

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WILLIAM MACDONALD *Appellant.*

MRS. ELIZABETH MACDONALD,
 otherwise LILLIE, and JOHN
 LILLIE, of Forres, her Hus-
 band, for his interest. } *Respondents.*

A LAW agent continuing to act for his client, held responsible for a loss caused by his neglect, although twenty-five years had elapsed since the transaction; notwithstanding a correspondence respecting the loss, in which the client acquiesced without remonstrance; and after a settlement of accounts with the Representatives of the client, and a discharge given by them before they had discovered the facts.

MACDONALD of Finlarig, the father of the Respondent, Mrs. Lillie, employed in the management of his affairs William Macdonald, of St. Martin's, father of the Appellant, and writer to the signet.

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Towards the end of the year 1787, Finlarig wrote to W. Macdonald, expressing his wish that some of his money then lying at a bankers should be laid out on security at five per cent. to his (W. Macdonald's) satisfaction. In April 1788, Macdonald was applied to by another of his clients, Colonel Charles Campbell, of Barbreck, by letter, in the following words:

Circumstances of the case.

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“ I have been so harassed and plagued with
“ applications for and from my son Charles, that
“ I have at last agreed to his purchasing Captain
“ Campbell Ederline’s company, which, with my
“ former advances this season raising men, and
“ to enable him to prepare for the voyage, will
“ at least cost 1,600*l.* So unexpected a demand I
“ did not expect, and consequently will oblige
“ me to borrow some money. I do not like the
“ idea of giving any person security if it can be
“ avoided; but I have no objection to lodge a
“ bond of Captain Hector M’Niel’s to me for
“ 1000*l.* in the hands of the person who will let
“ me have that sum, as an additional security with
“ my own bond.”

The letter then noticed some other difficulties in which Colonel Campbell was involved from advances he had been obliged to make, observing that, on the whole, these were “ *dreadful drains,*” and he concluded thus:—

“ I beseech you to get this 1000*l.* business set-
“ tled without loss of time, and let me hear from
“ you in course of post.”

Upon this application, Macdonald accommodated his client, Colonel Campbell, with 1000*l.* of his other client Finlarig’s money, taking as a principal security for that sum the bond of Colonel Campbell, with an assignment to that of Captain Hector M’Niel, as a collateral security, both conceived in favour of Finlarig as the lender; and on the 19th of May, 1788, Macdonald wrote thus to Finlarig:—“ I have lent another
“ 1000*l.* of your money at this time, on very good

“ security, to Colonel Charles Campbell of Bar-
 “ breck.”

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The *security* intended by this expression, ap-
 pears from an entry in Macdonald's books to
 Finlarig's account, of which a copy by way of
 account current was sent to Finlarig in December,
 1788, having this article :—

“ To Cash lent Colonel Charles Campbell of
 “ Barbreck, on your account, on bond and assig-
 “ nation to Captain Hector M'Neil of Ugadale's
 “ bond for 1000/.”

It appeared afterwards that Macdonald, the agent
 of Finlarig, did not complete the right of his prin-
 cipal to Captain M'Neil's bond, by giving intima-
 tion of the assignment to M'Neil, the obligor and
 debtor, according to the law and practice of Scot-
 land.

In May, 1789, Colonel Campbell and Captain
 Hector M'Neil granted their joint bonds to three
 different persons for 1000/ sterling each ; and of the
 same date, Colonel Campbell granted a bond of
 relief or indemnity to Captain M'Neil, on the recital
 of these three bonds, stating that the money was
 received by Colonel Campbell, and wholly applied
 to his use ; and that Captain M'Neil had become
 bound in the said securities at his, Colonel Camp-
 bell's desire, and for his account, and therefore
 engaging to indemnify Captain M'Neil, or to pay
 the money to him, that he might relieve himself
 of the said engagement. All these transactions
 were conducted by Macdonald.

