JOHN NAPIER and Mrs. SCOTT, Appellants:—*Spankie—Wilson.* No. 57.

Lady GORDON and others, Respondents.—*Sandford—Rutherfurd.*

Bankruptcy—Husband and Wife—Interest.—1. An estate was sold under burden of the price, being 60,000*l.*, and the interest of 10,000*l.*, being part of the price, was to be liferented by the purchaser, (who had married the daughter of the seller,) and the purchaser became bankrupt, and the estate was judicially sold, and produced a sum inadequate to pay the price:—Held, in a question between the three daughters of the seller as heirs-portioners (affirming the judgment of the Court of Session), that two of them were entitled to be ranked on the interest of the 10,000*l.*, to the effect of realizing full payment of their shares of the price, to the exclusion of their sister during the life of her husband the purchaser. 2. Circumstances in which (affirming the judgment of the Court of Session) interest on arrears of interest was allowed from the next term after the date of citation of the holder of a fund in a multiplepoinding of which he was the nominal raiser.

Oct. 3, 1831.

1ST DIVISION.
Lord Newton.

GLENDONWYN of Parton, by minute of sale, dated 22d April 1809, sold to William Scott, his son-in-law, the lands and barony of Parton and others for 60,500*l.*; 20,500*l.* to be paid on a year's notice; 30,000*l.* to be payable a year after Mr. Glendonwyn's death; and the remaining 10,000*l.* to be secured to Mr. Scott and Mrs. Scott in liferent, and to the children in fee; also 4,000*l.* part of the 30,000*l.* was declared to be the absolute property of Mrs. Scott. The minute bore, "That during the "life of the said William Glendonwyn, no interest shall be "payable by the said William Scott upon the remaining sum of "10,000*l.* sterling; which principal sum of 10,000*l.* sterling is "to be secured to the said William Scott and Mrs. Ismene "Magdalena Glendonwyn, spouse of the said William Scott, "in manner following, viz. the interest of the said sum is to "be liferented by the said William Scott and Mrs. Ismene "Scott, his spouse, during their lives, and during the life of the "survivor of them, and the said principal sum of 10,000*l.* to be "the property of and divisible amongst the issue of the marriage, "male and female, as their said parents may jointly direct by "any settlement under their hands, &c. And, farther, the said "William Glendonwyn promises, out of the said interest, to pay "to his daughter, the said Mrs. Ismene Magdalena Glendonwyn "Scott, during his life, the sum of 200*l.* sterling yearly, for her

Oct. 3, 1831.

" own separate use, free from the debts or control of her pre-
" sent or any future husband, as in the nature of pin-money:
" And farther, that the said sum of 200*l.* sterling yearly is to be
" secured to the said Mrs. Ismene Magdalena Glendonwyn Scott
" in like manner, by the principal sum of 4,000*l.* sterling being
" retained out of the said sum of 30,000*l.* sterling; and the said
" sum of 4,000*l.* shall be the absolute property of the said
" Mrs. Ismene Magdalena Glendonwyn Scott, and which she
" shall have the power of conveying and settling at her pleasure,
" to take effect after her death: Declaring always, that the dis-
" position to be granted by the said William Glendonwyn, of
" his lands and estates in the parish of Parton, shall be specially
" burdened with the payment of the foresaid price of 60,500*l.*
" sterling, and all interest to become due thereon, payable in
" manner before stipulated; and the same shall remain a real
" lien and nexus over the said lands and estates, and preferable
" to all other debts and deeds."

Glendonwyn died in June 1809; his three daughters, Lady Gordon, Mrs. Scott, and Miss Glendonwyn, succeeded as heir-ess-portioners to the estate; and as their father had not executed a disposition, they, in 1811, granted a conveyance in favour of Scott, declaring the lands to be burdened with the price as a real burden. Scott entered into possession, and having become indebted to Napier, as representing the Galloway Bank, granted him an heritable bond for 15,000*l.*, and in further security of this sum, Mrs Scott, with consent of her husband, for his interest, assigned to Napier her third share of the price of the estate, and the 4,000*l.* Napier subsequently received another heritable bond for 10,000*l.* from Scott, in security of which Mrs. Scott executed a similar assignation.

