No. 34.

WALTER ROSS and HENRY ANDERSON, (Representative of WILLIAM ANDERSON), Appellants.—*Scarlett—Maitland.*

Mrs HENRIETTA LOCKHART or WILSON and Husband, and the Trustees of the deceased Mrs ANN LOCKHART and her Husband.—*Murray—Campbell.*

AND

Sir COUTTS TROTTER, and Others, Trustees of the late COLIN M'KENZIE, CHARLES G. URQUHART, and Others, Respondents.—*Miller.*

Tutor and Curator—Discharge.—Held, (affirming the judgment of the Court of Session), 1. That a discharge of an heritable bond by tutors, after the expiration of the tutory, is not valid; and, 2. That the tutors granting such a discharge, are liable to repay the amount of the bond to the party to whom they had granted the discharge, and against whom the bond has been revived.

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1ST DIVISION.
Lord Medwyn.

CHARLES LOCKHART, Esq. had three daughters, Henrietta, Ann, and Jane. The two former were twins, and were born in June 1802; the latter was the youngest of the family. In September 1803, Mr Lockhart executed a mortis causa trust-deed in favour of Mr Walter Ross and the late Mr William Anderson. This deed contained the usual clauses, exempting the trustees from personal responsibility, except for actual intromissions; but it did not contain any nomination of guardians to the children. Mr Lockhart died in 1804; and on the 3d of February 1805 Mr Ross was appointed by the Court of Session factor loco tutoris to the children. Thereafter, on the 2d of June 1808, a gift of tutory was obtained from Exchequer, in favour of Mr Ross, Mr William Anderson, Sir Charles Ross, Mr William Henry Anderson, Mr Charles Gordon Urquhart, and the mother, Mrs Lockhart. By that deed they were named 'tutores dativos et administratores dict. Henriettæ Lockhart, Annæ Lockhart, et Jeanniæ Lockhart, duran. toto spatio annisque earum respectivarum pupillaritatum ullis tribus. eorum, in vicecomitatu de Ross residen. lie a quorum existen. pro administratione,' &c. In 1810 these persons, in their character of tutors, lent L.3000 of the money belonging to the pupils to David Urquhart, Esq. of Braelangwell, for which he granted an heritable bond over his estate, and bound himself to repay it 'to the said Henrietta Lockhart, Ann Lockhart, and Jean Lockhart, their heirs, &c. or to their said tutors above named and designed, or their quorum,' &c. Infeftment was taken in these terms.

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Soon thereafter Jane died in pupillarity, and was succeeded by her two sisters. They attained the age of twelve in June 1814, and afterwards made up titles to their sister's share of the bond by precept of clare constat.

The debtor, Mr Urquhart, having died, his son (who was one of the tutors) brought an action of ranking and sale of the estate, as heir-apparent, in which a claim was lodged by the tutors in virtue of the bond. Under this process, Sir Coutts Trotter and others, as trustees of the deceased Colin M'Kenzie of London, purchased part of Braelangwell; and by an interim decreet of division, dated 15th June 1815, they were ordained to pay to the Misses Lockharts, or their tutors, the principal sum, and interest, amounting to about L. 3500. An arrangement was then entered into by the tutors, to lend this sum to Mr M'Kenzie of Newhall, on an heritable bond over part of his estate. The same agents who acted for Sir Coutts Trotter and others, also acted for Mr M'Kenzie of Newhall. The transaction was concluded in August 1815, by these agents paying, on behalf of Sir Coutts Trotter and others, into the British Linen Bank, the above sum, on account of Mr M'Kenzie of Newhall. At the same time, a discharge, disposition, and assignation of the bond and sasine, (which proceeded in name of all the tutors, and acknowledged receipt by them of the money), was subscribed by Mr Ross and Mr William Anderson, and a duplicate by William Henry Anderson, in their character of tutors; but it was not subscribed by any of the others. This deed contained an obligation of warrandice against the facts and deeds done, or to be done, by the tutors, or the Misses Lockhart. An heritable bond, with sasine, was then obtained from Mr M'Kenzie, in the same terms as the previous one. At the time when the money was paid into the British Linen Bank, Mr M'Kenzie was indebted to it in a sum of greater amount; and it was applied by the Bank in extinction pro tanto of their debt. He afterwards became insolvent, and executed a trust-disposition for behoof of his creditors. The heritable bond in favour of the Misses Lockhart was ultimately found not to be a sufficient security for the sum lent. One of these ladies married the Reverend William Wilson, curate of Soham, and the other Dr John Argyll Robertson of Edinburgh, under whose contract of marriage trustees were appointed. An action of reduction was then brought by them against Sir Coutts Trotter and others, as trustees of Mr Colin M'Kenzie, and against Mr Urquhart, and Mr M'Kenzie of Newhall, concluding to have the discharge

set aside, the original heritable bond restored, and to have it declared an effectual security over the estate of Braelangwell. An action of relief was thereupon raised by Sir Coutts Trotter and others, against the appellants, Mr Ross and Mr Henry Anderson, (as representing Mr William Anderson), and also against Mr William Henry Anderson. June 24. 1829.