On the 2d of January, 1792, Macdonald,
 in a letter addressed to Colonel Campbell,

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uses the following expressions. " I had a letter
" lately from my namesake William Macdonald,
" who lent you 1000*l.* some years ago, upon your
" own bond simply, containing an assignation to
" a bond of Captain Hector's for the like sum ;
" and he mentions his intention of sending me the
" bond, as he wants money to, &c. I have been
" thinking of the affair you mention as to Mr.
" Calland's securities, and as I hear of a Mr.
" Turing lately from India, who has plenty of
" money, which it seems he is desirous to lend,
" might you not try Calland, who, I believe, is
" connected with him, and see if he would give
" the money on a conveyance ? What say you to
" this plan, as people here are perpetually *at*
" *searches of records, the moment you mention heri-*
" *table security, and that is to be avoided on all*
" *occasions.*"

In April, 1792, Colonel Campbell died in a state of insolvency, and his estates were brought to a judicial sale. Captain M'Niel being obliged to pay all the three bonds above mentioned, received from the creditors therein assignments *qua cautioner*, or surety, of their respective debts, for the purpose of enabling him to operate his relief against the estate of Colonel Campbell. On these and the bond of indemnity he was ranked as a creditor, and took a dividend with the other creditors when the estates of Colonel Campbell were sold.

On the same occasion Macdonald, who continued to enjoy the confidence of Finlarig, and the management of his affairs, got him ranked as a creditor on the estate of Colonel Campbell,

by virtue of the Colonel's bond for 1000*l.*, but made no claim on M'Niel.

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Pending the action for a sale of Colonel Campbell's estate, and the division of the purchase-money, Macdonald advised Finlarig, from time to time, of what was going forward, representing the Colonel's insolvency as a matter of surprise to himself and every one else, but taking no notice of the collateral security by the assignment of M'Niel's bond.

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Colonel Campbell's death and insolvency had been announced to Finlarig by Macdonald in the following letter:—“The hurry and confusion I have
“ been thrown in by the death of my book-keeper
“ and principal clerk, the one after the other within
“ six months, has engrossed my attention so much,
“ that I am not able to answer letters regularly of
“ late, and prevented me writing you earlier of
“ the death of Colonel Charles Campbell, to whom
“ 1000*l.* of your money had been lent several
“ years ago, when he was in as good credit as any
“ man; possessed of a land estate better than 2000*l.*
“ sterling of yearly rent; but since his death, it
“ turns out that he was greatly in debt, owing to
“ an expensive and extravagant family, and
“ various projects of improvements; for he was a
“ man of no expensive turn himself. However,
“ after a full examination into matters, it is the
“ general opinion, when the estate is sold, there
“ will be no short coming in payment of the cre-
“ ditors, though the interest will not be drawn
“ regularly, at least while the widow lives. This
“ is so far uncomfortable; but as I lent your
“ money on all occasions as I would my own,

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“ misfortune cannot be avoided at times, though
“ it seldom happens; and even in this instance, I
“ don’t look on it by any means as desperate, now
“ that matters are pretty well understood.”

Finlarig wrote an answer to this letter in the following words: *

Jan. 6, 1793.

“ Dear Sir, I have been favoured with yours in
“ course of post. I observe what you say con-
“ cerning Colonel Campbell; it is not very agree-
“ able, but it might be worse.”

April 25,
1800.

Of this date, Mr. Macdonald transmitted to Finlarig a copy of his account, accompanied with a letter, in which he says:—“ I have judged it
“ proper to send a duplicate, as then made up, for
“ your examination, having got a frank from Lord
“ Perth for that purpose, and shall be glad to hear
“ from you when convenient, that you find the
“ account right. You’ll observe; that you have
“ just now 2100*l.* lent on the two bonds by the
“ Perthshire trustees, of whom I am one myself,
“ along with Lord Perth, and several others, so
“ that no accident can befall any part of it; and
“ this, besides the debt due to you, as formerly
“ mentioned, by the estate of the late Colonel
“ Charles Campbell, the recovery of which, or
“ some part of it, must be a distant period before
“ dividends are made to the creditors, till the
“ widow dies.”

May 11, 1802.

In answer to this letter, Finlarig wrote in the following terms:—“ Dear Sir, I was
“ duly favoured with yours of the 25th ultimo,

* It appeared from all the letters of Finlarig that he was a very illiterate man.

