

of Patrick Taylor, and again in 1817 transferred into an account Dec. 14, 1830. called the separate account of John Taylor and Sons, has been received by the respondents in payment of a debt due to them from the firm of Taylor and Sons? Whether, when the respondents received such money, they knew that it was part of the estate of John Taylor, and that Patrick Taylor was possessed of that money as the executor of the said John Taylor, and held it subject to the trusts declared by that will, and that the said trusts were not satisfied? And that after the trial of such issues, the said Lords of Session of the Second Division do proceed further in this cause as shall be just.

*Appellant's Authorities.*—3 Ersk. 9. 27, and 33. Creditors of Murray, Nov. 27, 1744, (Elchies, No. 15, voce Executor.) Alison, Nov. 1765, (15,132.) Tait, Feb. 12, 1779, (3142.) Bell, Nov. 28, 1781, (3861.) 2 Bell's Com. p. 96. Andrew v. Wrigley, (4 Brown, p. 124.) Scott v. Tyler, (2 Dickens, p. 712, and 2 Brown, p. 431.) Hill v. Simpson, (7 Vesey, p. 152.) M'Leod v. Drummond, (14 Vesey, p. 353.) Keane v. Robarts, (4 Maddocks, p. 434.) Watkins v. Cheek, (2 Stuart and Simons, p. 205.)

*Respondents' Authorities.*—Minorman, Nov. 24, 1630; Cliftonhall, Jan. 1687, (1 and 2 Brown's Sup. 316—99.) Dobie, July 8, 1707, (14,390.) Dickson, Nov. 22, 1711, (14,392.) Buchanan and Auld, July 20, 1784, (14,378.) Smith, May 27, 1801, (App. voce Sub. and Cond., Inst. No. 1.)

E. J. SCOTT,—SPOTTISWOODE and ROBERTSON,—Solicitors.

MALCOLM M'NEILL, Appellant.—*Wetherell—Stewart.*

No. 52.

MRS M'NEILL, OR JOLLY, AND HUSBAND, Respondents.—  
*Pollock—Robertson.*

*Interest.*—Circumstances in which it was held, (reversing the judgment of the Court of Session,) that a party was not liable for compound interest on an heritable bond granted in 1787, and for payment of which action was raised in 1814, but not proceeded in till 1824, although the delay was alleged to have been caused by the improper acts of the debtor.

On the 20th of August, 1787, the late Daniel M'Neill, Esq. Dec. 22, 1830.  
of Gallochilly, granted to the late Dr James M'Neill an heritable  
bond for L.1000, payable at the first term of Whitsunday, with  
the lawful interest to that term, and yearly during the non-  
payment payable at the usual terms, together with penalty in  
common form. Sasine was taken in December, 1787, and the  
instrument recorded in February, 1788. The interest was paid

1ST DIVISION.  
Lord Eldin.

Dec. 22, 1830, till Martinmas, 1792; in 1794, M'Neill of Gallochilly died, and was succeeded by his eldest son, on whose death, in 1801, the estate descended to Hector Frederick M'Neill.

In the month of February, 1806, Dr M'Neill subjoined and signed the following note to a state of accounts made up with Hector M'Neill, but which the latter did not subscribe:—  
 ' Edinburgh, 21st February, 1806.—The above state of accounts  
 ' contained in the preceding page has been this day viewed and  
 ' examined by Captain Hector M'Neill of Gallochilly, and Dr  
 ' M'Neill of Stevenstown, as being the parties concerned,  
 ' amounting to the capital sum of L.2516, 0s. 8d. sterling as at  
 ' 17th current, when both parties declared their satisfaction  
 ' that all the particulars therein mentioned were justly and  
 ' fairly stated; when Dr M'Neill, as a testimony of his regard  
 ' for the present representative of the Gallochilly family, frankly  
 ' released the said Captain Hector from all the principal that  
 ' he had advanced to purchase the commission from Captain  
 ' Douglas to the late Daniel M'Neill, per Mr Balderstone, writer  
 ' to the signet: And also, as a farther evidence of his friend-  
 ' ship towards said family, Dr M'Neill grants L.50 sterling to  
 ' purchase a gown and other articles of dress, suiting her own  
 ' very genteel taste, and as may best please the present Mrs  
 ' M'Neill of Gallochilly. Accordingly, the above capital, at the  
 ' above date, is hereby restricted to the capital sum of L.2136  
 ' sterling, as the small fraction is hereby also cancelled: and the  
 ' above restricted capital, with interest from the above date, being  
 ' paid soon, Dr M'Neill shall formally discharge said Hector  
 ' M'Neill, Esq. of all the above particulars. In witness whereof,  
 ' this docquet, and another duplicate hereof, are wrote by said  
 ' Dr M'Neill, and signed by both parties, place and date as  
 ' above; and at same time it is the meaning of the parties,  
 ' that in case of any error or deficiency in vouchers, that the same  
 ' shall be amicably adjusted; and this account is liable to fu-  
 ' ture revisal on vouchers being produced.'