On 7th January 1814, Napier purchased from Scott the lands of Barwhillanty, part of the lands of Parton, at the price (as afterwards fixed by arbiters), of 14,830*l.* bearing interest from 22d November 1813, the date of Napier's entry. Scott afterwards became insolvent, and a process of ranking and sale was raised in 1818. Subsequent to the raising of the action of ranking and sale a process of multiplepoinding was brought in the name of Napier, for the purpose of having the price of the lands of Barquhillanty distributed among the several creditors. As the fund in medio in this process was to be divided among the same

Oct. 3, 1831.

body of creditors with the price of the rest of the estate, Napier consented to a conjunction of the processes, to the effect of having one scheme of division calculated on the whole fund.

After the lands had been sold (part of which was bought by Miss Glendonwyn) a decree of ranking was pronounced in 1827, "preferring the creditors, &c. upon the prices of the said "lands and estate of Parton sold at the judicial sale thereof, and "interest due thereon, and also upon the sum of 14,830*l.*, the "price of the lands of Barquhillanty, being the fund in medio "in the said multiplepoinding at the instance of the said John "Napier, and interest due thereon," and a remit was made to an accountant to draw up a scheme of division.

This was done, and the division was proposed to take place as follows: By the accountant's report, 1. The heritable creditors were to be paid off in terms of their preferences. 2. The 4,000*l.* destined to Mrs. Scott was to be paid out of the first part of the lands purchased by Napier. 3. The interest of the 10,000*l.* destined to Scott's children was to be divided equally among Lady Gordon, Miss Glendonwyn, and Mrs. Scott. 4. The principal sum of 10,000*l.* was to be paid to Lady Gordon, Miss Glendonwyn, and Mrs. Scott, to be held by them in security of the interest, and in trust for the children of Mrs. Scott, who had the fee of it; and, 5. The residue of the price of the lands was to be set apart to these ladies. An interest was accumulated on the price of Barwhillanty, as at Whitsunday 1820. The scheme of division was objected to by the whole parties.

Napier insisted that the interest of the 10,000*l.* during Mr. and Mrs. Scott's lives belonged to him in terms of his assignations already mentioned: That he was not bound to pay or consign any part of the price of the lands which had been allocated to Mr. and Mrs. Scott till his claims against them were ascertained, as he claimed not only the interest of the 10,000*l.*, but the 4,000*l.*, and the residue of 8,079*l.* 17*s.* 11*d.*, being the share of the residue belonging to Mrs. Scott, as an heir-portioner, and that there should be no accumulation of interest of his price at Whitsunday 1820.

Mrs. Scott pleaded that the 4,000*l.* destined to her by her father should be allocated in such a manner as to be secured over the lands, to yield her the annuity of 200*l.*, which her father intended

Oct. 3, 1831.

her to have, and to be free from Napier's claims:* That the principal sum of 10,000*l.* should not be paid to the heirs-portioners, but should be heritably secured, so that the interest, or at all events a third part of it, might during her husband's life be applied in liquidation of any deficiency which might accrue on her share as an heir-portioner of the residue of the price, and on his death that the entire interest should be payable to her if she survived him; and the fee after their deaths to go to the children.

Miss Glendonwyn (along with Crombie, who alleged that he had right to Lady Gordon's share,) maintained, that as Mrs. Scott's husband was debtor for the price, and as he had right jure mariti both to the interest of the 10,000*l.* and of the third part of the price belonging to Mrs. Scott as an heir-portioner, she could not claim that interest, and they were entitled to be preferred to it, in order to liquidate pro tanto any deficiency arising on their shares of the price.

"The Lord Ordinary repels the whole objections to the account-
"ant's report, with the exception of that made to the proposed pay-
"ment to Mr. Crombie for 3,333*l.* 6*s.* 8*d.*, being one-third of the
"sum of 10,000*l.*, belonging in fee to the said children; sustains
"the said objections; and finds that as this sum must continue
"in the meantime to be a burden on the lands, Mr. Napier and
"Miss Glendonwyn are entitled to retain it in the proportions
"allocated on their prices, on granting heritable bonds in secu-
"rity of the same; the bond by Mr. Napier to be for payment
"to the children of the principal sum of 6,666*l.* 13*s.* 4*d.* at the
"death of the longest liver of Mr. and Mrs. Scott, and for pay-
"ment, during the lifetime of Mr. Scott, of the interest of one
"moiety, or of 3,333*l.* 6*s.* 8*d.* to Mr. Crombie, as trustee of Lady
"Gordon, and of the interest of the other moiety to Mrs. Scott,
"as one of the heirs-portioners of the late Mrs. Glendonwyn, or
"to those in her right as such; and if she shall survive Mr. Scott,
"for payment to her, or those in her right, under her father's
"settlement, of the interest of the whole sum of 6,666*l.* 13*s.* 4*d.*
"from the time of her husband's death to the termination of her
"liferent; and the bond by Miss Glendonwyn to be for payment

