

No. 14. RUNDELL, BRIDGE and RUNDELL, and Others, Creditors of the late ARCHIBALD LORD MONTGOMERIE, Appellants.

:Right Honourable LADY MARY MONTGOMERIE, and CHARLES MONTOLIEU BURGESS, her Husband, Respondents.

Clause—Obligation.—A lady, after the death of her husband, having voluntarily offered to assign, for behoof of his creditors, the surplus rents of her estate, after allotting a certain part of them to her own use; and having calculated that thereby, and with other means, the debts would be paid in five years; and having granted an obligation and assignation, conveying her rents to commissioners for that purpose, but without restricting the period to five years;—Held, (reversing the judgment of the Court of Session), That the creditors were entitled to the surplus rents till their debts were paid.

April 15. 1825.

1ST DIVISION.
Lords Gillies and
Meadowbank.

THE late Archibald Lord Montgomerie, eldest son of Hugh late Earl of Eglinton, was, in 1806, married to his cousin-german, the respondent, Lady Mary Montgomerie. Her landed estates amounted to about L.20,000 a-year, and she had personal property to the amount of L.100,000. In 1814, Lord Montgomerie died, leaving his pecuniary matters in great embarrassment. Soon after his death, and on the 16th of July 1814, a minute and statement was drawn up by the agents of Lady Montgomerie, presenting a view of his Lordship's affairs, for the purpose of being communicated to his creditors. From this it appeared that his funds were estimated at L.34,000, and his debts at about L.100,000. To meet the deficiency, it was stated, that 'as Lady Montgomerie has resolved to restrict her expenditure to L.5000 a-year, and to allow the remainder of the free rents of her estate to be applied towards the extinction of the balance of the debt, it is calculated that the debts may, in this way, be all discharged in the course of five years, including the expenses necessary for carrying the arrangement into execution.' It was also proposed to sell to Lord Eglinton lands belonging to her, at the price of L.22,000, to be applied in extinction of the debts, and to grant a commission to Lord Alloway, and Messrs George Russell, and Samuel Anderson, writers to the signet, for carrying her object into effect. Accordingly, the minute concluded with a docquet in these terms:—'Lady Montgomerie having fully considered the particulars before stated, approves of and agrees to the arrangement suggested; and has, accordingly, executed a commission in favour of Lord Alloway, Mr George Russell, and Mr Samuel Anderson, for carrying the same into execution, as well as for the

‘ general management of her affairs. (Signed) MARY MONT- April 15. 1825.
 ‘ GOMERIE. Eglinton Castle, 16th July 1814.’ On the same
 day she executed a commission in favour of the above gentlemen,
 which, after conferring on them the most ample powers in re-
 gard to the management of her estate, was thus expressed:—
 ‘ And further, considering that there are debts in England and
 ‘ Scotland, contracted during the marriage between Archibald
 ‘ Lord Montgomerie, my late husband, and me, which, accord-
 ‘ ing to the claims that have been made, amount to about
 ‘ L.100,000 sterling, to answer which, the estate, whether real
 ‘ or personal, of the said Archibald Lord Montgomerie is nowise
 ‘ adequate; and that I have resolved to make up the deficiency,
 ‘ and pay off and discharge all these debts from the sale of the
 ‘ fee-simple lands, and the savings of the rents of the entailed
 ‘ estates as after-mentioned; and, in the mean time, I am in the
 ‘ course of making up a title by confirmation to the personal
 ‘ estate of the said Archibald Lord Montgomerie, as executrix
 ‘ qua relict to him; therefore,’ &c. Then follows a clause em-
 powering the commissioners to sell the unentailed property spe-
 cified in the minute, and binding herself to confirm these sales,
 and grant all necessary dispositions, &c.; after which the deed
 proceeds, ‘ As also, with power to my said commissioners, or
 ‘ commissioner, to sell and dispose of the personal estates of the
 ‘ said Archibald Lord Montgomerie, to which I am in the course
 ‘ of making up a title as aforesaid, except such part thereof as I
 ‘ may have occasion to retain, and to apply the prices and pro-
 ‘ duce of the foresaid whole subjects, heritable and moveable,
 ‘ together with the rents and profits arising from my other lands
 ‘ and estate, entailed and unentailed, with the exception of what
 ‘ may be required for defraying the expenses of my own esta-
 ‘ blishment, which at present I estimate may amount to L.5000
 ‘ a-year, towards the gradual payment and extinction of the
 ‘ foresaid debts—all as mentioned and contained, so far as the
 ‘ circumstances are at present known, in a statement and minute
 ‘ subscribed by me of this date, and bearing reference hereto;
 ‘ providing always, that the said commissioners shall be bound
 ‘ to hold just count and reckoning to me for their respective
 ‘ transactions and intromissions in virtue hereof. And, lastly,
 ‘ I hereby declare that this commission shall endure and con-
 ‘ tinue until the foresaid purposes are accomplished, so far as
 ‘ concerns the payment and extinction of the foresaid debts of
 ‘ the said Archibald Lord Montgomerie, and, quoad ultra, until
 ‘ the same is recalled by a writing under my hand.’ She then

April 15. 1825.

