No. 25. JOHN OUCHTERLONY, Appellant.—*Wetherell—John Miller.*

LORD LYNEDOCH, and WILLIAM M'DONALD, Respondents.
*Lushington—James Campbell.*

*Trust.*—Six trustees having been appointed under a deed of settlement, and any three declared to be a quorum while so many were alive; and all having accepted; but one having objected to a loan of part of the trust-funds, and declared he would no longer act; and the number having been reduced, including the objector, to three; and he having refused to concur in the discharge required on the loan being repaid; —Held, (affirming the judgment of the Court of Session), that he was bound to concur both in that and in all future proper and necessary acts of administration.

July 7. 1830.

1ST DIVISION.

Lord Eldin.

THE late John Kinloch of Kilry, by a disposition dated the 7th of July 1802, conveyed to Lord Lynedoch, George Dempster of Dunnichen, William M'Donald of St Martins, William M'Donald, junior, of St Martins, and John Ouchterlony of Guynd, and the survivor and survivors of them accepting, and their assignees, as trustees, his whole property, heritable and moveable, (under exceptions), for special purposes; and, inter alia, for investing L. 12,000 in lands to be entailed upon the same series of heirs, and under the same conditions, as contained in his entail of the estate of Kilry. The deed provided, that any three of the persons named as trustees, while so many were alive and had accepted, should be a quorum; and that they should not be answerable for omissions, or obliged to do diligence, but only for their own actual intromissions severally, and that each of them should be liable for his own acts and deeds only, and not for those of the rest. By a subsequent deed of assumption, he appointed Colonel Kinloch, his eldest son and heir of entail, an additional trustee.

All the trustees accepted, and, in execution of the trust, invested L. 8500 of the above L. 12,000 in land as directed. Thereafter, in December 1811, they lent to Colonel Kinloch, then in embarrassed circumstances, L. 1000, upon his and Kinloch of Kinloch's personal bond, taken payable to the trustees. Ouchterlony was ignorant of this transaction, and disapproved of it when it came to his knowledge. In July 1816 the trustees lent Colonel Kinloch, (his affairs having become still more involved), the remaining balance of the L. 12,000 on his personal bond, and a collateral security for the principal, by assignation to a policy of insurance for L. 2500, which he had effected with the Royal Exchange Assurance Company of London. Ouchterlony alleged, that he ob-

jected to it as ineligible, imprudent, and contrary to the directions and intentions of the truster. The other trustees denied that any such remonstrance was made, but admitted, that the loan did not meet his approbation. The loan was completed, and Ouchterlony's name employed in framing the conveyance, in the same way as those of the other trustees. Ouchterlony averred, that he had intimated that he would no more interfere with the administration of the estate, and would in no respect whatever hold himself responsible. July 7. 1830.

Colonel Kinloch died in May 1824, by which time there survived of the trustees only Lord Lynedoch, M'Donald, junior, and Ouchterlony. In order to receive payment from the Assurance Company, the signatures of a quorum of the trustees, namely, of all those three individuals, were required. Ouchterlony refused to concur, because the money had been lent without his concurrence, and with his decided disapprobation, and contrary to the injunctions of the truster.

The other trustees then brought an action against Ouchterlony, concluding inter alia that it should be found and declared, that he was not at liberty to withdraw himself, and renounce the management of the trust; but that he was bound to act as trustee along with them, in granting a valid discharge to the Assurance Company for the sum insured, and in recovering payment of the same, and, in general, in the management of the trust-estate, until the affairs should be finally wound up, and brought to a conclusion in terms of the trust-deed.

