May 20, 1814.

CONTRACT.—THE MERE EXHIBITION OF A PLAN NO WARRANTY.

of damages that the Governors of the Hospital could proceed against the Magistrates. If there was a contract at all, it could not be of the nature supposed by the Court below. But he concurred in the opinion, that the exhibition of the plan was no warranty. At the same time, it was fitting that the Respondent should have the opportunity of preserving his estate.

May 26, 1814. Judgment.

Judgment.—Feu duties, to be paid within a short period, to be fixed by the Court of Session, and remit.

Agent for Appellants, SPOTTISWOODE and ROBERTSON.
Agents for Respondent, CAMPBELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SIR JAMES GRAHAM and others, Executors of the Will of SIR WELFRED LAWSON, who was sole Executor of the Will of MRS. SARAH AGLIANBY, or LOWTHIAN - - - - - - - - - } *Appellants.*

MAXWELL and others, Representatives of LOWTHIAN - - - - } *Respondents.*

May 20, 1814.

JUS RELICTÆ.—RES JUDICATA.

To render the matter of a judgment a *res judicata*, so as to make this a valid plea, it is necessary not only that the subject and parties, but that the grounds of judgment, or *media concludendi*, should be the same. Thus, where one

had granted a general obligation (for the purpose of indemnifying others) to pay certain debts stated in a list referred to by the obligation after the death of the grantor, the Court of Session and House of Peers decided, that the obligation being of a moveable nature must affect the *jus relictæ*. It was afterwards found that a personal bond of corroboration, with interest and penalty, for payment of one of the debts in the list, had been given to the creditor himself by the grantor of the general obligation of indemnity, which bond was unsatisfied at the grantor's death. The House of Lords, contrary to the opinion of the Court of Session, held, that as the previous judgments had been pronounced solely with reference to the general obligation, —the particular bond, though produced in process, not having been attended to,—the question as to this debt was still open upon this new ground, and judgment accordingly.

May 20, 1814.

JUS RELICTÆ. —RES JUDICATA.

ONE Mackenzie, law-agent of Mr. Lowthian, of Staffold, in the county of Cumberland, who resided at Dumfries, had purchased the estate of *Netherwood*, for the price of which Lowthian had become his surety, and had otherwise engaged his credit for him. Mackenzie died in 1781, leaving a disposition and settlement, by which his whole estate and effects were given to trustees for the benefit of his creditors, representatives, &c. with power to sell. The trustees having found some difficulty in acting, conveyed and assigned, in pursuance of an agreement to that effect, all the estate and effects of Mackenzie to Lowthian; and Lowthian, on the other hand, executed a deed, whereby, on a recital of the transactions, &c. he became bound "to free, relieve, and indemnify "them of all the consequences of their having accepted the trust, and acted under it, and of the "conveyance, &c. to him; and for that effect, that "he would, with all convenient speed, make pay-

Facts and circumstances.

Deed of exoneration and obligation.

May 20, 1814.

JUS RELICTÆ.—RES JUDICATA.

"ment of all the just and lawful debts due by the "said deceased G. Mackenzie, and procure valid "discharges of the same to all concerned." One of these debts was a sum of 10,000*l.* borrowed by Mackenzie from Richard Glover, of London, secured by heritable bond on the estate of Netherwood.

Glover's debt.

Lowthian died in 1784, having previously made a testamentary settlement in the Scotch form, by which the whole of his heritable and moveable property in Scotland was given to his wife, who survived him. In 1793, upon action raised at the instance of the Respondents, the heirs and executors of Lowthian, the testamentary instruments were set aside by judgment of the Court of Session, affirmed on appeal, June, 1794.

Feb. 6, 1796. Judgment of the Court of Session, that Lowthian's obligation to the trustees, being of a moveable nature, must affect the *jus relictæ*.

Upon an action of count and reckoning which followed, it was held by the Court of Session, (for reasons not necessary here to state,) that Mrs. Lowthian was not entitled to her terce of the Scotch real estates, and *that Lowthian's obligation respecting Mackenzie's debts, being of a moveable nature, must affect the* JUS RELICTÆ. On appeal, the first branch of the decree (as to the terce) was reversed; the second was *affirmed*.

1797. Affirmed by the House of Lords.

Bond of corroboration now first particularly noticed.