got herself confirmed executrix qua relict, and gave up a full inventory; and also administered in England. Thereafter, on the 1st of October of the same year, she executed the following deed:—‘ I, the Right Honourable Mary Lady Montgomerie, ‘ considering that, by a statement and minute regarding the ‘ debts due by my late husband, Archibald Lord Montgomerie, ‘ subscribed by me on the 16th day of July last, I resolved to pay ‘ and discharge these debts, which were estimated at L.100,000 ‘ sterling, in the way and manner therein mentioned; and par- ‘ ticularly, by a sale of certain lands held in fee-simple by me, ‘ and by restricting my expenditure to L.5000 sterling per ‘ annum, and allowing the remainder of my rents of my whole ‘ lands and estates to be applied, as they should be received, to- ‘ wards the extinction of the said debts; and for accomplishing ‘ inter alia this object, I granted a commission in favour of the ‘ Honourable David Cathcart, Lord Alloway, one of the Sena- ‘ tors of the College of Justice, George Russell, writer to the ‘ signet, and Samuel Anderson, writer in Edinburgh, jointly and ‘ severally; and that this arrangement having been generally ‘ communicated to the creditors in the said debts, as well in ‘ England as in Scotland, they have signified their acquiescence ‘ in the same, upon my granting these presents: Therefore, I ‘ do hereby bind and oblige myself, my heirs, executors, and ‘ successors, to implement and fulfil the foresaid statement and ‘ minute, by making payment and satisfaction of the debts there- ‘ in and before referred to, according to the foresaid estimated ‘ amount, and in the way and manner specified in the said state ‘ and minute, or as nearly so as circumstances will admit; and ‘ for this purpose I do hereby assign, convey, and make over, to ‘ and in favour of the said David Cathcart, George Russell, and ‘ Samuel Anderson, my foresaid commissioners, and the sur- ‘ vivors or survivor of them, the sum of L.20,940. 6s. 7d. ster- ‘ ling, being the price of the lands of Bogside and others, sold ‘ by me to the Earl of Eglinton, conform to minute of sale ‘ executed by us upon the 21st day of September last; as also, ‘ the whole estate, real and personal, whether in England or in ‘ Scotland, to which I have right as administrator or executrix ‘ of the said Archibald Lord Montgomerie; and also, the whole ‘ rents, profits, duties and casualties of my lands and estates, as ‘ well entailed as unentailed, lying in the counties of Ayr, La- ‘ nark, and Renfrew; providing and declaring, that nothing ‘ herein contained shall subject me personally in payment of the ‘ foresaid debts, or in any other way impose a burden upon me

April 15. 1825.

‘ regarding the same, farther than to the extent of the funds and
 ‘ effects hereby conveyed ; but declaring that the foresaid obliga-
 ‘ tion come under by me shall attach and be binding upon my
 ‘ heirs and representatives to the extent of what they shall
 ‘ take or succeed to through me ; and providing farther, that
 ‘ my said commissioners shall make payment to me, yearly,
 ‘ and each year, and by such payments as I may find necessary,
 ‘ the sum of L. 5000 sterling, free of all deductions whatever,
 ‘ and likewise free of the taxes payable from the house of Coils-
 ‘ field, and the expense of maintaining the garden and grounds
 ‘ there ; and that so soon as the foresaid debts (an account and list
 ‘ of which is to be taken and made up by my said commissioners
 ‘ so soon as the same can be properly investigated) are fully paid
 ‘ and discharged, my said commissioners shall be bound to de-
 ‘ nude of these presents, and hold count and reckoning with me
 ‘ and my foresaids for the application of the funds and effects
 ‘ hereby conveyed. And I consent,’ &c. She then, with con-
 sent of the commissioners, granted a factory to a Mr Hal-
 dane, taking him bound to account to them for the rents.
 These several deeds were entirely the voluntary act of Lady
 Montgomerie, no demand having either been made, or being
 capable of being made, on her by the creditors. In con-
 sequence of them, the creditors desisted from taking any steps
 against the property left by Lord Montgomerie. In 1815 her
 Ladyship married Mr Montolieu Burges, the other respondent.
 Several of the preferable, and some of the personal creditors,
 were paid ; but in 1817 it was found that, in consequence of
 the great depreciation in land, the inability of the tenants to pay
 their rents, the property not having turned out so productive as
 had been calculated upon, and the debts being ascertained to
 amount to L.104,000, it would be impossible to discharge them
 within any precise definite period. A ‘ memorandum and pro-
 posal’ was therefore addressed by her Ladyship and Mr Burges
 to the creditors, in which, after narrating the minute and state-
 ment, the commission, the property to be disposed of in part of li-
 quidation of the debts, and that ‘ what part of the debts should
 ‘ remain after the application of this was proposed to be paid off
 ‘ gradually from the surplus rents of her Ladyship’s estates, after
 ‘ setting aside L.5000 a-year for herself ;’ it proceeded to state,
 that the funds realized had fallen greatly below those which had
 been relied on ; that the rents, from the agricultural distress,
 could not be realized ; that many of the tenants must leave their
 farms ; that, if ‘ matters were to go on in this way, there is no

April 15. 1825. ‘calculating when the creditors may receive payment;’ that the commissioners had intimated a wish to withdraw; and that as some creditors are taking separate steps, ‘it is probable the result would be a judicial management under the authority of the Court of Session, which would be equally prejudicial to the interests of Lady Montgomerie, and of the creditors at large.’ It was then stated, that ‘in these circumstances Lady Montgomerie is disposed to make every sacrifice in her power for the immediate satisfaction of the creditors; and, upon their discharging the debts, she is ready to convey to them, or any trustee they may appoint, all that she has to dispose of, except the family plate, Coilsfield furniture, and the rents of her own entailed estate.’ This proposal was not acceded to by the creditors. In 1818 a correspondence was opened with them by Lady Montgomerie, through her agents and husband, with the view of a settlement; and several letters passed between them, in which nothing was stated on her part importing that her obligation was limited to five years, but rather the reverse. The creditors having refused the terms proposed, the commissioners, towards the end of 1819, brought a process of multiplepointing and exoneration; and claims having been lodged for the appellants, creditors of Lord Montgomerie, on the one hand, and for Lady Montgomerie and Mr Burges on the other, the question came to be, Whether, by the above deed, she had assigned the surplus rents, after deducting the L.5000 payable to herself, for five years, or till the debts were paid, and without any limitation in point of time, so long as they were not extinguished? After ordering memorials, Lord Gillies, on the 15th of January 1822, pronounced this interlocutor:—