The Lord Ordinary found and declared, 'that the defender 'John Ouchterlony is not at liberty to withdraw himself and re-'nounce the management of the trust-estate, as one of the trus-'tees appointed by the trust-deed in question executed by the 'deceased John Kinloch; but that he is bound to act as trustee 'along with the pursuers, in granting a valid discharge to the 'corporation of the Royal Exchange Assurance in London for 'the sum of L.2500 sterling mentioned in the summons, contain-'ed in the policy of insurance by said corporation, and in re-'covering payment of the same; and, in general, in the manage-'ment, recovery, and application of the said trust-estate, until 'the trust-affairs shall be finally wound up and brought to a con-'clusion in terms of the before-mentioned trust-deed; and also, 'that the said defender is bound, in the future management of the 'estate, to act along with the trustees, and to concur with them 'in all proper and necessary acts of administration.'

July 7. 1830. To this judgment the Court, (Feb. 15. 1827), on advising a reclaiming petition, adhered, with expenses.*

Ouchterlony appealed.†

*Appellant.*—The loans to Colonel Kinloch were a breach of trust. It was clearly the trustees' duty not to put the funds in peril, or to grant a loan of the trust-estate to one of their own number. The appellant was therefore bound to have dissented; and he did dissent from such an arrangement, declined incurring any responsibility respecting it, and withdrew from a trust conducted on such destructive principles. By the trust-deed he was only bound for intromissions, not omissions, and could only be liable for what he sanctioned; and, at common law, a trustee cannot be compelled to approve of or incur responsibility for improper measures. He was entitled to withdraw altogether from a trust so managed. The office is no doubt voluntary, and need not be accepted unless the party chuses; but it is not on that account indivestible. Not that, by resigning, the party can shake off old responsibilities, but he can avoid assuming new. Besides, there being a quorum without the appellant, his name ought not to have been introduced into the conveyance. The respondents had no right to mix him up with a measure which he regarded as a manifest breach of the duties of the trust, or to force on him a responsibility for what he would not assent to, but could not prevent. In insisting that the character of trustee is indelible, the respondents assert a legal proposition neither supported by principle nor precedent. But if the appellant could demit, then the conclusions of the present action must fall, particularly that which declares that he must, whether he approves or not, concur in acts and deeds of those trustees who will not listen to his counsel, and who disregard the true interests of the trust. The respondents' conduct has involved them in difficulties; but that is their own fault. In truth, however, the remedy is obvious. On proper application, the Court would appoint new trustees, who would execute the trust. The judgments of the Court have no doubt, from time to time, varied on this point; but the Court plainly has the power, and the latest decisions import that the Court would exert it.

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* 5. Shaw and Dunlop, 358.

† He afterwards concurred in executing the discharge, subject to the appeal.

*Lord Chancellor.*—You are called upon to receive the money, not to lend it out. There are now only three surviving trustees, and the quorum are three. Suppose that the manner of investing the money had not been justifiable, is the dissenting trustee, when the money is to be recovered, not to accept repayment? July 7. 1830.

*Wetherell.*—But observe the true character of the case. The trustees, by their mismanagement, get into a dilemma; and they then sue the faithful trustee to interpose, to enable them to repair the wrong. Would not a Court of Chancery have said, that the trustee acted perfectly right in refusing to concur? No doubt the Court could give redress against the Insurance Company, and the faithful trustee might be obliged judicially to assent; but he would not be bound to mix himself up with what had been done by his co-trustees, or clothe himself with a trust which had been violated from the beginning.

*Lord Chancellor.*—Still the appellant is merely required to accept a payment to the trust-estate: how can that acceptance make him responsible for the loan? The Court of Chancery would compel him to receive the money, and grant a release. The Insurance Company are entitled to a discharge from all the parties. If the appellant had been dissatisfied with his co-trustees, he might have applied to the Court of Session.

*Lushington* (for the respondents).—The appellant has, in point of fact, obeyed the order of the Court. He has actually signed the discharge. How can he be heard against a judgment which he has obeyed?

*Wetherell.*—He only obeyed the order of the Court when he had no choice. Besides, the judgment goes much farther, and obliges him to concur in all future acts of management. At all events, this trustee should be dealt with as favourably as other trustees, who have acted reasonably and to the best of their judgment, and not have been found liable in expenses.

