[1st *June* 1833.]

Sir WILLIAM F. ELIOTT and his Trustees, Appellants. No. 25.
—*Lord Advocate* (*Jeffrey*)—*Dr. Lushington.*

The Earl of MINTO, Respondent.—*Knight*—*Murray.*

Testament — Trust — Clause. — Circumstances in which it was held (affirming the judgment of the Court of Session) that a testator's intention was to subject certain trust funds and estate to the payment of his debts, and to free certain property in England from that liability; and effect given to the testator's intentions.

2D DIVISION.
Lord Medwyn.

IN the month of February 1806, the late William Elliott of Wells executed a deed of entail and also a trust deed. By the deed of entail he disponed the lands of Wells, the baronies of Ormiston and Hadden, together with other lands under the fetters of a strict entail, to himself and the heirs male of his body; whom failing, to Sir William F. Eliott. The following clause was contained in this deed:—" I hereby " bind and oblige me and my heirs at law, and my " executors and successors, to free and relieve the said " lands and estate, and the heirs of tailzie that shall " succeed thereto, of all debts to which I shall be liable " at the time of my death." A power to alter and revoke was reserved.

By the trust deed Mr. Eliott conveyed to the late

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Earl of Minto and others, as his trustees, the whole lands and estates contained in the deed of entail, and the whole of his other property, heritable and moveable, for the payment, inter alia, of all his just and lawful debts then due, and which should be due by him at the time of his death. The trustees were invested with power to sell the lands of Ormiston and Hadden for payment of the debts, but they were authorized to dispense with a sale if they could pay off the debts by degrees out of the surplus rents or other funds falling under the trust.

In December 1809 Mr. Eliott executed a supplementary deed of settlement, by which he nominated the Earl of Minto to be one of his trustees, and which contained the following clause:—" I hereby " 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 falling under the said trust." And " whereas " I am possessed of certain funds and effects situated in " England, which I may dispose of by 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 the said funds and effects situated " in England, so far as they are thereby conveyed, " settled, or bequeathed, and the same shall not be held " or considered as falling under my foresaid trust deed; " and I hereby ratify, approve of, and confirm the fore- " said trust disposition."

In July 1813 Mr. Eliott executed a deed of codicil, directing his trustees to pay sundry legacies and annuities, and ratifying and confirming the foresaid deed of entail and trust disposition. On the 4th July 1816 Mr. Elliott executed a settlement in the English form,

containing the following clause:—"All my books, and "whatsoever effects and property, I give and bequeath "unto the foresaid Earl of Minto, on condition that "he pays unto Ambrose Glover, Esq., of Ryegate," &c. the sums therein mentioned. "And I do hereby "appoint the said Gilbert Earl of Minto and Ambrose "Glover, Esq., executors of this my last will and testa-"ment; and I also hereby confirm the entail and trust "deed before mentioned."

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In July 1818 Mr. Elliott sold the lands of Ormiston to Mr. Mein for 28,000*l.* One of the objects of the sale was to pay off an heritable debt of 15,000*l.* affecting that property. Of the purchase money 16,000*l.* was remitted to London by Mr. Mein; and thereafter 15,000*l.* of this sum (being the amount of the bond) was, by the direction of Mr. Elliott, invested in the three per cent. consols until the term of payment in the bond arrived.

Mr. Elliott died in October 1818, before the heritable debt on Ormiston was paid off, and while the money continued invested in the funds. A dispute thereafter arose between Sir William F. Eliott, as heir of entail, and the Earl of Minto, as administrator under the English will, regarding this sum. After considerable discussion a judgment was pronounced by the Court of Session, and afterwards affirmed by this House*, by which the 15,000*l.*, though carried by the English will, was held to be so carried under the obligation, on the part of the Earl, to relieve the trust estates of the heritable debt, for payment of which it had been transmitted to England. In consequence of this decision the Earl of

* Ante, Vol. II. p. 678.

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Minto sold out the sum vested in the funds, and made over the proceeds to the trustees; but having applied the remaining property situated in England to his own private use, Sir W. F. Eliott raised an action, (afterwards insisted on by him and his trustees) against his Lordship, concluding that it should be found that the property in England, so far as required for paying off the debts and obligations, had been wrongously and unjustly taken possession of by his Lordship, and that the same pertained to Sir W. F. Eliott, or to the trustees of Mr. Eliott; or otherways that the Earl of Minto was bound, out of that property, to free and relieve Sir W. F. Eliott and the other heirs of entail of all the debts and obligations affecting the entailed estate, and that his Lordship was bound to relieve him and the heirs of entail, and the rents of the estate, of the whole interest due on the debts and obligations, from the death of the testator, &c.