‘The Lord Ordinary having considered the mutual memorials for the parties, and whole process, finds, that the memorialist, Lady Montgomerie, at the date of her marriage with the late Lord Montgomerie, was possessed of a large personal estate, of a very valuable entailed property in land, and also of unentailed landed property to a considerable amount: Finds, that upon the dissolution of the marriage by the death of Lord Montgomerie, it appears that the whole of her Ladyship’s personal estate had been spent during the subsistence of the marriage, and that Lord Montgomerie owed debts besides to a large amount, far exceeding the value of the funds of every description left by his Lordship: Finds, that Lady Montgomerie having succeeded to nothing by the death of her husband, and representing his Lordship no otherwise than as having been

confirmed his executrix qua relict, was not, in any respect, April 15. 1825.
 liable for payment of his debts, in so far as the same exceeded
 the amount of the inventory of his funds: Finds, that under
 these circumstances the memorialist, Lady Montgomerie, form-
 ed the intention of paying off the debts of her husband, and
 for that purpose, of disposing of a considerable part of her
 unentailed property, and also of surrendering the rents of her
 whole estate, reserving to herself out of the same only a suitable
 annuity for her maintenance; which rents, together with the
 price of the lands proposed to be sold, and the produce of Lord
 Montgomerie's funds, it was calculated would be sufficient, in
 the course of five years, to pay the amount of his Lordship's
 debts, as then estimated: Finds, that with those views Lady
 Montgomerie, on the 16th July 1814, subscribed a minute,
 which, after mentioning that Lord Montgomerie's debts amount
 to L.99,000, afterwards calculated at L.100,000, specifies the
 funds left by his Lordship, which are valued at L.50,000, in-
 cluding the family plate, valued at L.8,000, and the furniture
 at Coilsfield, valued at the like sum, both of which were to be
 retained by the memorialist: Finds, that the minute proceeds
 to state, that, to provide for payment of the balance, certain
 lands therein mentioned can be sold to Lord Eglinton; and
 the price expected for them is calculated at L.22,820; after
 which the minute proceeds in these words: "As Lady Mont-
 gomerie has resolved to restrict her expenditure to L.5,000 a-
 year, and to allow the remainder of the free rents of her estate
 to be applied towards the extinction of the balance of the debt,
 it is calculated that the debts may, in this way, be all discharg-
 ed in the course of five years, including the expenses necessary
 for carrying the arrangement into execution;" and thereafter
 the minute concludes in these words:—"Lady Montgomerie
 having fully considered the particulars before stated, approves
 of and agrees to the arrangement suggested; and has, accord-
 ingly, executed a commission in favour of Lord Alloway, Mr
 George Russell, and Mr Samuel Anderson, for carrying the
 same into execution:" Finds, that, on the same date, Lady
 Montgomerie accordingly granted a commission in favour of
 the persons above named, which, proceeding on the narrative of
 her having resolved to pay off all the debts "from the sales of
 the fee-simple lands, and the savings of the rents of her entailed
 estates, as after-mentioned," empowers the commissioners to sell
 the lands specified in the minute, and also to dispose of the
 personal estate of the said Lord Montgomerie, to which the

April 15. 1825. ‘ minute states that she was in the course of making up a title,
 ‘ and to apply the prices and produce, together with the rents and
 ‘ profits of her other lands, with the exception of what may be
 ‘ required for defraying the expenses of her own establishment;
 ‘ which at present she estimates may amount to L.5,000 a-year,
 ‘ towards the gradual payment and extinction of the foresaid
 ‘ debts, “ all as mentioned and contained, so far as circumstances
 ‘ are at present known, in a statement and minute subscribed
 ‘ by me of this date, and bearing reference hereto:” Finds, that,
 ‘ on the 1st of October following, Lady Montgomerie granted
 ‘ another conveyance in favour of the same commissioners,
 ‘ which, after mentioning the arrangement that had been made
 ‘ for payment of the debts, proceeds in these words:—“ That this
 ‘ arrangement having been generally communicated to the cre-
 ‘ ditors in the said debts, as well in England as in Scotland, they
 ‘ have signified their acquiescence in the same, upon my grant-
 ‘ ing these presents; therefore, I do hereby bind and oblige
 ‘ myself, my heirs, &c. to implement and fulfil the foresaid
 ‘ statement and minute, by making payment and satisfaction of
 ‘ the debts therein and before referred to, according to the fore-
 ‘ said estimated amount, and in the way and manner specified in
 ‘ the said state and minute, or as nearly so as circumstances
 ‘ will admit.” And with respect to the rents reserved by Lady
 ‘ Montgomerie, this deed provides, that “ my said commissioners
 ‘ shall make payment to me yearly, and each year, and by such
 ‘ instalments as I may find necessary, of the sum of L.5,000 ster-
 ‘ ling, free of all deductions whatever, and also free of the taxes
 ‘ payable from the house of Coilsfield, and the expense of main-
 ‘ taining the garden and grounds there:” Finds, that, in so far
 ‘ as the foregoing writings imposed any obligation on Lady
 ‘ Montgomerie, the same was, in its nature, purely gratuitous,
 ‘ since her Ladyship neither stipulated nor received from the
 ‘ creditors in return any valuable consideration whatever, the
 ‘ reservation of the furniture at Coilsfield, and the family plate
 ‘ at a fair valuation, being a condition equally advantageous to
 ‘ both parties: Finds, that an obligation of this sort is to be in-
 ‘ terpreted in the most favourable manner for the memorialist,
 ‘ Lady Montgomerie, and must be explained and controlled by
 ‘ the understanding of parties, and by the views and inten-
 ‘ tions of the granter at the time of entering into it, as indi-
 ‘ cated by the terms of the minute which she then subscribed,
 ‘ and to which both the commissions granted by her Ladyship
 ‘ expressly refer: Finds, that the estimated amount of Lord