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* Pending the proceedings she raised an action for setting aside the deeds granted by her in favour of Napier.

Oct. 3, 1831.

" to the children of the sum of 3,333*l.* 6*s.* 8*d.*, being the remain-
" ing third retained by her at the death of the longest liver of
" Mr. and Mrs. Scott, and for payment of the interest only which
" may fall due after Mr. Scott's death; which interest, if
" Mrs. Scott survive, shall be payable to her, or those in her
" right, under her father's settlement, so long as she lives; and
" in respect the claim of Mr. Napier, as a riding interest, on the
" sums to which Mrs. Scott may be preferred, is uncertain, and
" contingent upon the issue of the reduction at her instance, and
" that the lands purchased by him cannot be considered as an
" adequate security for the prices, and the large sum of interest
" due upon them, nor, indeed, for more than the original prices
" themselves, ordains them, betwixt and the ensuing term of
" Whitsunday, to consign in the Bank of Scotland, Royal Bank,
" or with the British Linen Company, the whole interest due by
" him on these prices, up to the term of Martinmas last; and
" with these findings, approves of the report, and decerns in
" the division, and for payment accordingly."

This interlocutor having been taken before the Court, their Lordships remitted the case back to the Lord Ordinary to reconsider his interlocutor, and thereafter (July 11, 1829) his Lordship repelled " the objections to that part of the report
" which assigns to the heirs-portioners of the late Mr. Glendonwyn
" the interest due, or which may become due during Mr. Scott's
" life, on the sum of 10,000*l.* belonging in fee to his children by
" Mrs. Scott; finds, that as the right of the heirs-portioners to
" this interest arises from the failure of Mr. Scott to pay to them
" the stipulated price, which is declared a real burden on the
" lands, the interest, as coming in place of the price, must be
" held to be real in their persons, so that Mrs. Scott's share of
" the same does not fall under her husband's jus mariti, therefore
" repels the claim of Mr. Crombie and Miss Glendonwyn to
" Mrs. Scott's share of the said interest; sustains the objection
" to that part of the report which proposes that one-third part of
" the said principal sum of 10,000*l.* be paid to Mr. Crombie, to
" be retained by him during Mr. Scott's life; and finds, that as
" this sum must continue in the meantime to be a real burden
" on the lands, Mr. Napier and Miss Glendonwyn are entitled
" to retain the respective portions allocated to their prices, on
" granting heritable bonds in security of the same, the bond by

Oct. 3, 1831.

" Mr. Napier to be for payment to the children, at the death of " the longest liver of Mr. and Mrs. Scott, of the principal sum " of 6,666*l.* 13*s.* 4*d.*, and for payment, during Mrs. Scott's life, " of one moiety of the interest to Mr. Crombie, as assignee to " Lady Gordon, and of the other moiety to Mrs. Scott or her " assignees, and, in the event of Mrs. Scott surviving her hus- " band, for payment to her or her assignees of the whole interest " of the said principal sum from the time of Mr. Scott's death " till the termination of her liferent; and the bond by Miss Glen- " donwyn to be for payment to the children, at the death of the " longest liver of Mr. and Mrs. Scott, of the principal sum of " 3,333*l.* 6*s.* 8*d.*, and for payment of interest only for the time " subsequent to Mr. Scott's death, which interest, if Mrs. Scott " survive him, shall be payable to her or her assignees so long " as she lives: Reserves consideration of the new claim made by " Mr. Crombie to the interest of the sum falling to Mrs. Scott as " heir-portioner, till the issue of the question betwixt her and " Mr. Napier, as to the validity of his assignation; sustains " Mr. Napier's objection to the report, in so far as it accumu- " lates the interest arising on the price of the lands of Barqu- " hillanty, with the price itself, so as to form a new capital, " bearing interest from Whitsunday 1820: Finds, that there is " no legal ground for an accumulation at that term, nor at any " other prior to Whitsunday 1828, when the division is cal- " culated to take place; and as the effect of this finding seems " likely to affect the division, remits to Mr. Charles Ferrier, to " rectify the report, in so far as may be necessary in consistence " with this interlocutor. Note.—The Lord Ordinary has re- " served consideration of the claim of the interest of Mrs. Scott's " share as heir-portioner, because it appears to him, that unless " she shall succeed in reducing her assignation to Mr. Napier, " he, as having right to the principal sum under this assignation, " will have right also to the interest, so that the latter will not " fall under Mr. Scott's jus mariti, the sole foundation of " Mr. Crombie's claim to it."