“ covering my account ; which I have examined,
 “ and find perfectly right ; and I have great
 “ reason to be very thankful to you for the great
 “ trouble you have been at, and so many trans-
 “ actions which I see by the account, till you got
 “ my little matters put out of all danger. Those
 “ transactions show very plainly, that I was not
 “ forgot, for which I return my most cordial
 “ thanks ; at the same time I see likewise, that
 “ there is nothing charged on your part for
 “ trouble, which is more than I have any right to
 “ look for ; and therefore wishes that you charge
 “ me whatever you see proper ; for I have it not
 “ in my power to make you any recompense any
 “ other way. I have been more obliged to you than
 “ all the rest of Adam’s posterity ; and it was a
 “ lucky introduction for me, that first brought us
 “ together. I observe, that as this is a bad year, al-
 “ though the balance in my favour be but very small,
 “ that you allow me to draw on you as usual. May
 “ God keep you in good health and long life, in the
 “ head of your own affairs ; and much satisfaction
 “ may you have of your family and your fortune,
 “ is my prayer towards you,” &c.

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In the month of April, 1802, Mr. Macdonald April 8, 1802;
 transmitted to Finlarig an affidavit to be made by
 him, relative to the debt due from the estate of
 Colonel Campbell, in order to be produced in the
 process of ranking, sale, and division above-
 mentioned. In his letter inclosing this paper,
 Mr. Macdonald says—“ Dear Sir, I send you the
 “ inclosed affidavit to be made before a justice of
 “ the peace, and I fancy you need not go farther

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“ than my cousin Tullochgriban to do it, as he will
 “ readily oblige you or me so far. You and he
 “ will have each page to sign with your names,
 “ immediately below the writings; and mention,
 “ when you send back the paper, after signing, the
 “ place and date of signing, and the shire, so as
 “ to be filled up by the same hand. This is a des-
 “ perate debt, as I formerly mentioned to you, but
 “ it is right to take all that can be got. I never
 “ was so much deceived by mankind as by Colonel
 “ Campbell, who had a large estate; but his debts
 “ have turned out immense in England and Scot-
 “ land.”

April 15,
1802.

Finlarig returned the affidavit, executed, in a letter to Mr. Macdonald, of the following tenor:—
 “ Finlarig, 15th April, 1802. Dear Sir, I re-
 “ ceived yours, inclosing the affidavit, and I hope
 “ that matters is done to your mind. Your cousin
 “ Tullochgriban is just such another justice as
 “ myself; although appointed for two counties,
 “ we never qualified either of us. I have not
 “ been well since I was at Elgin, with fever and
 “ ague, and have not been out of the house for
 “ eighteen days; therefore was obliged to get the
 “ justice of the peace to my own house, so that
 “ you may date it at Finlarig, 14th instant, in the
 “ county of Moray or Elgin, and the justice is
 “ for the same county, and Inverness; take your
 “ choice. *I am afraid I must call on you for*
 “ *money at Whitsunday and Martinmas both.*
 “ Those years have ruined us. This is a terrible
 “ climate; we could not get a yoke a plough for
 “ three days past, with frost and snow; it will kill

“ all our lambs ; it bids badly for a crop or a
 “ good harvest, as they say that the harvest will be
 “ like the spring. The justice of the peace is
 “ James Grant, Ballintom, in case you should
 “ want his designation. I hope all is according to
 “ your directions ; and with best respects to your-
 “ self and family, I remain,” &c.

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In the month of April, 1803, Mr. Macdonald April 1, 1803.
 sent Finlarig for execution, a discharge for a
 dividend from Colonel Campbell's estate ; in the
 letter accompanying which, Mr. Macdonald says—
 “ I now send you a discharge for a dividend from
 “ Colonel Charles Campbell's estate, *upon that*
 “ *unlucky debt he owed to you upon bond* ; and
 “ there will be another dividend of less amount
 “ very soon, but no more till the death of his
 “ widow, when the sum she liferents will also be
 “ divided among the creditors, &c. This same
 “ sum, small as it is, I had once little hopes of
 “ recovering ; the Colonel's failure from affluent
 “ circumstances being to so great an amount as
 “ astonished every body.”

In his letter returning this discharge, Finlarig April 6, 1803.
 says :—“ I find by the dividend, that Campbell
 “ must have died much involved ; and from seeing
 “ the bond being landed security, I see it hardly
 “ possible to guard against a man that is in good
 “ credit, when he is inclined to be a villain,” &c.