‘ Montgomerie’s debts on the one hand, and the amount of the April 15. 1825.
 ‘ rents of her Ladyship’s estate on the other hand, formed the
 ‘ basis of the arrangement agreed to by the memorialist; and
 ‘ finds, therefore, that if it appears from the minute that the
 ‘ memorialist at the time laboured under any material error as
 ‘ to any one or both of these points, and was misinformed or
 ‘ mistaken either as to the amount of Lord Montgomerie’s debts,
 ‘ or with respect to the amount and permanency of her own
 ‘ rental, the obligation undertaken by her must be limited and
 ‘ restricted accordingly: Finds, that in the aforesaid minute, the
 ‘ estimated amount of Lord Montgomerie’s debts is L.99,000,
 ‘ or, as afterwards supposed, L.100,000: Finds it now stated, that
 ‘ his debts greatly exceed the above-mentioned sum: Finds it
 ‘ admitted by the creditors, that Lady Montgomerie is not liable
 ‘ for said debts, in so far as the same exceed the estimated amount
 ‘ of L.100,000 as at the date of the minute: Finds, that neither in
 ‘ the minute, nor in the relative commission, is the amount of the
 ‘ rent of Lady Montgomerie’s estate specified; but finds, that it
 ‘ appears to have amounted, at the date of the minute, to about
 ‘ L.20,000 yearly; and finds, accordingly, that in the minute it
 ‘ is assumed as a ground for the proposed arrangement, that,
 ‘ setting aside the sum reserved by the memorialist, the free rent
 ‘ of the estate, together with the other funds allotted to the
 ‘ same purpose, would be sufficient, in five years, to discharge
 ‘ the debts: Finds it now stated, that in consequence of an
 ‘ extraordinary depression in the value of landed property
 ‘ and its produce, particularly felt in that part of the country
 ‘ where the memorialist’s property is situate, the rents of her es-
 ‘ tate are greatly diminished, and that the rents actually recovered
 ‘ during the five years immediately subsequent to the date of the
 ‘ minute and commissions fall greatly short of the rents which
 ‘ were payable, or which the estate was calculated to yield, at the
 ‘ period when the arrangement was agreed to: Finds, that not-
 ‘ withstanding this change of circumstances, the creditors insist
 ‘ that they are entitled to the free surplus rent, not for a period
 ‘ of five years, but for a period altogether indefinite, viz. until
 ‘ such time as those rents, together with the other funds before-
 ‘ mentioned, shall be sufficient to pay Lord Montgomerie’s debts
 ‘ to the extent of L. 100,000, as calculated at the date of the mi-
 ‘ nute, with interest from that period: Finds it stated, that, ac-
 ‘ cording to the present rental of the estate, the creditors would
 ‘ thus be entitled to the rent for a period equal to the probable dura-
 ‘ tion of Lady Montgomerie’s life: Finds, that such a claim on the

April 15. 1825.

‘ part of the creditors is inconsistent with what must be presumed
 ‘ to have been the understanding of parties at the period when the
 ‘ arrangement in question was made: Finds, that the obliga-
 ‘ tion undertaken by Lady Montgomerie will be sufficiently im-
 ‘ plemented by her commissioners making payment, as she pro-
 ‘ poses that they should do, to the creditors of the whole free
 ‘ rent which they received, or which, consistently with the rules
 ‘ of good management, they might have recovered from the
 ‘ estate, deducting the sum reserved by the memorialist for the
 ‘ period of five years posterior to the commencement of their pos-
 ‘ session under the commissions,—the commissioners also account-
 ‘ ing to the creditors for the price of the property which was
 ‘ sold to the late Earl of Eglinton: Therefore, in this multiple-
 ‘ pointing, prefers the creditors to the extent of the price afore-
 ‘ said, and to the extent of the five years’ rents as aforesaid, and
 ‘ also to the extent of the whole of the funds of the late Lord
 ‘ Montgomerie, so far as the same are here in medio: quoad
 ‘ ultra prefers Lady Montgomerie to the whole sums in the hands
 ‘ of the raisers of the multiplepointing, and decerns in the prefe-
 ‘ rences accordingly; and appoints the raisers of the multiple-
 ‘ pointing to give in a condescendence of the whole sums in their
 ‘ hands, specifying particularly the amount of the rents received
 ‘ by them during the five years for which the creditors are hereby
 ‘ found entitled to them.’ The appellants having lodged a repre-
 ‘ sentation, and Lord Gillies having been removed to the Inner-
 ‘ House, Lord Meadowbank, on the 29th of May 1822, pronounc-
 ‘ ed this judgment:—‘ Recalls the interlocutor complained of, in so
 ‘ far as it finds “ that the obligation undertaken by Lady Mont-
 ‘ gomerie will be sufficiently implemented by the commissioners
 ‘ making payment, as she proposes that they should do, to the
 ‘ creditors of the whole free rent which they received, or which,
 ‘ consistently with the rules of good management, they ought to
 ‘ have received from the estate, deducting the sum received by
 ‘ the memorialist for the period of five years posterior to the
 ‘ commencement of their possession under the commissions;”
 ‘ and appoints parties to debate; and quoad ultra supersedes
 ‘ consideration of the representation.’ On hearing parties, his
 ‘ Lordship pronounced this interlocutor on the 14th of June:—
 ‘ Recalls hoc statu the interlocutor complained of, in so far as it
 ‘ finds, that the obligation undertaken by Lady Montgomerie
 ‘ will be sufficiently implemented by “ the commissioners also
 ‘ accounting to the creditors for the price of the property which
 ‘ was sold to the late Earl of Eglinton,” these words forming the

conclusion of the finding recalled hoc statu by the interlocutor of the 29th ultimo; and farther, recalls the words "as aforesaid," in that part of the interlocutor which prefers the creditors "to the extent of the five years' rents as aforesaid;" quoad ultra refuses the representation, and adheres to the interlocutor complained of.* Both parties having reclaimed, the Court, on the 14th of January 1823, pronounced this interlocutor:—'Recall the interlocutors of the Lord Ordinary, dated the 29th of May and 14th of June 1822, in so far as they alter the interlocutor of the Lord Ordinary dated the 15th of January 1822; and they accordingly refuse the desire of this petition for Messrs Rundell, Bridge and Rundell, and adhere to the interlocutor of 15th January 1822 reclaimed against; but reserve consideration of the point, what shall be considered as sufficient diligence upon the part of the commissioners of Lady Montgomerie in the management of the trust committed to them.' And on the 12th of February 1823 their Lordships refused a petition without answers.†

April 15. 1825.

Lords President, Hermand, and Gillies, were of opinion that the obligation was limited to five years. Lords Succoth and Balgray, on the contrary, held that there was no such limitation.

Messrs Rundell, Bridge and Rundell, and the other creditors, appealed.

Appellants.—Although it is true that the obligation contracted by Lady Montgomerie was purely voluntary on her part, yet she thereby effectually bound herself; and in reliance upon it, the creditors abstained from adopting any steps against the estate of her husband. It was an obligation proceeding on good and sufficient considerations; and therefore it is irrelevant to say, that she received no actual value. A cautioner gets no direct value for his obligation; but, nevertheless, he is as effectually bound

* It is stated in the respondent's case, p. 7. that 'it was the intention of both the Lords Ordinary to find, that Lady Montgomerie's engagements to the creditors would be sufficiently fulfilled by her commissioners accounting for the five years' surplus rents, reserving the consideration of the question, how far they were bound to use strict diligence in the recovery of those rents. But Lord Meadowbank's interlocutor, instead of qualifying in that way the finding in Lord Gillies's interlocutor, had recalled that finding altogether. This defect, which on the part of his Lordship was plainly unintentional, he would no doubt have rectified as soon as it was pointed out to him in a representation; but the creditors in the mean time having prepared a petition to the Court against the principles of the interlocutor, the respondents were obliged to present a short petition also.'