In defence Lord Minto pleaded, that according to the legal construction of Mr. Eliott's deeds of settlement the combined operation of them was to subject the trust funds and estates to the payment of his debts, while the property in England was withdrawn from that liability, and bequeathed to Lord Minto, subject only to the specific burdens created by the will.

On the 7th July 1829 the Court pronounced the following interlocutor:—" The Lords, on the report of " the Lord Ordinary, having considered this process, with " the closed record cases for the parties, and other pro- " ceedings, and having heard counsel thereon, sustain " the defences, assoilzie the defender from the conclu- " sions of the libel, and decern: Find the defender " entitled to his expenses, allow an account thereof to

" be given in when lodged, remit to the auditor to tax " the same."* Expences were decerned for on the 14th of November.

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Sir William F. Eliot and his trustees appealed.

Appellants.—The clause in the deed of entail whereby Mr. Eliott bound and obliged himself, " and my heirs " at law, and my executors and successors, to free and " relieve the said lands and estate, and the heirs of " tailzie who shall succeed thereto, of all debts to which " I shall be liable at the time of my death," is conceived so as to apply, not merely to the case of intestate, but also to that of testate succession. The Earl of Minto was the universal successor of the late Mr. Elliott in England. A universal legatee is liable in payment of the debts of the testator, and consequently is subject to the operation of the clause in the deed of entail, binding the heirs, executors, and successors of Mr. Elliott in the payment of his debts. In questions inter hæredes it is of no consequence for an heir who is liable in payment of debt to be able to point to a nearer heir, and to say that he must relieve him, unless he can also show that such nearer heir was in some way or other lucratus by his succession to the deceased.† In point of general legal principle, the question in the present case is precisely the same as that which was formerly decided between the same parties.

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* 7 S. & D. 845.

† See Fount. Nov. 12, 1680, Stevenson compared with, July 12, 1734; Lady Kinfauns, both observed in Folio Dict. v. ii. p. 133, 134; and Clerk Home, 76; Durie, March 10, 1627; Forrester, Durie, March 8, 1626; Traquair, Forbes, Dec. 16, 1712; Monro, July 7, 1732; Strachan observed in Folio Dict. v. ii. p. 133.

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Respondent.—The evident intention of the late Mr. Elliott, as well as the ordinary rules of law applicable to special testamentary donations, infer an exemption of his English property from general liability for his debts; and such exemption is established by the express terms of the settlements, which absolutely exclude the contrary supposition. The judgment pronounced in the former question proceeded upon a speciality applicable only to a particular part of the funds in England, which excludes by necessary inference the plea of general liability for the testator's debts, now sought to be attached to the other English funds.

LORD CHANCELLOR.—My Lords, whatever doubts I might have entertained, had I been called on to consult with your Lordships in the former case, respecting the 15,000*l.* disposed of in this House by appeal from the Court of Session — (and many grave doubts were entertained, and among persons who attended to the subject, and very great difficulties were pressed in argument by those who argued it here, as well as in the argument of Lord Gifford,)—my advice to your Lordships in the ultimate decision, would be for affirming that judgment of the Court of Session; and in offering this recommendation I certainly have no doubt whatever. I see it in the same light in which it has appeared to the learned Judges below, and I will not detain you further than by simply moving that the interlocutors of the 7th of July and the 14th of November be affirmed.

LORD WYNFORD.—My Lords, I will just state to your Lordships, that I have not, from the beginning to the end of this case, entertained the least doubt. I think

this case entirely distinguishable from that which was decided in this House, where your Lordships had the assistance of Lord Gifford. If I had had the honour of sitting in this House on that occasion, I should have concurred entirely in the opinion my Lord Gifford delivered to your Lordships. My Lord Gifford was of opinion that that 16,000*l.* was an exception out of the rule; whereas, if we were to say that the judgment of the Court below is not correct, we should get rid of the rule altogether, and render that provision, which this eminent person has made as to the English property, entirely inoperative. It is a question of intention, as the Lord Advocate has argued for some time;—no doubt his intention was that this property should go to Lord Minto, unfettered by any application for the payment of debts in Scotland; yet, if the judgment of the Court below is wrong, that intention will be entirely defeated, and not the least effect can ever by possibility be given to that design. For this short reason, my Lords, without going further into the case, I entirely concur with my noble and learned friend, that the judgment of the Court below ought to be affirmed.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the several interlocutors therein complained of be and the same are hereby affirmed; and it is further ordered, That the appellants do pay or cause to be paid to the said respondent the sum of 200*l.* for his costs in respect of the said appeal.

HALL & BROWNLEY—SPOTTISWOODE & ROBERTSON,
Solicitors.