In the month of November, 1803, Mr. Mac- Nov. 18, 1803.
 donald transmitted to Finlarig a discharge for an-
 other dividend inclosed in a letter, of which the
 following is an extract : “ I am favoured with
 “ yours of the 12th current, and was just prepar-

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“ ing to write you with the inclosed papers for
 “ your signing, when your letter came to hand.
 “ This second dividend of Colonel Campbell’s
 “ estate, (and God knows when the next will take
 “ place,) will, small as it is, enable me, with 50/
 “ of interest I have to draw in January next for
 “ you, to pay the 100/. you are to draw for, which
 “ do when you please. I have lent this term
 “ 400/. for you, made up of interest with the
 “ former dividend from Colonel Campbell, as I
 “ manage for you as I do for myself; and there-
 “ fore don’t draw for more than this 100/. you
 “ mention, till next Martinmas, if you can avoid
 “ it, because I’ll have no money of yours till
 “ then; but for all that, if you are in need, I’ll
 “ honour your bills.”

Nov. 22, 1803.

Finlarig returned the discharge, executed, in a
 letter to Mr. Macdonald, in which he says,—“ I
 “ am favoured with yours, inclosing the instru-
 “ ment and discharge, which I have executed, as
 “ near as I can, according to your instructions.
 “ The witnesses are both my servants, and lives
 “ in my family at Finlarig, and signed this day the
 “ witnesses and myself. I will draw no more than
 “ the 100/. from you, I hope, for a year. I am
 “ always sensible of your good offices towards me,
 “ since I had the honour of your acquaintance,
 “ and I am always sensible that you do every
 “ thing for my interest,” &c.

The dividends received from Campbell’s estates,
 and paid over to Finlarig, amounted to 304*l.* 1*s.* 3*d.*
 He died in the year 1806, leaving an only child,
 the Respondent, Mrs. Lillie.

In the year 1807, Mr. Macdonald, the Appellant's father, having rendered a state of his accounts, and in the year 1811, a farther and final account, to the representatives of Finlarig, Mrs. Lillie, in a letter of July 20th, 1811, wrote to Mr. Macdonald in the following terms:—“ My uncle,

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July 20, 1811.

“ Mr. Grant, at Muirtown, was favoured with
“ your letter of the 11th instant, inclosing an ac-
“ count current between you and my curators,
“ commencing the credit side in your favour on
“ 20th March, 1807, and ending on the 11th July
“ current; commencing the debit side against
“ you 26th February, 1807, and ended on the
“ said 11th July current; on which there arises a
“ balance due by you to me and my late curators,
“ of 51l. 15s. 9¼d. *This account has been perused
“ by myself, Mr. Lillie, and Mr. Grant for himself,
“ and acting as factor for my other curators, and is,
“ as well as all other accounts rendered by you of
“ your intromissions with my father's concerns,
“ found to be perfectly accurate and satisfactory to
“ all concerned; not only so, but the liberal and
“ friendly manner in which you have conducted this
“ business in general, by departing from claims so
“ competent to yourself, merits, as I trust it will
“ have, my most ample acknowledgements and grati-
“ tude upon all future occasions. I have therefore,
“ this day, drawn upon you, with the consent of my
“ husband, for the above balance of 51l. 15s. 9¼d.
“ in favour of John Gordon, Esq. Forres, at three
“ days' sight, which we have no doubt will be duly
“ honoured by you, and will of course be in full of
“ all you are resting and owing either on account
“ of your intromissions with my father's estate*

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“ *during his life-time, or since his death with mine,*
“ *as his only child and executor.*”

After the death of Finlarig, and after all the correspondence and transactions before stated (see p. 17), the account current, which Macdonald had transmitted to Finlarig in 1788, being found among his papers; the entry in it respecting Captain M'Niel's bond suggested an inquiry why, instead of resorting to the insolvent estate of Colonel Campbell, and taking the small dividends which it afforded, Macdonald had not recovered the money from M'Niel, a person in affluent circumstances.