† See 2. Shaw and Dunlop, No. 188.

April 15. 1825. as if value were paid to him. Neither is it relevant to relieve a party, either in law or equity, that the calculations which he may have made for his own guidance in entering into it have not been realized, or that his means of implementing it have by subsequent events been taken away. Still the obligation subsists; and therefore the only question here is, what is the import and construction of the obligation? It is said by the respondent, that it is limited to five years; but there is no such limitation either in the obligation itself, or in the commission, or in the minute and statement. In the latter, no doubt, it is said, that 'it is calculated that the debts may in this way be all discharged in the course of five years;' but this was a mere matter of calculation, held forth to induce the creditors not to proceed against the estate, and was not a limitation or restriction. Accordingly, no condition of that nature is inserted in the obligation itself; and both the memorandum, and subsequent correspondence, evidently proceeded on the footing that there was no such limitation.

Respondents.—The obligation being purely a voluntary and gratuitous deed on the part of Lady Montgomerie, must be construed in the most favourable way for her; and, in judging of its meaning, the whole circumstances must be taken into view. It cannot be supposed that, out of an income of L. 20,000, she meant to restrict herself during her life to an annuity of L. 5000. Accordingly, in the minute and proposal, the contemplated period was only five years, and which, if matters had not entirely changed, would have yielded a sufficient surplus to pay the debts. It is true, that it is not expressly stipulated in the obligation that it shall endure for only five years; but the minute is specially referred to, and the terms of it must be held as incorporated in it. In these circumstances, therefore, she cannot be considered as having pledged the rents of her estate for an indefinite period; and if not so, then that period must be the one specified in the minute forming the basis of the obligation.

The House of Lords found, 'that under the commission, 'bearing date the 16th of July 1814, and the deed of obligation 'and assignation, bearing date the 10th October 1814, the said 'commissioners are bound to apply the rents of the estates mentioned therein, after making payment of the sum therein mentioned to Lady Montgomerie, and of the sums and expenses therein provided for, in discharge of the debts due by the late 'Lord Montgomerie, until thereby, and with the other funds 'mentioned in the foregoing instrument, the same debts shall

‘ be paid and extinguished. It is therefore ordered and ad- April 15. 1825.
 ‘ judged, that so much of the interlocutors complained of as is
 ‘ inconsistent with the above findings, be reversed; and it is
 ‘ further ordered, that the cause be remitted back to the Court of
 ‘ Session, to do therein as shall be consistent with this judgment,
 ‘ and as shall be just.’

LORD GIFFORD.—My Lords, I am to call your Lordships’ attention to an appeal in which Messrs Rundell, Bridge and Rundell, and others, creditors of the late Archibald Lord Montgomerie, are the appellants; and the Right Honourable Lady Mary Montgomerie, now the wife of Charles Montolieu Burges, Esq. and the said Charles Montolieu Burges for his interest, are the respondents.

My Lords,—It may be necessary for me, before I state the interlocutors against which this appeal has been brought, to state to your Lordships shortly the circumstances which have occasioned the litigation in question. It appears that the late Lord Montgomerie, in 1806, was married to Lady Mary Montgomerie, who appears to have been a lady of very large personal property, and a landed estate estimated at L.20,000 a-year. Lord Montgomerie died in the year 1814, and it appeared that at his death he left debts to a very large amount, amounting altogether, as they were then estimated, to L.100,000. The property which he left of his own, and which was applicable to the payment of his debts, was not equal to his debts. It appeared that the property, at a valuation, amounted only to L.50,000, from which Lady Montgomerie wished to retain a portion, namely, the furniture at Coilsfield, valued at L.8000, and the family plate, valued at L.8000; so that those two portions of the property being deducted, there remained only L.34,000 applicable to the payment of his debts, except these two portions of property, for which, of course, she must be debited. Lady Montgomerie appears to have been very anxious, from a very honourable feeling, that all his debts should be discharged, and therefore she proposed to appropriate part of her own property immediately, retaining to herself an income of L.5000 a-year, and to appropriate also the surplus rents of the other part of the property in liquidation of those debts.

In consequence of that determination, a minute and statement, as it is called, to which I shall have to call your Lordships’ attention more particularly by and bye, was, upon the 16th of July 1814, drawn up, giving on the one hand the estimated amount of the debts, and on the other the property, which, I have already stated, Lady Montgomerie proposed to render applicable to the payment of these debts; and then stating the deficiency, and containing this clause:—‘ As Lady Mont-
 ‘ gomerie has resolved to restrict her expenditure to L.5000 a-year,
 ‘ and to allow the remainder of the free rents of her estate to be ap-
 ‘ plied towards the extinction of the balance of the debt, it is calcu-

April 15. 1825. 'lated that the debts may in this way be all discharged in the course
' of five years, including the expenses necessary for carrying the ar-
' rangement into execution.' The minute then went on to make a
statement relative to some property which was sold to Lord Eglinton
for L. 22,000; and then it concluded in this way:—' Lady Mont-
' gomerie having fully considered the particulars before stated, ap-
' proves of and agrees to the arrangement suggested, and has accord-
' ingly executed a commission in favour of Lord Alloway, Mr George
' Russell, and Mr Samuel Anderson, for carrying the same into exe-
' cution, as well as for the general management of her affairs. (Signed)
' MARY MONTGOMERIE. Eglinton Castle, 16th July 1814.' My
Lords, it appears, on the same day, that a commission was executed;
and at a subsequent date, in the month of October in the same year,
to satisfy the creditors, another deed was executed, which is called a
deed of fulfilment.