Thereafter, on the 25th of December, 1811, an arrangement took place between them, and the following missive was subscribed by them:—

*Edinburgh, 25th December, 1811.*

' As you have this day given me your bill for L.230 sterling,  
 ' I bind myself to give you credit for the same in my account;  
 ' and I further bind and oblige myself, in consequence of this  
 ' payment from you, to free you from all bonds and other  
 ' claims that I may have against you, on condition that you

' grant me your bond of annuity during my life, for a sum equal Dec. 22, 1830.  
 ' to the balance you owe me, after deducting this L.230, at the  
 ' rate of  $7\frac{1}{2}$  per cent.

(Signed)

' JAS. M'NEILL.

Agreed

' HECTOR F. M'NEILL.'

At this time Dr M'Neill was under trust; and his trustees having protested against the validity of this transaction, Hector M'Neill, on the 19th of January, 1814, raised an action of implement, and the trustees thereupon raised an action of reduction, on the grounds of imbecility and error on the part of Dr M'Neill. Lord Alloway, on the 24th of June, 1814, decerned in the reduction, and assoilzied from the action of implement, and to this judgment the Court adhered in July, 1816.

Soon thereafter, (Feb. 1817,) the trustees of Dr M'Neill raised an action against Hector M'Neill, founding on the bond, and concluding for payment of the ' principal sum of ' L.1000 sterling, with the sum of L.240 sterling expenses incurred through failure, together also with the due and lawful ' interest of the said principal sum from the term of Martinmas ' 1792, and thereafter during the not payment,' &c. Dr MacNeill died in the month of May, leaving a general disposition and deed of settlement in favour of his natural daughter, the respondent. This deed was challenged by his heir at law, which gave rise to a great deal of litigation, and was not terminated till the end of the year 1822; and in consequence thereof (as was alleged) the procedure in the action on the bond was superseded. An appeal had also in the meanwhile been entered against the judgment, setting aside the transaction of December, 1811, but the judgment was affirmed on the 21st May, 1824.\*

The action on the bond being then revived, no objection was made to decree for the principal and simple interest; but the respondents, as in right of the trustees and Dr M'Neill, claimed that the bygone interest due at Martinmas 1811, should be accumulated as of that date with the principal sum, and that thereafter the interest should be accumulated annually. Lord Eldin, on the 12th of November, 1825, repelled ' the claim of ' the pursuers (respondents) for compound interest on the heritable debt libelled; and appointed them to give in a state of the ' sum due under the heritable bond with simple interest.' The respondents having reclaimed, the Court, on the 26th of May,

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\* 2 Shaw, App. Ca. 206.

Dec. 22, 1830. 1826, 'altered the interlocutor of the Lord Ordinary complained of; sustained the claim of the pursuers for compound interest on the heritable debt libelled; found that the pursuers are entitled to have the bygone interests, at the rate of five per cent per annum, accumulated on the 26th day of December, 1811 years, with the principal sum, and also to have the same and accruing interests accumulated at the foresaid rate at the end of every two years thereafter, until the whole are paid up; and remitted to the Lord Ordinary to proceed accordingly; and further, found the pursuers entitled to the expenses of process.\*'

Hector M'Neill thereafter died, and the appellant, Malcolm M'Neill, having succeeded to the estate, was sisted as defender in his place.