Miss Glendonwyn and Crombie reclaimed, and prayed that the whole interest of the 10,000*l.* might be assigned to them. Lady Gordon separately prayed to the same effect. Mrs. Scott also resumed her objections, and the common agent insisted that the interest on the price of the lands purchased by Napier

ought to be accumulated at Whitsunday 1820. The Court, on the common agent's note (1st December 1829) altered "the Lord "Ordinary's interlocutor reclaimed against, and find Mr. Napier "liable in accumulation from Whitsunday 1821, being the first "term after the date of citation in the process of multiplepoind-"ing, and adhere quoad ultra;"* on Mrs. Scott's note, "adhered "to the Lord Ordinary's interlocutor; but reserving the objec-"tions by Mrs. Scott relative to the annuity claimed by her, as "payable during her father's lifetime; also of the annuity of "200*l.* claimed by her from and after the death of her father, "and to the sum of 4,000*l.* mentioned in her objections;" and on the notes for Crombie and Miss Glendonwyn, and Lady Gordon, appointed minutes of debate, "and thereafter the Court, (21st "January 1830) recalled that part of the Lord Ordinary's inter-"locutor complained of, and find that Mr. Crombie and Miss "Glendonwyn are entitled to the whole interest of the sum of "10,000*l.* sterling, which has accrued, or may accrue, during the "life of Mr. William Scott; and that neither Mrs. Scott, nor her "disponee Mr. Napier, are entitled, during the life of the said "William Scott, to draw any part thereof, until the debts of the "petitioner are paid: Find Mr. Napier liable in the expense "attending this part of the discussion, and appoint an account "thereof to be given in, and remit to the auditor, &c." The Court also "refused Lady Gordon's note, in so far as it prays to "sustain the objections stated in her name, against Alexander "Crombie uplifting the fund set apart to him as trustee.†"

Oct. 3, 1831.

Mrs. Scott and Napier appealed.

Mrs. Scott and Napier as to her right to interest.—The interlocutor finding that Crombie and Miss Glendonwyn are entitled to the whole interest of the 10,000*l.* during the life of Scott, and that Mrs. Scott, and Napier as her disponee, are not entitled to draw or retain any part thereof, is irreconcileable to legal principle, and proceeds on a misapprehension of the facts. Glendonwyn's three daughters had right, in equal portions, to the real burden of 60,500*l.* constituted over the estate of Parton by original minute of sale and by the disposition from Lady

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* 8 Shaw and Dunlop, p. 149. † 8 Shaw and Dunlop, 357.

Oct. 3, 1831. Gordon and her sisters in favour of Scott, and his seisin thereon; but they were liable for equal portions of the 10,000*l.* On the supposition that the interest of the 10,000*l.* can be applied in compensation and satisfaction of the non-payment of the price, Mrs. Scott is entitled to the same right as her sisters, and therefore to participate with them in this benefit.