My Lords,—After these instruments were executed, and the
estates thus put under the management of these commissioners and
trustees in the year 1815, it is within your Lordships' recollection that
a considerable depreciation of land took place, and Lady Montgomerie's
estates, in common with most of those in that part of the kingdom as
well as this, suffered a great diminution in annual income. It was
soon found, therefore, that the calculation which had been made of
those debts being to be paid off in five years by this appropriation was
incorrect. Accordingly, the creditors becoming clamorous in the
year 1817, another memorandum was prepared, to which I shall have
to call your Lordships' attention. My Lords, I should have stated to
your Lordships, that Lady Mary Montgomerie, in the year 1815, mar-
ried Mr Burges.

Disputes arising between the commissioners and Lady Montgomerie
as to the effect of those arrangements which had been made, in the
year 1818 or 1819 an action of multiplepoinding, as it is called, was
raised by the trustees, and which was brought for the purpose of ob-
taining the opinion of the Court of Session upon the construction of
those deeds; it being contended on the part of Lady Montgomerie,
that her intention, to be collected from the papers, (and therefore the
arrangement must be so construed), extended only to this, that she
devolves only the surplus funds of her estates for a period of five years;
and therefore, that if, at the expiration of those five years, the surplus
rents were insufficient to pay the creditors, the creditors must be con-
tent with what they could get from that surplus; but that the deed
was then to end. On the other hand, it was contended by the credi-
tors, that it was clear in their judgment that Lady Montgomerie's ob-
ligation did not cease at the expiration of the period of five years; and
that although, through the depreciation in the value of the property,
it might be a considerable period before those rents would liquidate
the debts, the trustees were bound to apply the surplus rents in liqui-
dation of the debts till they were satisfied.

My Lords,—This coming on before the Lord Ordinary, my Lord Gillies, he, on the 15th of June 1822, pronounced a very elaborate interlocutor, stating the circumstances which I have already detailed to your Lordships. (His Lordship then read the interlocutor). April 15. 1825.

After that interlocutor was pronounced, Lord Gillies was removed into the Inner-House, and this interlocutor having been represented against by the appellants, came before Lord Meadowbank, who made some alteration in it, which it is unnecessary for me to state. The interlocutor afterwards came before the First Division of the Court of Session, and they pronounced an interlocutor in the month of January 1823, which interlocutor is as follows:—(His Lordship then read it).

My Lords,—A reclaiming petition was presented to the First Division, which came on, and on the 12th of February 1823 a second interlocutor was pronounced. I should state to your Lordships, that a very considerable difference of opinion was entertained by the Judges of the First Division. Lord Gillies, before whom it had been originally as Lord Ordinary, continued of the same opinion which he expressed in the interlocutor which I have stated to your Lordships; the Lord President agreed with him, and likewise my Lord Hermand; but the two other Judges, Lord Succoth and Lord Balgray, were of a contrary opinion. The majority, of course, prevailed, and the creditors have brought these interlocutors before your Lordships for your consideration.

My Lords,—It has been stated at the Bar, and is stated in these papers, that this must be considered in a great measure as a voluntary obligation entered into on the part of Lady Montgomerie; and that, therefore, if there is any doubt upon its construction, it ought to receive the most favourable construction. No question is made upon this proceeding, nor do I see how such a question could be raised with respect to her being bound by these instruments; but the only question which has been argued, is upon the construction of these instruments. Undoubtedly, my Lady Montgomerie was not legally liable beyond the extent of the property acquired with her husband, and which was applicable to the payment of his debts; but from that feeling which is most praiseworthy in her, she appears to have had a great desire and a great wish that her husband's memory should not be tarnished in any respect by the debts he had contracted remaining unpaid. Her desire appears to have been, that those debts might be paid; and the only question, as I stated to your Lordships, is, whether, from the language in which this minute is drawn, which it is contended was the basis of the contract, and is therefore to be taken in conjunction with the other instruments, the other instruments referring to the minute and statement, whether, taking both in conjunction, that minute and statement does contain any restriction and limitation of the period during which those rents were to be applied to the payment of the debts?

April 15. 1825.

I will now, therefore, call your Lordships' attention more particularly to that minute, and to the other minutes which were prepared, one at the time, and the other at a period four or five months posterior to it. My Lords, this minute and statement appears to be made out by Lady Montgomerie's agent, submitted undoubtedly to her; and, as I collect, afterwards submitted to the creditors. The minute begins by stating the supposed amount of the debts due by Lord Montgomerie, which is stated to be in London L.60,000, in Scotland L.30,000, and in the country L.9,000, constituting by the state of Mr Dunlop, the agent, such a total as I stated to your Lordships of L.99,000. It then proceeds to say;—' By Mr Dunlop's account it would appear, ' that the rents of the estate for crop and year 1813 have been paid ' and exhausted, excepting an arrear of about L.1500 sterling.' So that there was an arrear of rents. ' Therefore, there is no fund for ' answering the above debt of, say L.100,000 sterling, except what ' will arise from the following sources.' It then states the particulars of the property belonging to Lord Montgomerie,—the above arrear of rent of L.1500; house in Hamilton Place, with furniture and wine, say L.22,000; household furniture and wine at Coilsfield, say L.8000; family plate, ditto, L.8000; the crop, stocking, &c. on the lands which were in Lord Montgomerie's own possession, L.2000; the stud, L.1000; furniture at Skelmorlie, L.300; lands of Park, L.8000;—total, L.50,000. But of this fund, Lady Montgomerie will have to retain furniture at Coilsfield, L.8000; family plate, L.8000; ' retain- ' ing these two subjects, which are estimated at the value of L.16,000, ' that being deducted from the L.50,000, left a balance of L.34,000;' this, therefore, leaves a ' deficiency of L.66,000 sterling to pay the ' balance of the debt, to provide for which the following lands can be ' sold to Lord Eglinton, as they lie intermixed with his estate.' Then certain lands are enumerated, which are proposed to be sold to Lord Eglinton, and which, it is estimated, will be sold for L.22,820. Then comes this statement,—' As Lady Montgomerie has resolved to re- ' strict her expenditure to L.5000 a-year, and to allow the remainder ' of the free rents of her estate to be applied towards the extinction ' of the balance of the debt, it is calculated that the debts may in ' this way be all discharged in the course of five years, including the ' expenses necessary for carrying the arrangement into execution. As ' the lands proposed to be sold to Lord Eglinton are, with the other ' fee-simple lands belonging to Lady Montgomerie, charged with ' L.20,000 sterling;' it then goes on to state, that a sale could not, with any prospect of advantage, be made to any other person but his Lordship; but that has no bearing upon any part of the instrument upon which this question arises. Then follows this statement:— ' Lady Montgomerie having fully considered the particulars before ' stated, approves of and agrees to the arrangement suggested, and ' has accordingly executed a commission in favour of Lord Alloway,

‘ Mr George Russell, and Mr Samuel Anderson, for carrying the same April 15. 1825.
 ‘ into execution, as well as for the general management of her affairs.’