*Lord Chancellor.*—Probably the Court considered this trustee's conduct not reasonable. They held, that even if he regarded the loan imprudent and unjustified, yet he should have thought it right to receive the money back again. There is a very important point raised in this case. If a trustee accepts, and by the death of some of his co-trustees becomes a necessary party to make up the quorum, can he be permitted to retire, whether there was original misconduct on the part of the other trustees or not?

*Respondents.*—The appellant has assumed, that an accepting trustee can retire when he chuses. But this proposition has no

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sanction from decisions or practice. He accepted, and neither has nor could have resigned. If he had disapproved of the conduct of the other trustees, the Court of Session, if the complaint were well founded, would interfere and direct a wiser management. But instead of adopting this measure, he allowed the loan to proceed; and now, when deaths among his co-trustees make him a necessary party, he refuses to receive the very funds described by him to be in danger. He has no ground to complain of the declaration that he must in future concur in the management, for that concurrence is expressly confined to all proper and necessary acts. This case has been argued as if the administration had been faulty and exposed to challenge; but there is no ground for such an assumption; and, if there were, it makes the appellant's refusal still more inexcusable. If his co-trustees are guilty of malversation, that is the best reason why he should remain true to his duty. It is a mistake to say that there is any authority for holding that the Court of Session would appoint new trustees, in the place of trustees who had accepted, but affected to disapprove of the acts and deeds of their associates. Looking to the unreasonableness of the appellant's opposition, and the pertinacity with which he delayed the repayment of this part of the trust-estate, he was justly burdened with costs.

LORD CHANCELLOR.—This case arises out of a trust-deed and disposition, executed in the year 1802 by John Kinloch of Kilry. By that deed, five trustees named in the instrument are directed to lay out the sum of L.12,000, for certain purposes, upon lands in Forfarshire. The testator afterwards appointed his son and heir of entail, Colonel Kinloch, a co-trustee. The trustees acting under the trust-deed laid out eight thousand pounds and upwards, on lands of the description mentioned in the deed; and afterwards employed L.2400 and odds, not in the purchase of land, but in loans to Colonel Kinloch, the heir of entail and co-trustee. By way of security for one of these loans, Colonel Kinloch insured his life with the Royal Exchange Assurance Company; and he also gave a security for the payment of the premiums. This transaction, when under negotiation, was communicated to Mr Ouchterlony, one of the trustees, who dissented from it, and declared his dissatisfaction with this mode of applying the funds, as being inconsistent with the terms of the deed; and in the course of the correspondence or communication which took place upon that subject, he said he would not act any longer as trustee. Nothing farther took place with respect to this transaction during the lifetime of Colonel Kinloch. But in the year 1824 he died. At this time there were only three trustees living, Mr Ouchterlony, Lord Lynedoch, and Mr M'Donald. By the terms of the trust, any three

of the trustees are declared to be a quorum, while so many were alive and had accepted, but the three must concur in every act; and when application was made to the Insurance Office for the payment of the money, (the insurance having been very properly effected in the names of all the accepting trustees living at the time), the Insurance Office refused to pay the money without a discharge by the three surviving trustees. Mr Ouchterlony was desired to unite in giving this discharge. He refused, and, in consequence of that refusal, this suit was instituted against him, calling upon him to join in the discharge. A judgment of the Court of Session was pronounced against him, giving effect to that demand. From that judgment there has been an appeal to your Lordships' House. July 7. 1830.

After the judgment was pronounced, and, I believe, pending this appeal, Mr Ouchterlony was advised to sign the discharge. A discharge was accordingly signed, and the money was paid. Still, however, Mr Ouchterlony has a right to your Lordships' judgment, with respect to the validity of the decision in the Court below.