Answered.—Scott could claim nothing from the prices, or interests of prices, obtained for the estate of Parton, as long as any part of the price originally agreed to be paid by himself was due to any of the co-heiresses of Glendonwyn, seeing that the whole of these prices, and the interests, except in so far as otherwise specially appropriated by Glendonwyn by the minute of sale, were immediately and primarily answerable for payment of the price agreed to be paid by Scott. Under the provision in the minute of sale, the whole interest of the 10,000*l.* belonged originally to Scott, either directly or jure mariti; and the third share of that interest, or the right to it, falling to Mrs. Scott as one of the co-heiresses, could not be claimed by her from her husband Scott, seeing that any claim she might have to it fell under his jus mariti, so that it either reverted to him, or continued with him in virtue of his original right under the minute of sale;—and this third of the interest thus belonging to him he was the creditor in, and the only party who could claim it as against the respondents, while the respondents were entitled to retain it as against him, out of the prices in medio, till their shares of the price due by Scott were fully paid up to them. Napier's assignation from Mrs. Scott could convey no right to the third of the interest of the 10,000*l.* or any portion of it, seeing that Mrs. Scott had no right to it in any view which did not instantly pass to her husband, or which she could enforce against her husband, and none therefore which she could effectually assign to a third party; and the assignation from Scott was equally unavailable as against the respondents, seeing that he had no claim to assign to the appellant, as long as any portion of the respondents' portion of the price due by him remained unpaid up; and the appellant, as his assignee, can claim nothing which it was not competent to Scott himself to claim.

Napier as to accumulation of interest.—There is no principle of law or equity which could entitle the Court to accumulate the interest of the price of Barwhillanty, and convert the same into

Oct. 3, 1831.

a capital sum bearing-interest from Whitsunday 1820 to 1821. The appellant purchased the lands of Barwhillanty at a price which was to be fixed by arbiters; and till the price was fixed the appellant had it not in his power to pay it. In consequence of the bankruptcy of Scott, and the failure of the arbiters to fix the price, the appellant was compelled to bring an action for the purpose of having the price ascertained by skilful persons appointed by the Court; but when he had thus at last succeeded in getting the price fixed, there was no person in titulo to receive it. The price was to be appropriated to such of the debts due by Scott as the Court might determine; but, till such determination, the appellant was obliged to keep it in his hands. All this, from first to last, was a severe hardship imposed on the appellant. The current rate of interest has, in general, since he made the purchase, not exceeded four per cent., even when money is placed on permanent securities; but banks in general, and even private bankers, have seldom allowed more than two and a half per cent. on monies deposited with them.

Answered.—By the minute of sale entered into between Napier and Scott he was bound to pay interest on the price of the lands of Barwhillanty from the term of Whitsunday 1813, and half-yearly thereafter, at the terms of Martinmas and Whitsunday, till he made payment of the price itself; but, not having paid any of the interest, he was not entitled to retain both the principal and interest, and make profit thereof at the expense of the creditors of the common debtor Scott.

Lord Chancellor.—My Lords, the judgment complained of seems to me well founded, but there is one point that deserves to be considered, namely, the only point substantially relating to the compound interest. I must take it that the decision of the case of *Jolly* v. *M'Neill* is not to be held affected by the reversal of the decision of *M'Neill* v. *M'Neill*—I must take it that it only goes to show the jurisdiction of the Court of Session to allow interest from and after the date of the citation in the process of multiplepoinding. But I wish to have time to consider how far that decision in *M'Neill* v. *M'Neill* can be taken to throw any light upon the Scotch law upon the subject. I happen to know that the late Chief Baron (*Alexander*) who heard the case here, and mentioned it to me afterwards, took very great pains with it, and I believe had some communication with the Scotch Judges upon the Scotch law of compound interest. I wish to

Oct. 3, 1831.