Now, before I proceed to the instrument, which was executed on the same day, upon which most material observations arise, I would call your Lordships’ attention for a moment to this. It is contended, on the one hand, that this statement, that the debts might be all discharged in the course of five years, was intended by Lady Montgomerie to limit the period during which the surplus rents were to be applied to those five years; although she had previously stated, that her object was to discharge the debts altogether, certainly in that part of the instrument, without any regard to the period at which they should be discharged. Here she states, that ‘ it is calculated that the ‘ debts may in this way be all discharged in the course of five years :’ not saying there, that five years was to be the ultimate limitation, but that it was calculated that the debts might be all discharged in that way in the course of five years. Now, as I have stated to your Lordships, this was not only submitted to Lady Montgomerie, the person undoubtedly, in the first instance, to regulate the terms, but was afterwards submitted to the creditors, as will appear by the recital in a subsequent instrument.

My Lords,—On the same day Lady Montgomerie executed a commission, and by that commission she nominated my Lord Alloway, Mr George Russell, and Mr Samuel Anderson, managers of her estate; and in the first part of the instrument she gave them the most extensive powers to carry on this trust—powers to receive rents, powers to grant receipts and acquittances, and powers to bring ejectments and grant leases. Then it goes on in these words:—(His Lordship then read the deed. See ante, p. 113.)

Now, my Lords, it strikes me at the first perusal of this instrument to be rather remarkable, that if my Lady Montgomerie’s intention was only to appropriate the surplus rents for five years, the delegation to the commissioners did not extend only to five years,—I mean as far as the payment of debts was concerned. It is true she appointed them general managers; but it is stated by her, that the commission to them shall continue as long as the object continued unanswered, namely, the extinction of the debts: she says, I will have the power of recalling it whenever I please. I say, if that was intended as a matter of limitation, and not merely as a calculation that the debts would be paid within that time, it is remarkable that she does not expressly restrict the duration of it, as to the payment of the surplus rents and profits, to the five years to which it is said she intended to confine the application of it. It is true she says they are to apply the rents, ‘ with the exception of what may be required for defraying the ‘ expenses of my own establishment, towards the gradual payment and ‘ extinction of the aforesaid debts, all as mentioned and contained, so ‘ far as the circumstances are at present known, in a statement and ‘ minute subscribed by me of this date, and bearing reference hereto.’

April 15. 1825. Undoubtedly she refers to the statement and minute as containing the calculation of the property and the general object by which she intended to be bound; but if it was intended by her to consider the period within which the payment of the debts was expected to be made as a limitation of the liability to supply the surplus rents, it is remarkable that this commission does not contain a limitation to that effect.

But, my Lords, let us see what subsequently took place. In the month of October 1814, in consequence of the application to the creditors, she executed an obligation and assignation, to which I will call your Lordships' attention. It is in these words:—(His Lordship then read the deed. See ante, p. 114.)

My Lords,—There is no limitation introduced here as to the period for which the commissioners were to hold these lands, except the period of the extinction of the debts contracted by Lord Montgomerie. This obligation is stated to be in implement of the minute and statement; and if it be so, then it shews that the intention of the parties was not to restrict the commissioners to the period of five years, but that her object was to extinguish those debts in toto, and that until those debts were extinguished she was willing to restrict herself to L. 5000 a-year. Upon the instrument itself, therefore, it appears to me there is no doubt of the intention of the parties.

My Lords,—Throwing out of consideration the letters written by this lady herself and her agent, which have been pressed at your Lordships' Bar, the effect and purport of which letters was, that the debts would be ultimately paid, though in consequence of the depression of rents the period of payment would be farther removed, there is another important document, clearly manifesting what was the intention of the parties, and what they thought they had done,—I mean the statement and proposal submitted to the creditors in 1817. In 1817 it was found, that by the diminution of rents it would be a long period before the surplus rents would enable these commissioners to liquidate the debts; a proposal was therefore made to the creditors, the language of which is not unimportant for your Lordships' consideration. It states, 'By the arrangement made by Lady Montgomerie in summer 1814, regarding the debts of the late Lord Montgomerie, which were estimated to amount to about L. 99,000, it was proposed that they should be paid off from the following sources;' and then it states the sources, as stated in the minute, amounting to L. 50,800. 'But of this fund Lady Montgomerie would have to retain furniture at Coilsfield, which was then estimated at L. 6000, (it had before been taken at L. 8000), family plate L. 8000, making together L. 14,000, being the sum of L. 36,800 to be applied to the payment of the debts.' And thus there appeared to be a deficiency of funds to the extent of L. 63,000, which her Ladyship proposed to make up by a sale of part of her fee-simple estate to Lord Eglinton, which it was calculated might produce L. 22,820. But as the property was