Various conflicting statements were made by the parties, as to the circumstances under which the money had been paid, and various pleas were raised; but it was admitted on all hands that the discharge had been granted after the tutory had expired; and the ultimate judgment proceeded on this ground alone.

The Lord Ordinary having reported the case, the Court, on the 15th December 1826, decerned in terms of the conclusion of the action of reduction, 'but with this restriction, that the 'heritable security by the late Mr Urquhart, and sums of money 'therein contained, are, and must continue to be, a real burden 'and effectual security, affecting only that part of the lands and 'others contained in the heritable bond, and other writings, 'which was acquired by the trustees of Colin M'Kenzie;' found these parties liable in expenses; and in the action of relief, decerned in terms of the libel, with expenses.*

Ross and Anderson appealed, but Sir Coutts Trotter, and others, did not. In their pleading before the House of Lords, the appellants contended chiefly, that as they had been appointed trustees under the deed of 1803, and as they were liable only for actual intromissions, they could not be made responsible for the insolvency of M'Kenzie of Newhall. To this it was answered, that they had acted throughout as tutors, and not as trustees, and therefore could not now assume that character.

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

LORD CHANCELLOR.—My Lords, in this case it is perfectly clear that the authority of the tutors dative had expired at the period of the transaction in question. The deed of discharge, disposition and assignation, is in consequence altogether invalid, and it follows therefore that the action of reduction ought to be sustained. I should recommend to your Lordships, therefore, upon that branch of the case, to affirm the judgment of the Court of Session. It was argued at the bar, that these parties were acting under the trust-deed of the year 1803; but that view of the case is entirely inconsistent with all the

* 5. Shaw and Dunlop, No. 87. p. 136.

June 24. 1829. circumstances of the transaction. Two only of the parties out of the three were trustees,—William Henry Anderson was not a trustee. It appears that the money was advanced by these parties, and the obligation taken by them as tutors. It further appears, that the discharge was given to them in their character of tutors; and throughout this transaction, in every part of it, they appear to have acted in their character of tutors. This view of the case taken at the bar, cannot I think be supported, and the correct course will be to affirm the judgment of the Court of Session.

With respect to the action of relief, it appears to me that the decision of that follows as a consequence from the other. The money was paid under an authority which turns out to be altogether invalid. It was paid on a consideration which has entirely failed. The parties represented themselves, when this money was advanced, as clothed with an authority which in point of fact they did not possess. It appears to me, consequently, that the parties who are the pursuers in this action are entitled to the relief which they seek. I should recommend to your Lordships, therefore, that the judgment of the Court below in this action of relief should also be affirmed.

LE BLANC, OLIVER, and COOK—SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—Solicitors.

No. 35. ALEXANDER RITCHIE, Appellant.—*Lushington—Hunter.*

JOHN MACKAY, Respondent.—*Spankie—Napier.*

Bill of Exchange—Oath.—The Court of Session having found, that a reference to the oath of the drawer of a bill was incompetent, in respect that he had been convicted of a crime inferring infamia juris;—the House of Lords found it unnecessary to pronounce any judgment on that question, but that under the circumstances the reference had been properly rejected.

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2D DIVISION. Lord Cringletie.

ON the 4th of March 1817 the appellant, Alexander Ritchie, accepted a bill drawn on him by his brother, James Ritchie, for L. 250, payable three months after date. The bill was discounted by the drawer with the Commercial Banking Company, and was dishonoured when it fell due on the 17th June. He held two shares in the Bank; and on the same day desired the manager of the Bank to pay the bill from the proceeds of the shares. This was declined. On the 18th of August he executed a conveyance of all his effects to a trustee for behoof of his creditors, and afterwards attempted, unsuccessfully, to get the benefit of the cessio. On the 18th or 25th November the respondent, Mackay, (who alleged that he was a creditor of the drawer to a