Mr Ouchterlony has stated, that he did not conceive that he would be justified in signing the discharge; that if he did, it would make himself a participator in the original act which he had condemned; that he was not liable by the trust-deed for his omissions, but for his intromissions; and that by signing the discharge and receiving the money, he would be an intromitter, and would be liable if the estate had suffered any thing by this mode of investing the fund. My Lords, I apprehend that these objections were altogether frivolous. In the first place, if the money were misapplied—if it were an improper investment—it was the duty of Mr Ouchterlony, as one of the three surviving trustees, to do every thing in his power for the purpose of recovering the money, that it might be invested more in conformity with the terms of the trust-deed. The signing the discharge would not, under the circumstances in which he was placed, have made him a participator, or at all responsible for the original investment of the money. I conceive, therefore, that the excuse, or reason, which he has assigned for not signing the discharge, is altogether unsustainable.

There is, however, another part of this judgment brought under the consideration of your Lordships' House, which is material. The Court below have not only ordered that the appellant should sign the discharge, but they also declared that he is bound, 'in the future ma-'nagement of the estate, to act along with the trustees, and to concur 'with them in all proper and necessary acts of administration;' and have decerned accordingly. Now the question is, whether the Court below had authority to make a decree of this description?

My Lords, Mr Ouchterlony had accepted the trust. By the terms of the trust, three of the trustees who lived and had accepted, were necessary to concur in any act, and to give effect to that act. All the trustees, except Mr Ouchterlony and two others, had died. If Mr Ouchterlony, therefore, did not concur in any act, nothing

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could be done under the trust. According to the decision and opinion of the Court below, he, having once accepted the trust, could not withdraw from it, so as to defeat the object of the trust; and it appears to me that this opinion is confirmed by the law of Scotland. But, according to some suggestions which were stated at the bar, it was conceived that there was no authority to support such a doctrine. On the contrary, it was submitted that there were authorities the other way. But, after diligent examination, I have found nothing in any text writer, or any case, to establish this position. At the bar no passage was quoted—no opinion referred to—no such case was shewn to exist. Therefore I feel it my duty to advise your Lordships to concur in the decision of the Court below, the effect of which is to uphold this trust, and to give effect to it, and to compel the appellant to act in discharge of it, in the manner stated in this decree;—that is, to concur in all lawful and necessary acts, for the purpose of giving effect to the trust to which he was a party, and which he had regularly accepted. Under these circumstances I should humbly advise your Lordships to affirm this decree.

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

*Appellant's Authorities.*—Holmes, (2. Cox, 1.) Walker, (3. Swanstoun, 62.); Order of House of Lords, May 22. 1799. Marquis of Montrose, Jan. 27. 1688, (14,679.) Aikenhead, June 24. 1703, (14,701.) Watts, Dec. 10. 1792, (14,700.) Campbell, June 26. 1752, (14,703, and 7,440.) King's College of Aberdeen, Jan. 27. 1741; (Elchies, Jurisdiction, No. 21.) Sir Alexander Dick, Jan. 22. 1738, (7446.) Merchant Company of Edinburgh, Aug. 9. 1765, (7448.) Wotherspoon, Dec. 15. 1775, (7450.) M'Dowall, Nov. 20. 1789, (7453.) Carstairs' Trustees, Nov. 28. 1775; (Brown's Synopsis, vol. v. p. 526.) Whitson, May 28. 1825; (4. S. & D. 42.); 1. Merivale, July 6. 1816; 2. Vesey, p. 319.; 6. Mad. 123. Montgomerie, (4. Dow, p. 109.)

*Respondents' Authorities.*—1. Bell's Com. p. 31. Stothard, June 30. 1812, (F. C.) 1. Ersk. 7. 25.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER and THOMSON,—Solicitors.

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No. 26.

## EDWARD ERRINTON TURNER, Appellant.—*Wilson.*
## GIBB and MACDONALD, Respondents.

*Possession—Proof.*—Circumstances in which (affirming the judgment of the Court of Session) the presumption of property arising from possession was held to be overcome.

July 7. 1830.

1ST DIVISION.
BILL-CHAMBER.
Lord Newton.

TURNER, who described himself as having for many years been extensively engaged in mercantile concerns, presented a petition