Upon this subject, a correspondence* took place between Macdonald and the friends of Mrs. Lillie, in consequence of which a demand was made on Captain M'Niel; but he founded on the want of intimation of the assignment, as entitling him to plead compensation (a set off) on the three bonds for borrowed money granted in 1789, which he as surety had been obliged to discharge, and Colonel Campbell's bond of indemnity; and he pleaded also compensation on another debt, alleged to have been due to him from Campbell, on a transaction previous to the date of the bond assigned.

As to the latter ground of set-off, it appeared that by a personal bond dated in Dec. 1776, Colonel Campbell of Barbreck, and Captain John M'Niel the younger of Ugadale, upon a recital that they had borrowed and received from Niel M'Niel, Esq. of Ugadale, the sum of 1100*l.* ster-

* The only letter in this correspondence which appears to be material, is mentioned by the Chancellor, in his observations, *post*, 382, and an extract from it is printed at the end of this case.

ling, became bound jointly and severally to repay the said sum to the said Niel M'Neil, of Ugadale, or failing him by decease, to Captain Hector M'Neil of the Marines, his second son, and his heirs, &c. Captain Hector M'Neil, the substitute in this bond, is the same person who became the debtor in that which was assigned as security to Finlarig. The right to the sum secured by this bond, devolved, as it was alleged in the pleadings, upon Captain H. M'Neil. But, notwithstanding this apparent claim, H. M'Neil had, in 1788, paid three years' interest upon his bond to Colonel Campbell; and in the process of ranking of Colonel Campbell's creditors, no claim, upon this bond for 1100*l.* was made by or on behalf of Captain H. M'Neil.

Under these circumstances, in the year 1813, the Respondents brought their action in the Court of Session against Macdonald for payment of the 1000*l.* and interest, so far as payment had not been recovered from the estate of Colonel Campbell; founding on his gross and culpable negligence in not having intimated the assignment of Captain M'Neil's bond; and in order (as it was said) to give Mr. Macdonald an opportunity of proving, if he could, that there had been intimation, the Respondents made Captain M'Neil a party to the action. Macdonald, one of the defenders in this action, died shortly after its commencement; whereupon the Appellant, his son, became a party as his representative.

By an interlocutor pronounced on the 25th of June, 1814, the Lord Ordinary, before whom

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the cause came, assoilzied Captain M'Niel, but repelled the defences pleaded for the Appellant, and decerned against him according to the conclusion of the libel.

The Appellant having given in a representation against this interlocutor, to which answers were made for the Respondents, the Lord Ordinary, on the 17th January, 1815, pronounced the following interlocutor: "The Lord Ordinary having considered this representation, with the answers thereto, and whole process of consent of the pursuer, restricts the principal sum decerned for to the sum libelled of 1000*l.* sterling, deducting therefrom the sum of 248*l.* 17*s.* 8*d.* sterling paid to account, on the 13th of April, 1803, and 55*l.* 4*s.* 0½*d.* sterling paid to account on the 30th of November, 1803; and further ordains the pursuers on receiving payment of the sums decerned for to assign over to the defender their claim to be ranked on the estate of Barbreck, that he may operate his relief, but *quoad ultra* refuses the desire of the representation, and adheres to the interlocutor represented against."

A representation against this last interlocutor was refused by the Lord Ordinary without an answer.

The Appellant then presented his petition to the Court in the Second Division, reclaiming against the said interlocutor of the Lord Ordinary, to which answers being made for the Respondents, the following interlocutor was pronounced:

Dec. 15, 1815.
1st interlocutor of the
Lords of Session 2d Div.
appealed from,

"The Lords having advised this petition with the answers, refuse the petition, and adhere to the

“interlocutor complained of in so far as respects
 “the principal sum, and two partial payments
 “therein specified, but consent to find interest
 “only due from the 15th day of May, 1791, and
 “to that extent alter the interlocutor complained
 “of and decern; find the defender liable in ex-
 “pences; allow an account thereof to be given
 “in, and remit to the auditor to tax the same and
 “report.”

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To this interlocutor the Lords adhered, by re-
 fusing a second petition for the Appellant on
 answers made;

Dec. 13, 1816.
 2d interlocu-
 tor of the
 Lords of Ses-
 sion appealed
 from.

And finally, they awarded costs to the Re-
 spondents, to the amount of 140*l.* 19*s.* 2*d.*

From these several interlocutors of the Lord
 Ordinary, and Lords of Session, the Appellant
 appealed to the House of Lords.