The accounting having proceeded, it was noticed that Lowthian, on obtaining a delay of payment, had, in corroboration of the heritable security held by Glover, in June, 1782, granted his own personal bond, with interest and penalty, to Glover, for payment of the 10,000*l.* at the following Martinmas.

The accountant (Wilson) stated in his report, that "this bond of corroboration did not appear to

" have been under the view of the parties in dis- May 20, 1814.
" cussing the question, whether or not G. Macken-
" zie's debts should affect the fund of *jus relictæ*; JUS RELICTÆ.
" at least, that it was not noticed in any of the —RES JUDI-
" written pleadings, *the case having been argued* CATA.
" *and decided only with relation to the deed of exo-*
" *neration and obligation by Mr. Lowthian to*
" *Mr. Mackenzie's trustees.* That accordingly, by
" the judgments of the Court of Session and House
" of Peers, it was found, that the obligation being
" of a moveable nature must affect the fund of *jus*
" *relictæ*, and though it seemed to have been all
" along understood that Glover's debt was included
" under the findings of these judgments, and indeed
" must have been the chief and in effect the only
" cause of the discussions, yet it seemed doubtful
" if, in consequence of the bond of corroboration
" before mentioned, it could be considered as affected
" by the decision of the general question."

The Appellants, by leave of the Lord Ordinary, made remarks on this report, under the title of objections; to which the Respondents having answered, the Lord Ordinary pronounced an interlo- Jan. 17, 1809. Lord Ordinary's interlocutor. cutor, which, after touching upon other points not necessary now to be stated, proceeded in these terms:—

" As to the fifth point, repels the plea of the ob-
" jectors, and adopts the view, according to which
" Glover's debt is made to affect the *jus relictæ* in
" respect of the judgment of the Court, affirmed in
" the House of Lords; and that the Ordinary does
" not think himself at liberty to consider whether
" the circumstance of Mr. Lowthian having granted

May 20, 1814.

JUS RELICTÆ.—RES JUDICATA.

"a bond of corroboration of Glover's debt was of "was not argued on and considered at the time the "said judgment was pronounced, it being unques- "tionable that the said debt was contained in the "list referred to in the obligation granted by Low- "thian, mentioned in the said judgment, and, as "observed by the accountant, must have been the "principal, if not the sole cause of agitating the "question."

Adhered to by the Court, June 22, and July 8, 1809.

To this interlocutor the Court adhered, and an appeal was lodged.

It was insisted for the Appellants, that the previous judgments of the Court of Session and House of Lords rested entirely upon the obligation to the trustees of Mackenzie, without any relation whatever to the particular obligation granted by Lowthian himself to Glover, which raised a totally distinct question; and that, this latter bond not being one of the *media concludendi*, the judgment could not be considered as extending to that point so as to render it a *res judicata*. That the plea of *competent* and *omitted* did not apply, as the cause was still in Court, and a competent defence, though omitted at the proper stage, might be taken into consideration, if made at any time during the same process. (*Grant v. Grant*, Fountainhall.—*Malcolm v. Henderson, ante*)

Ersk. b. 4. t. 3. s. 3.

For the Respondents it was insisted that the matter was a *res judicata*, as Glover's debt was included in the list of the debts to which the findings of the judgments referred. That the bond of corroboration, whether dwelt upon or not, was produced in process before any judgment was pronounced; and that the

judgments ought not now to be opened up, on an allegation that an argument which might have been founded upon it had been omitted; and that at any rate the bond of corroboration was merely an accessary obligation, which afforded no solid ground of distinction between this and the other debts.

May 20, 1814.

JUS RELICTÆ. —RES JUDICATA.

Lord Eldon (Chancellor.) After stating the circumstances. One question in this cause, which had been here long ago, was, Whether the debts of Mackenzie for which Mr. Lowthian had engaged did or did not affect the *jus relictæ* of Mrs. Lowthian, the widow? The Court of Session had decided,—"that the obligation granted by Mr. Low-"thian to the trustees of G. Mackenzie for the "price of the estate of Netherwood and debts "owing by G. Mackenzie, *being of a moveable na-"ture*, must affect the *jus relictæ*." One of these debts was due to a person of the name of Glover. The obligation was constituted by a deed of exoneration, by which Lowthian became bound to indemnify the trustees, and to pay Mackenzie's debts.