After some procedure before the Lord Ordinary, the interest was accumulated, and interim decree issued for L.3300.

Malcolm M'Neill appealed.

*Appellant.*—1. The judgment of the Court was incompetent, because the action was libelled upon a bond which stipulated that only lawful interest should be paid, and the conclusion of the summons was limited to that demand, whereas the Court have awarded that which is not warranted either by the terms of the bond or the summons. In order to make such a demand, it ought to have been specially concluded for; but it was not.

2. Accumulation of compound interest upon a loan of money is contrary to the established rules of the law of Scotland. To this there are no doubt exceptions, but none of them apply to the present case, and they fortify the general rule. The first relates to cautioners paying on distress; the second to the effect of denunciation on letters of horning; and the third to questions arising between tutors and their wards, or factors and their constituents. The present, however, is a case simply between an ordinary debtor and a creditor holding a security. The only one at all approaching in similarity to the present, is that of the Duke of Queensberry's executors v. Tait. But in that case, Mr Tait insisted on retaining a large sum of money in security of a right of relief, and the Court held, that although he was entitled to the right of retention, he could not make profit by it, and therefore ordered bank interest to be accumulated.

*Respondents.*—1. As the bond stipulates for lawful interest, Dec. 22, 1830. and the summons concludes in the same terms, it is clear that if the judgment be well founded on the merits, that there is no objection in point of form, because the Court have only awarded what they considered to be lawful interest.

2. It is true that accumulation of interest is not, in strict law, absolutely due, but the Court has an equitable power to allow compound interest at such periods of time as the circumstances of the case may in reason and justice require. This was done in the cases of Hamilton and of the Queensberry executors, and was recognised by this House in that of *Montgomerie v. Wauchope*, and in the Court of Chancery in that of *Raphael v. Bohen*. It is no answer to say, that in some of these cases the parties stood in the relation of tutor and ward, or factor and constituent, because, although this may have been the ground of claim, they truly stood in the position of debtors. In the present case, the circumstances warrant an accumulation. The recovery of payment was prevented by the fraudulent act of Hector M'Neill, in 1811—an act which he attempted to support by a litigation which did not terminate till May, 1824. During the intervening period, therefore, he was possessing the money and the interest in virtue of his own wrong, and contrary to the right of the respondents.

The House of Lords 'ordered and adjudged, That the several  
' interlocutors complained of be reversed: and it is farther order-  
' ed, that the cause be remitted back to the Court of Session, to  
' ascertain what is due to the pursuer on the heritable bond, with  
' simple interest thereon, to be calculated on the principal debt,  
' and to proceed accordingly without prejudice to such claim, if  
' any, as the said respondents may be enabled to make for any  
' part of expenses of process incurred prior to the date of the  
' interlocutor of the Lord Ordinary of the 12th, and signed 16th  
' Nov. 1825; or to the objections which the appellants may be  
' enabled to make against such claim.'\*

*Appellant's Authorities.*—(1.)—4 Ersk. 3. 3.; 4 Bankton, 536; Fraser, Jan. 22, 1679, (564.)—(2.)—3 Ersk. 3, 81; A. S. Feb. 1, 1610, and Dec. 21, 1690, Stat. 1621, c. 20; 1 Stair, 15. 8; 1 Bankton, 21. 9; Braid, Jan. 26, 1669, (16,411); Dunn, Feb. 12, 1790, (16,436); Campbell, March 3, 1802, (No. 4, Appendix, Annual Rent); 2 Atkins, 331; 1 Vesey, 99 and 451.

*Respondents' Authorities.*—Hamilton, Feb. 23, 1813, (F. C.); *Montgomerie*, April 8, 1816, (4 Dow, 109); 11 Vesey, 92; *Queensberry Exec.* May 23, 1822, (1 Shaw and Dunlop, 428.)

SPOTTISWOODE and ROBERTSON—S. S. BELL—Solicitors.

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\* This case was heard by the Lord Chief Baron, (Lyndhurst,) but no opinion was delivered.