed under the will. The only question is, Whether, under all the circumstances of the case, there was such a separation of the L.16,000 by this correspondence, (I will not say actual appropriation; but not only an intention to appropriate, but such a separation), as shewed the purchaser that this L.16,000 was to be applied to Mr Balfour? and supposing Mr Elliot had lived, and had misappropriated that sum after it had been paid by Mr Mein, under the impression that Ormiston was to be free from that debt, whether he would not have had an equity against Mr Elliot to have that sum repaid?

My Lords,—As I have stated before, the Court below were very much divided upon the question; and I am free to confess to your Lordships, that the case appears to me to be one of very considerable difficulty. Lord Minto is contending for more than I think the intention shews he was entitled to; because no man who looks at this correspondence can doubt, that it was the intention of Mr Elliot, upon

receiving the L.16,000, to pay off that debt payable in England, and June 29. 1825.  
relieve the estate from that debt which he was so anxious to relieve it from: But perhaps a mere intention on the part of Mr Elliot, unless it was sufficiently expressed in the correspondence, so as to shew a sort of right in Mr Mein to call upon Mr Elliot to discharge that debt, would not be sufficient. But whatever we may think out of this House, we have no right to speculate as to what the mere intention was—he might have altered his intention before the money was paid. You have no right to say what his intention was at the time of his death, unless you can see that the L.16,000 was detached from the general property, so as to be appropriated by him for the payment of this debt to Mr Balfour. I have thought a great deal of this case, and it is one of considerable difficulty; yet I think the decision of the Court of Session is right. I think, taking all the correspondence and all the circumstances of the case into consideration, there was an equity attaching on the L.16,000 with respect to this debt to Mr Balfour, which called upon Lord Minto to apply a sufficient portion of the estate to the payment of that debt.

Such, my Lords, after a very anxious consideration of this perplexing case, is the result of my opinion; and therefore, upon the whole, I should humbly propose to your Lordships to affirm the decision of the Court below, which appears to be not only consistent with the party's intention, but consistent with the rules of law, (as applied to this case), which entitles Sir William Elliot to call upon Lord Minto to apply that part of the fund existing in England, which appears to be carried by the will, but with this equity attaching upon it, in consequence of all the correspondence that had taken place between him and Mr Mein, in payment of that debt. What took place after Mr Elliot's death, cannot be taken into consideration. The debt is still existing; and the L.16,000 not having been paid at the time of his death, what took place afterwards cannot affect the rights of the parties. Under all the circumstances, I think the decision of the Court of Session is right.

*Appellant's Authorities.*—Cheisly, Dec. 21. 1704, (5531.); Ker, July 7. 1714, (5533).

*Respondent's Authorities.*—Campbells, Jan. 4. 1747, (5231.); Farquharsons, Feb. 10. 1756, (6569.); Countess of Cromarty, Jan. 26. 1764, (6601.); Waddel, 1814, (House of Lords, March 9. 1819), 1. Vesey, 273.

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