hear what he says upon this matter. I have a strong opinion upon the biennial rests; but for greater accuracy I wish for a little time to look into it, and consult the late Lord Chief Baron. The only other ground upon which I entertain any doubt is this: Suppose the Lord Chief Baron should inform me that the case of Jolly v. M'Neill rests quite independent of the reversal of M'Neill v. M'Neill—that it proceeded upon the ground of biennial rests—then I shall be of opinion that the Court of Session has done wisely in reversing the interlocutor of the Lord Ordinary, who disallowed the interest, and found that Napier was liable in accumulations from Whitsunday 1821, being the first term after the date of citation in the process of multiplepoinding; and I should be of opinion to agree with them, were it not for the consideration that struck me while the case was going on, and which the learned Sergeant has alluded to in his reply, though I do not find any reference made to it in the argument in the printed cases; but I am certain there is no reference made to it in the Judges' notes in the present case, or in the cases of Jolly v. M'Neill or M'Neill v. M'Neill—and that is this, Whether a citation in a summons of multiplepoinding is the same, in respect of the law of Scotland, as regards allowing interest after the date of the citation, and the judicial demand it implies? Whether the law is the same in a demand of this nature, which has been called a case of constructive demand, as in an ordinary case, where there is a debtor on one side and a creditor on the other, a party demanding and a party resisting the demand, and where the party refusing to comply with the demand has a party to pay to, and to whom he may safely pay? If I pay money to one not entitled to receive it, I pay it in my own wrong, and I am liable to pay it over again. The consequence of which is, that in the law of Scotland, there has arisen a process of multiplepoinding which calls parties to come forward with their claims, and after these have been adjusted, it appears who is in law entitled to receive; and then the pursuer in that process—the party who wishes to pay, but cannot safely pay—pays to the person indicated as the person to whom he may pay safely; for he has the best authority—a judicial authority—for paying, and cannot pay in his own wrong. In like manner, in England, a bill of interpleader has been devised to enable a party to pay, who could not otherwise pay, though he admitted the demand. This is a proceeding in equity with us now, but it used to be known in the common law. You may have an interpleader in common law, but that has been superseded by a more convenient practice with us, and it would in Scotland also avoid much of the litigation we have in these cases. The question generally arises in the case of a party holding goods; a doubt exists who has the right to them; whether, *e. g.*, the unpaid seller has a right to stop them, or whether the assignee under the buyer's

commission has a right to them; and they take a much shorter and easier course than interpleader or multiplepoinding. One party indemnifies the wharfinger, who has no objection to give them up, and only wishes to be safe in doing so; he gets his indemnity, which puts the party in his shoes. Suppose A. the stake-holder, B. and C. the conflicting parties; A. gives up the stake to B. upon an indemnity, which leaves B. to fight it out with C. An action of trover is brought by C. against A.; then B. defends it, though in the name of A., and without the evicuity of a bill of interpleader or of that obsolete proceeding in a court of law the same result is obtained, and A. has not to pay one farthing, the whole trouble and whole costs falling upon B. and C. How far complaints may lie against that simple remedy among members of the profession I will not say. However, here the question is, Whether the non-payment of a demand, on citation upon a summons of multiplepoinding, is to be taken to be equivalent to non-payment in the case of a legal demand? that would let in the principle recognised rather than laid down in Jolly v. M'Neill. It is said, on the other hand, that this is not all, because no person can say there was any laches, any mora. I can see no difference between interest upon interest (if interest is part of the legal demand) and interest upon a sum of money, if that sum of money is a legal demand. I cannot perceive the difference between the liability to pay interest, where A. is indebted to B. for interest upon money due, and the liability to pay interest upon interest, where A. owes B. money plus the interest. You may call it compound interest; it is perfectly immaterial as to the law of Scotland. But the answer made as to the two cases of a summons of multiplepoinding and an ordinary demand, is this; it is true you were not bound to pay upon the citation in the multiplepoinding, because you did not know the parties entitled; but why did you not consign the money? You might have consigned it; and the not consigning, upon being served, is held to be, in this case, equivalent to a refusal to answer the demand in the other case, where there is no conflict of creditors, but one creditor and one debtor, and it is admitted that the Court had the ordinary jurisdiction of charging interest from the time of the citation. I am not quite prepared to say that that is so. I can see some difference between the two cases; but this is not a question raised in the Court below; this view has not been taken on the Bench; and as that is the main ground, supposing the law in Jolly v. M'Neill to stand, notwithstanding the reversal of M'Neill v. M'Neill,—as, I apprehend, it will be found to stand, the only ground of doubt being one apparently not raised below, and on which the opinions of the Judges give me no light—I should wish to have an opportunity of communicating with them, to ascertain how far it is, according to the law and the practice of

Oct. 9, 1831.

Oct. 3, 1831. Scotland, that non-consignment is held to be the same as non-payment, where there is a possibility of paying safely without the chance of loss. I shall however say no more upon this case, unless it turns out something further arises upon this inquiry, when made, of the Chief Baron and the Judges in Scotland. I shall have stated the grounds of my opinion in affirming the decision of the Court below, if it is affirmed; and I shall also have stated the grounds of the reversal, if it is reversed, and that will dispense with the necessity of my troubling your Lordships again.