For the Appellant—*the Solicitor General** and
Mr. J. A. Murray. For the Respondents—*Mr.*
C. Warren and *Mr. W. Adam*.

On the part of the Appellants, it was argued
 that the agency was gratuitous—that the neglect
 was not gross—that intimation ought to be pre-
 sumed—that it would have been useless if made—
 as M'Niel might have pleaded compensation
 upon the old bond—that the client's claim was
 barred by acquiescence and prescription; and
 that of his representatives by discharge—and both
 by length of time.

Argument.
 May 21, 1819.

* Sir R. Gifford.

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The gratuitous agency was denied on the part of the Respondents, and argued to be immaterial; and it was insisted that the responsibility continued, notwithstanding time and apparent acquiescence; for the client was ignorant both of the fact and the law; and the agent, continuing to act for the client and his family, kept them uninformed, contrary to his duty. The fact was discovered by the representatives, after they had given the discharge. If M'Niel had any counterclaim, he would not have paid interest.

On behalf of the Appellant the following authorities were cited:—Ersk. 3. 7. 29. on the extinction of obligations by taciturnity; Ersk. 4. 4. 109. As to the vicennial prescription, which operates even in cases of murder, *Macgregor's case*, M'Laurin's Crim. Cases.* As to bar by presumption, *Wemyss v. Clark*, 28th June, 1749, Dict. of Decis. 11640; *Case of Fullarton*, 27th July, 1757. As to length of time, Kames, tit. *Grounds and Warrants*, p. 353; *Blackwood v. Purvis*, Dict. of Decis. 5167; *Provost of Stirling v. Jardine*, Dict. 5191; *Maxwell v. Maxwell*, Dict. 5174; *Maxwell's Creditors*, Dict. 5181; *Wilson v. Sellers*, Fac. Coll. 6th July, 1757, Dict. 5184. As to prescription, under stat. 1494, c. 57. and 1617, c. 13. Ersk. 3. 7. 19. As to implied discharge and renunciation, Kames, pp. 430—440. *Hogg v. Niven*,

* pp. 595. 773. Callum Macgregor, Aug. 9. 1773, was put upon his trial for a murder committed twenty-five years before the indictment. It did not appear that any sentence of fugitation had passed against the prisoner, and the Court unanimously sustained the defence of prescription.

Dict. 6533. As to settlement of accounts, *Graham v. Rochead*, Id. 6534.* 1819.

For the Respondents the following cases were cited, of mandatories and agents held liable for neglect:—*Garden v. Lindsay*, Dict. 3519; Case of Susanna Rae, Id. 13963; *Goldie v. Macdonald*, Id. 13965; *Lizars v. Dickie*, Id. 3532; *Masson Thorn*, Id. 3535 and 13967.

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The *Lord Chancellor*, in the course, and at the conclusion, of the argument, made the following observations:—when Campbell's insolvency became known, it did not appear that M'Donald the writer mentioned the assignation in the whole course of the correspondence—the form of the assignation was to M'Donald the lender (Finlarig), and to M'Donald the writer, which was said to be the common form—in the summons, the pursuers state that they did not discover the fact of the assignation until after the letter of discharge: there was no clear evidence that the bond was in the hands of Finlarig—Colonel Campbell's bond contained a recital of the assignation—and Finlarig ought to have had, not only Colonel Campbell's bond, but also the bond recited to be assigned—it did not appear why M'Donald the writer made no claim against M'Niel—if the intimation had been given, he was liable—if M'Niel had a prior demand upon Campbell, how

* And see generally in the Dict. of Decis. the titles Prescription, Presumption from Lapse of Time, Grounds and Warrants, and Implied Discharge.

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If a debtor by obligation, having a counter-claim of compensation against his creditor, knows of a transaction of loan, in which his creditor assigns the obligation as a collateral security to the lender—and suppresses his knowledge, leaving the parties to complete the transaction of loan and security—he cannot afterwards claim compensation so as to defeat the collateral security.

did it happen that M'Donald, being the law agent of both, took it as a security, knowing a fact which would make it ineffectual—if there was no prior debt, then there was nothing to prevent the claim against M'Niel. Suppose M'Niel had a prior claim, unknown to both the writer and the lender; if he suppressed that fact, knowing of the transaction of loan and security, he could not claim compensation. It is unaccountable that the security was not made complete by intimation. For when the writer recommended the security, he had received a letter from Campbell, which showed the hazard of lending the money on his personal responsibility.