charged with certain encumbrances, which could not be easily removed, it was necessary, in order to induce Lord Eglinton to make the purchase, that the payment of the price should be made convenient for him. ‘What part of the debt’—I beg your Lordships’ attention to this statement—‘What part of the debt should remain after the application of this, was proposed to be paid off gradually from the surplus rents of her Ladyship’s estates, after setting aside L. 5000 a-year for herself. Lady Montgomerie granted a commission to Lord Alloway, Mr Russell, and Mr Anderson, for carrying the arrangement into execution, and likewise granted a factory to Mr Haldane for managing the estate and uplifting the rents. The personal effects of Lord Montgomerie, before noticed, were accordingly sold off and converted into money, (except the household furniture at Coilsfield, and plate), and the produce applied in part payment of Government taxes and privileged debts. The house in Hamilton-place and furniture were likewise sold for L. 22,500; but owing to its being under a lease for two years the bargain was broken off, and it has since been sold at the reduced price of L. 19,000, and the necessary steps are now taking for completing the sale. The lands proposed to be sold to Lord Eglinton were purchased by his Lordship, but fell short of the estimated price by about L. 2000; and owing to the encumbrances which have been mentioned, his Lordship has only paid L. 4000 to account of the price. With regard to the rents of Lady Montgomerie’s estate, they have been very unproductive, owing to the general distress of the tenantry in Scotland; and all the surplus rents that the factor has been able to collect have been little more than sufficient to answer public burdens and preferable debts. From these causes, therefore, the original estimated amount of Lord Montgomerie’s debts has not suffered a reduction to a greater extent than about L. 21,000. If, therefore, matters are to go on in this way, there is no calculating when the creditors may receive payment.’ Why, my Lords, if the intention of these parties had been that the period of five years should be the whole period during which this trust was to continue, would it not have been said, We are now in the year 1817; there are only about two or three years during which these rents will be received; the whole amount received, therefore, will be quite insufficient to pay you your debts, and after that period Lady Montgomerie is totally discharged from the payment of them? But no such thing. Then they go on to say, that she is inclined to sell certain property valued at L. 30,985. 9s. 9d., which had not been intended to be appropriated by her to the payment of the debts; and thus it is held out to the creditors, that if they will accept that, they will be very nearly paid in full, and they will not have to wait for the payment of their debts till the rents can make up the deficiency, but they can at once by this arrangement receive the payment of their debts, if not altogether in full, with a very slight deficiency; and that therefore it is much more for their interest to be paid thus, than to wait for the pay-

April 15. 1825. ment of their debts till an indefinite period when they may expect to receive payment. My Lords, according to the restriction which Lady Montgomerie now puts upon this instrument, this was a most advantageous arrangement for the creditors, for this was giving them infinitely more than they could receive within the five years. The creditors, however, refused this proposition, in consequence of which ultimately this proceeding has been instituted.

My Lords,—I must confess that, hard as this case may appear to be upon Lady Montgomerie, and hard it undoubtedly is, because, as I have already stated, this was an obligation under which she was under no legal liability to come, but was dictated by feelings which I have more than once stated to be so honourable to her, it appears to me, and it was so argued at the Bar, that the only question for your Lordships' consideration is, What is the fair construction of the whole of these instruments taken together, and what was the liability under which Lady Montgomerie came? My Lords, I observe that those very learned persons, for whose opinions we must entertain the highest respect, the Lord President and Lord Gillies, as well as Lord Hermand, seem to argue, that because, after these instruments were executed, this depression took place, which had not been in the minds of the parties, that is a circumstance which entitles her to be relieved from this contract. My Lords, I must beg leave to differ from those learned persons in that view of the subject. There is no doubt she conceived that, the amount of the rents being that which is stated, it was most probable her whole estates would produce for the next five or six years the same as they had produced; and therefore she should, at the expiration of that period, be relieved from the burden she had imposed upon her estate, and the creditors all be paid. But, my Lords, how can it be contended, that because there has been that depression in the value of property, she is therefore released from her contract? It was impossible at that time to foresee whether the value would be depressed or increased. If the rents had been increased, the creditors of course would have received payment sooner, and she would have been at an earlier period relieved from the burden. But the question is, what was the contract Lady Montgomerie entered into? Was it not, that the surplus rent should be appropriated to the debts till they were extinguished; and was this reference to the period in the statement and minute intended as a limitation of that trust? I think, my Lords, on looking at the words themselves, it is impossible to contend that it was a limitation. It appears to me that it was only the expression of an idea on her part, and that of the creditors, as to the period within which they might probably expect payment. It is not said they will be paid before that time, but that they may be paid before that time. The construction now contended for is, that even if the rents had remained as they were, and if they and the other property had not produced the sum at which they had been calculated, the moment of the expiration of the five years there was an end of the

power of the trustees to apply one farthing to the payment of the debts. My Lords, having looked at this case most anxiously, because it is certainly not to be concealed that it is a case of hardship on the part of Lady Montgomerie, it is plain that the single question is, what is the contract between the parties? In judging of this your Lordships must confine yourselves to the instruments; you cannot go out of the instruments themselves, and cannot be influenced by any circumstances of hardship operating on the one party or on the other, in consequence of the contract they have entered into. My Lords, upon the whole, after the most deliberate consideration, I cannot bring myself to coincide with the opinion of the Court of Session. I am of opinion that the true construction of this instrument is, that the surplus rents were to be applied till the debts were extinguished. I am of opinion, therefore, that that part of the interlocutor which is complained of should be reversed; and I shall therefore—not at this moment, for it will require some little attention as to the manner in which your Lordships' judgment shall be drawn, because, in this view of the subject, the case must go back to the Court of Session; but I shall certainly propose to your Lordships, the next time I have the honour to attend your Lordships, a minute of the judgment, the effect of which will be to alter that part of the interlocutor of the Lord Ordinary, and the subsequent interlocutor of the Court of Session, as to the construction of the instrument. Of course, the case must then be remitted to the Court of Session, to apply your Lordships' judgment to the circumstances of the case.

April 15. 1825.

Appellants' Authorities.—3. Ersk. 3. 89. ; Hog, Nov. 30. 1749, (1390.); 1. Bankton, 9. 8. ; 14. Vesey, 273.

Respondents' Authorities.—3. Ersk. 3. 87. and 92. ; French, Feb. 18. 1669, (6366); Duke of Lauderdale, Dec. 14. 1684, (6379.)

J. CAMPBELL—A. MUNDELL,—Solicitors.

ALEXANDER COOPER, of Failford, Appellant.

No. 15.

MARGARET CAMPBELL, and Others, Children of the late JAMES CAMPBELL, and ALEXANDER HAMILTON, Writer in Mauchline, Respondents.

Reparation—Damages.—Circumstances under which it was held, (affirming the judgment of the Court of Session), That a party was not entitled to damages for the alleged illegal execution of diligence.

THE late James Campbell, the father of the respondents, was a tenant on the estate of Failford, in the county of Ayr, belonging to the appellant Cooper. In 1793 Cooper raised an action

April 18. 1825.

2D DIVISION.
Lord Cringletie.