The case was thereupon adjourned.

LORD CHANCELLOR.—My Lords, this is a case of very considerable importance in one view of it; namely, that relating to the accumulation of interest, which has been given by the ultimate judgment of the Court—interest upon interest. This arose out of a minute of sale, executed on the 7th of January 1814 by Napier to Scott, and in which Scott stipulated for the payment, and Napier bound himself to pay interest from the Michaelmas preceding, namely, 1813, to be paid every half year, till the term of the payment of the principal, which was a sum of about 10,000*l*. I think he was only to pay the principal money; and interest up to that date was to be accounted from the period of a certain decreet-arbitral, affixing the amount of the purchase money, and stating the value of the land. Napier appointed an arbitrator, and so did Scott, but the arbitrator appointed by Scott refused to act, and Scott refused to concur in appointing another, so that the laches in obtaining the award was to be imputed to Scott, and not to Napier; but nothing will turn upon that, proceedings having taken place in the Court of Session to ascertain the value, in consequence of the refusal to appoint an arbitrator, in November 1819. The Court of Session, having taken means to ascertain the value, fixed it at a certain sum, which ought to have been paid after deducting 10,000*l*., the balance due from Scott to Napier; and it was on the balance that the interest was to be paid. This goes only to the amount. A process of implement was raised, and after that an action of multiplepoinding—summoning all the parties having claims, with a view to its being determined what was the balance, and to whom it should be paid. The Lord Ordinary having disallowed the account of Mr. Ferrier the accountant, the Court of Session reversed that interlocutor, and allowed the interest upon interest ever since the date of citation in the multiplepoinding. Ferrier appears to have reported, that the interest should be allowed from Whitsuntide 1820; the Court have decreed that interest should be paid from Whitsuntide 1821. I will state to your Lordships what I take to be the reason of the report of Ferrier, referring to Whitsun-

tide 1820, which was before the citation in the action of multiple- Oct. 3, 1831.
poinding. Mr. Ferrier (and I think with a colour of reasoning in the Scotch law; but that is not now before us, as the party appears to have acquiesced in the ultimate decree, allowing it only from the decree,) gave the interest from Whitsuntide 1820, upon this ground, that Napier had agreed to pay Scott interest every half year, from Michaelmas 1813 to the date of payment. Now, the date of payment was to be upon the award. When was the award? There was no award; but in the place of an award is to be substituted the proceedings in the Court, and the final judgment in that proceeding, which was the 12th of November, the first day of the winter session in 1819. Now, the accountant says, that as he ought to have paid the principal fund upon that day, so ought he upon that day to have paid up the arrears of the interest—but he did not; and therefore he accumulates them in the meantime, and makes him pay interest from Whitsuntide 1820: That is the colour of reason which appears to have been for his report. My opinion is, that the Court have come to a sounder conclusion, in point of law, in not allowing that interest from Whitsuntide 1820, but from Whitsuntide 1821; because in order that you may be entitled to accumulate interest upon interest, you must have something more than the arrival of the day of payment, where there is no express stipulation reserving rests, or accumulation of interest—and even rests are subject to much consideration; because, as they tend greatly towards usury, our Courts of equity discountenance them as cloaks and shifts for usury, and so does the Court of Session, which is a court of equity as well as of law. I therefore think the interlocutor is right in preferring the period of Whitsuntide 1821 to the period of Mr. Ferrier's report, of Whitsuntide 1820. I have also to add, that the ground of this last period being taken is that the summons of multiplepoinding was signeted on the 26th of February 1821; consequently they could not give interest until the Whitsunday immediately following (Martinmas and Whitsunday being the accustomed terms). They would take the interest only from the term next succeeding to the summons; which is to say, the Court held that citation in the multiplepoinding to put the party not paying in mora, and therefore they give accumulation upon the sum—they give the interest not as compound interest; and that is the fallacy of the argument of the appellants in this case, when they say that this is contrary to law; as if it were interest upon interest, annual rent upon annual rent. It is not so: the claim of the party is for two sums—the principal which was due, and the interest due from the date of the decreet-arbitral, or, in place of the decreet-arbitral, the judgment of the Court on the first day of winter Session 1819,—from the time the

Oct. 3, 1831.