But if the bond had been duly assigned, and duly intimated, would there have been any necessity to wait for the winding up of Campbell's affairs, before suing upon the bond of M'Niel?

In the oath of verity, in the process of ranking, M'Donald recites the assignment, "This deponent," &c. *Appendix to paper*, 6th April, pp. 18, and 19. After this he cannot say he considered the security as good for nothing.

The printed cases have not stated letters written in 1813, which are material. In one of those,* M'Donald the writer states the bond only to have been deposited. From this representation, it appears improbable that there could have been intimation of assignation. *Paper*, 12th June, 1815, p. 11.

* See extracts from this letter at the end of the case.

Lord Redesdale observed, that when M'Niel became a creditor, it was not likely he would leave a bond in the hands of his debtor.

The *Lord Chancellor* moved the Judgment.

The proceedings in this case were instituted in 1814, and as they refer to transactions commencing in 1788, the case deserves great attention. It is a claim made against an agent, for compensation on account of negligence in providing for the interest of his client. It is admitted that Mr. M'Donald was highly respectable in his profession. I should be unwilling to act on any principle adverse to the doctrines of presumption or prescription. If this is to be represented as a cause of action arising in 1788, and there was nothing to keep it alive, it would be too dangerous to inquire into it. But, unless I mistake the nature of the case, there certainly was negligence; and the ground of the complaint is not taken away by lapse of time, or the nature of the transactions which have since taken place.

The word negligence, I do not use in a sense reproachful to the memory of Mr. M'Donald the writer.

In 1788, M'Donald the father (Finlarig) employed M'Donald the writer to place out his money on good securities. Colonel Campbell was a man in suspicious circumstances, as we may understand from the advice against real securities, on account of the evidence which it would furnish upon record. The fact that he wanted 1000*l.* is a proof that he was not in easy circumstances. Colonel

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Campbell was obligee in a bond from M'Niel, and M'Donald the writer gets an assignment of this bond, as an additional security. There is no doubt that the bond was assigned: it must be inferred that M'Donald the father knew that his money was lent on a bond. That might have been an objection in England, though not in Scotland.* The policy of the law requires that we should hold that Macdonald the writer knew that intimation was necessary, and that the security was imperfect without it. By a letter, written in January, 1792, from Macdonald the writer to Campbell, it appears that Macdonald the father intended to call up the money; or that Macdonald the writer, knowing the risk of Campbell's insolvency, desired it. In that letter, he says, "I had
" a letter lately from my namesake, who lent you
" 1000*l.* some years ago, upon your own bond
" simply, containing an assignation to a bond of
" Captain Hector's, for the like sum, and he men-
" tions his intention of sending me the bond, as
" he wants the money," &c.

There has been much argument as to the question in whose possession the bonds were; but it is not material. It is fully ascertained that, at a subsequent period, the bonds must have been in the possession of Macdonald the writer. At this time, Macdonald the writer was negotiating securities from Colonel Campbell; and then, not confiding in the circumstances of Campbell, occurs

* Because heritable bonds charge the land specifically, and, when perfected by seisin, operate as a direct conveyance by mortgage, in England.

the expression as to heritable securities. It is not easy to understand the expression, as to securities of record, in any but one way. The accounts sent in (the first, the second, and the third, being further parts of the same account,) may be said to have been in the possession of Macdonald the father, from 2d April, 1792, up to the year 1811. There is, in these accounts, an item thus: "*By three years' interest from bond and assign-
ation.*" This is said to be an intimation to the father; but, from the complexion of the accounts, and the other transactions, it is just to say that Macdonald the writer was, in the amplest sense, the man of business of Macdonald the father, and bound to advise and act for him. Colonel Campbell died in 1792, in a state of embarrassment. Immediately following that event, there is a letter from Macdonald the writer, intimating that his affairs might be retrieved.