May 26, 1814. Observations in judgment.

He had looked into the cases as they stood when the cause was before their Lordships in 1797 as to this point,—"that the obligation, &c. by Lowthian "to Mackenzie's trustees, being of a moveable na-"ture, must affect the *jus relictæ*." He had been curious to do this, as he recollected that he had at that bar argued with great zeal, and with too much confidence as he was taught by their Lordships' decision, in favour of Mrs. Lowthian, who had at first claimed under a settlement, or will, which to his dying day he should think was a valid will,

May 26, 1814.

JUS RELICTÆ.—RES JUDICATA.

except when he thought of it with reference to their Lordships' judgment. He found, that in 1797 it was contended, in one of their reasons of appeal, that the question was the same as if Lowthian had given a corroborative bond to each of Mackenzie's creditors, and then that there could be no doubt that the debts would not affect the *jus relictæ*. Why then, if it appeared that such a corroborative bond had in point of fact been given to Glover, it was to be considered whether this did not so far alter the case.

Bond of corroboration.

It appeared from the accountant's report, that a personal bond of corroboration was executed by Lowthian to Glover,—the very case under which, if it had been known, it was supposed the law would be clear,—Lowthian "becoming bound, in corro-"boration of the heritable security held by Mr. "Glover, to make payment to him of the said sum "of 10,000*l.* at the term of Martinmas then next, "*with interest and penalty*," &c. If that was to be a payment merely in discharge of the old bond, it would fall under the principle of the former decision; but if it was to be in discharge of the new bond, then it should be considered what was the effect of the payment under this last bond. It was now stated by the accountant, that this bond of corroboration did not appear to have been attended to before, and it seemed doubtful whether, in consequence of that bond, the debt to Glover could be considered as affected by the decision of the general question.

The state of the question then was this:—Their Lordships had decided that the obligation of Low-

thian to Mackenzie's trustees to pay this debt, *being of a moveable nature*, must affect the *jus relictæ*, though the original obligation was heritable. But if the nature of the obligation had been changed, if the debt and payment were different from what they had been understood to be, that might raise a different question.

May 26, 1814.

JUS RELICTÆ.—RES JUDICATA.

It had been argued, that this might have been attended to by the Court of Session and the House of Lords before, as this debt was contained in the list of Mackenzie's debts referred to by the general obligation. If their Lordships had attended to this state of the facts, and decided upon them, then they were now bound by the decision, but not if the judgment did not go that length. The former obligation was one of indemnity. The trustees could claim nothing, except they were damnified; and to this obligation alone the former judgment referred. But if the creditor entered into a new bargain with Lowthian, that raised a new question, which had not before been decided. He was clearly of opinion, therefore, that it was competent to the Court of Session and their Lordships to entertain this new question, without trenching upon any point before decided. As to whether this debt did in fact affect the *jus relictæ*, he had an opinion upon that point; but as the question had not been entertained by the Court below, no judgment could be given upon it here. The only judgment that could at present be pronounced must be to this effect,—to declare that neither the former judgment of the Court of Session, nor that of the House of Lords, imported that, *under the circumstances of this case*,

The bond of corroboration raised a new question, which had not before been decided upon, and this question was still open.

May 26, 1814.

JUS RELICTÆ.—RES JUDICATA.

Glover's debt must affect the *jus relictæ*, and to reverse the interlocutors, so far as they were inconsistent with this declaration.

Judgment

Judgment accordingly.

Agent for Appellants, CHALMER.
Agents for Respondents, CLAYTON and SCOTT.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SCOTT and Co.—*Appellants.*
M'INTOSH—*Respondent.*

May 25, 1814.

MILITIA BALLOT.—INSURANCE.

WHERE a militia ballot was illegally conducted, it was held, that an insurance against the consequences of militia ballots did not bind the insurers to protect the insured against any consequences of such irregular ballot, as it imposed no real obligation to serve or provide substitutes, and as the insurers had a right to avail themselves of the non-liability of the assured.

THE Respondent, in January, 1808, insured with the Appellants against the consequence of any militia ballot for the county of Inverness that might take place between the time of the insurance and the 1st of September following. The premium was paid on the 2d, and the insurance was considered as then effected, though the paper called a policy was not delivered till the 11th. The Deputy Lieutenants