interest became the subject matter of the suit. It is just as much liable to interest from that day, up to the time of payment, as the principal. The party refusing payment on the citation has put himself in mora, and is just as much liable to pay interest upon that as upon the principal, or any other debt which one man owes another. In England the case is perfectly different; but then, in England, it is not different in respect to interest and principal; for if, instead of saying a word about interest, an action had been brought, it would not have made the slightest difference whether it was interest upon principal, or upon interest. In neither case would interest have been allowed. A stronger instance cannot be taken than an action upon a bill of exchange;—you can get no interest on interest there, but you get interest on the bill up to the fourth day of next term. If I have a demand for 1,000*l.*, not upon bill or note, and bring an action for it, by which I make a judicial demand of the principal, I do not recover interest upon that. By the English law, you cannot recover interest either before the commencement of the suit, or from the commencement of it, either on principal or interest; but in Scotland it is not because it is interest, but because it is the subject matter of the action, that the Scotch law gives interest, contrary to the principle of the English law, from the instant that the party being called upon to pay, and who ought to pay on the citation, refuses to pay, and thereby becomes, under the Scotch law, in mora. But now with respect to the particular form of the action. I entertained, as your Lordships may remember, some doubt whether the case of multiplepoinding was not different from an ordinary action; for in an ordinary action, you are in mora if you do not pay, because you know to whom you are to pay; but not so with respect to an action of multiplepoinding. The answer to this appears to be what I flung out at the time, and on which I have since had communication with learned persons on the bench in Scotland. It is clearly just as good in an action of multiplepoinding as in an action of another nature; upon this no doubt exists. An action of multiplepoinding puts the party who does not pay in mora, as much as in any common action; because he has only to consign. There is a provision, as I observe, in the 53d of George III. to which I am referred by one of the printed cases; the party is safe on consigning into Court, and from that time he is chargeable with no interest; but if he chooses to keep the money mixed up with his own funds, it is in vain for him to say that he ought not to pay five per cent., because he may not have got above two or three, or nothing at all. He is in mora; there is a wilful neglect of duty on his part; and therefore he shall pay interest. Upon these grounds, I humbly submit to your Lordships, that the judgment of the Court below, which is the subject of appeal, ought to be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed. Oct. 3, 1831

Napier's Authorities.—Campbell, March 3, 1802 (F. C.); M'Neill v. M'Neill, May 26, 1826 (4 S. & D., No. 386); 22 Dec. 1830, (4 W. & S. p. 455); Jolly v. M'Neill, May 28, 1829 (7 S. & D. p. 666).

Common Agent's Authorities.—Queensberry's Executors, 21 Dec. 1826 (5 S. & D. No. 112).

DUTHIE, MACDOUGALL, and BAINBRIGGE—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.

BARRON GRAHAME, Appellant.—*Sir C. Wetherell—A. M'Neil.* No. 58.

SARAH GRAHAME and others, Respondents.—*Dr. Lushington.*

Entail—Sale.—Sale of lands by public roup sustained (affirming the judgment of the Court of Session), which was alleged to have been made in contravention of a strict entail in an antenuptial contract, recorded in the books of Council and Session for preservation and infeftment, engrossing the fetters of the entail taken and recorded previous to the sale, but the entail not having been recorded in the Register of Entails till after the sale. *Appeal.*—Order on an agent to exhibit the authority for putting the name of a counsel to an appeal case which was disclaimed by the counsel, and observations on alleged practice of doing so without authority.

BARRON GRAHAME, as one of the heirs-substitutes under a strict entail of the lands of Balmakewan and others, contained in an antenuptial contract which had been entered into in 1748 between William Grahame of Morphie and Katherine Ogilvy, brought a reduction of the sale of a portion of these lands which Robert, eldest son of William, had made in 1786 in contravention of the entail. The pursuer was descended of William Grahame by a subsequent marriage with Wilhelmina Barclay of Almeriecloss. His action was directed against Sarah Grahame the only surviving child of the contravener, Robert Grahame, and against Shand and other parties, into whose hands the purchased lands had come. At the date of the action only two days were wanting to complete forty years from the date of the sale. Oct. 6, 1831.

1ST DIVISION. Ld. Fullerton.

The defenders stated that the purchase of the lands had been