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Macdonald the writer still continued to be the man of business for the father, and afterwards for the representatives. If the bond of M'Niel had been intimated, the insolvency of Campbell would not have prevented their putting it in suit. But no demand was made upon it; and in the correspondence it is remarkable, that in all the letters between Macdonald the father, and Macdonald the writer, no mention is made relative to the bond supposed to be assigned, or the intimation of it, or the reason why it was not made effectual, if completed. To meet this observation, it is said that if there be taciturnity, courts do not inquire; and, undoubtedly, though nothing is more im-

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portant than to hold professional men to accuracy, yet, on the other hand, they ought not to be made to account, twenty-five years after a transaction, if the circumstances of the particular case make it unreasonable; but circumstances are to be considered. Whether the father knew the law of intimation, is doubtful; but the writer must have known it, and ought to have acted upon it. This is the taciturnity, not of Macdonald the father, but of Macdonald the writer. The representatives, when they find the papers as to the bond and assignment, call upon Macdonald; and, looking at the letters, it is difficult to read them, and suppose he had lost his memory. He could not have forgotten so far the transaction as to call that a deposit, which, in the accounts, he had called an assignment. This case, therefore, by its circumstances, is taken out of the principles of presumption and prescription, which ought to protect professional men. On these grounds, and a fair view of the case, as a jurymán, it is my opinion that the bond was not intimated; and, by reason of non-intimation, the debt was lost from the estate. Either the want of intimation caused the loss, or, if it was intimated, and the doctrine of set-off had applied, Colonel Campbell might have been called upon forthwith to pay, and, at that time, could have paid; because he afterwards raises 3000*l.* on different bonds. That transaction could never have furnished a defence against a bond duly intimated.

Professional men must be strictly held to such accuracy as to give security to their employers.

Lapse of time, under circumstances, may be an excuse; but the former principle preponderates here: and as the safety of clients ought not to be discussed at the expense of their representatives, this case ought to be affirmed with 80% costs.

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Lord Redesdale. — Macdonald the writer recommended the security of his own client, Campbell, with collateral securities. It is clear that no intimation was given, because of the transaction in 1789, where M'Niel became security for Campbell to the amount of 3000%. If M'Niel had been debtor to Campbell in 1000% that transaction would have taken place in a different form. When Campbell died, and his affairs were in a state of insolvency, Macdonald does not give notice immediately; but in December following, stating the circumstances, and the necessity of going upon the estate of Campbell, he does not mention a word of the demand against M'Niel. If Macdonald had not been then conscious that no demand could be made, he would have spoken of the claim on him. His memory was then full; because it was but a few years after the transaction, and then he must have known whether he had given intimation. The letter of 1813 clearly proves that there was no intimation.* There was

* Referred to by the Lord Chancellor, ante, p. 332. It is a letter from M'Donald the writer to Mr. Lillie, dated March 26, 1813. It contains the following passages:

“ I can now, however, tell you that Captain M'Niel was not bound as cautioner along with Colonel Charles Campbell; for, at that time, the Colonel was in great credit, and in pos-

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no necessity to wait for winding up the affairs of Campbell's estate. These transactions could arise from this circumstance only, that there had been no intimation. The negligence is clear. As to length of time, the letter of 1813 holds out hope as against M'Niel. There was no negligence in Finlarig, or his representatives. He was a person of ignorance, trusting to his legal adviser, and the representatives acted as *soon as* they had information.

Judgment affirmed.

“ session of a large estate ; but the Colonel gave him a bond of
 “ the Captain's for 1000*l.* by way of deposit, as additional
 “ security, with his own bond for the 1000*l.* of Finlarig's
 “ money lent him ; and upon the Colonel's death, it was found
 “ that he was so much involved in transactions with Captain
 “ M'Niel that it is difficult to say what may be recovered from
 “ Captain M'Neil, or how far he may be liable, until the
 “ process of ranking and division, among the Colonel's cre-
 “ ditors, is deliberately examined into, which must take time,
 “ as there is no access, at present, to that part of the process,
 “ which is most material to be looked into, it being borrowed
 “ up by one of the agents for creditors, who has either mislaid
 “ it, or lent it to some other of the agents, and requires time to
 “ be got at. At any rate, there are further dividends to be
 “ made, of which Mrs. Lillie draws her share ; which is all I
 “ can say on the subject at present.”