[11*th August* 1832.]

No. 14. ARCHIBALD HUNTER, Appellant. — *Attorney General (Denman) — Lord Advocate (Jeffrey).*

ALEXANDER DUFF and others, Trustees of the deceased Major Duff, Respondents. — *Lushington — T. H. Miller.*

Circumstantial — Expenses. — Circumstances in which it was held, affirming the judgment of the Court of Session, that the interest on a bond was paid; that one bill was prescribed, and another retired; and that the trustees of a party, alleged, but not proved to have purchased pictures, was entitled to return them to the seller. But the interlocutor of the Court below was altered in part as to costs.

2d DIVISION.

Ld. M'Kenzie.

ARCHIBALD HUNTER of Upper Baker Street, London, in August 1829, raised an action in the Court of Session against the trustees of the late Major Duff of Milton, and concluded for payment of 600*l.* sterling, due on an English bond dated the 30th of August 1821, with interest from that date; for 478*l.* sterling, as the contents of an acceptance by Duff to Hunter, which fell due on the 2d of September 1822. This bill is dated London, 30th August 1821, was drawn by Hunter, residing in London, accepted by Duff, 185, Piccadilly, and made payable to Hunter twelve months after date. The summons also concluded for payment of 200*l.* sterling, as contained in another acceptance by Duff to Hunter, which fell due on the

28th of May 1826, with interest upon both these sums; for the sums of 1,050*l.* and 105*l.* sterling, represented to be the price of certain pictures alleged to have been purchased from Hunter by the deceased, with interest from the 28th of August and 4th of October 1822, and for expences of process. The trustees maintained that the interest had been paid on the 600*l.* bond till the time of Duff's death, and that certain partial payments had been received by Hunter, which fell to be applied in extinction of the principal. Afterwards, however, upon production of the correspondence recovered under diligence, the trustees, who were previously unacquainted with these affairs, became satisfied that Duff had not intended to ascribe these payments in extinction of the principal of the bond. They abandoned, therefore, these deductions, and admitted the bond to be due, with interest, from their constituent's decease. The other claims they disputed in toto.*

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The Lord Ordinary found, in respect to the bond for 600*l.* libelled, that it is not now disputed that the principal thereof is due, with interest thereon from the period of the death of Major Duff, viz. April 1828; and therefore finds the defenders, as trustees libelled, liable for the said principal and interest, and decerns accordingly. But in regard to the interest on the said bond prior to the death of Major Duff, finds it sufficiently appears, from the writings and admissions in process, that the said interest was paid, or the claim for the same extinguished, by payments made in each year

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* The respective statements of parties were in the usual shape of revised condescendence and revised answers, statements of facts and answers, counter statement of facts and answers, with additional statement of facts for the defenders, and answers for the pursuer.

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by Major Duff to the pursuer, and that the same did not constitute an arrear of interest due between the parties; therefore, in respect to the same, assoilzies the defenders, and decerns. In respect to the bill for 478*l.*, finds that the same has fallen under the sexennial prescription of the law of Scotland; and in respect no offer is made to prove that the sum therein is due by the oaths of the defenders, therefore, in regard to this bill, assoilzies the defenders, and decerns. In respect to the bill for 200*l.*, finds it proven by the correspondence in process, and admitted to be genuine by the pursuer, that the same was retired with money remitted by Major Duff for that purpose; and, therefore, in regard to this bill, also assoilzies the defenders, and decerns. In respect to the price of the pictures libelled, finds it appears that the same were sent to Major Duff, not in consequence of any prior contract of sale, but, at the farthest, in the hopes that a sale of them might be made; finds no evidence that any such sale ever was completed; and therefore finds it unnecessary to decide in regard to the defenders plea of the quinquennial prescription; and in respect to the defenders offer to restore the said pictures, assoilzies them from that part of the conclusions of the libel, and decerns: Finds the pursuer liable to the defenders in expences, of which appoints an account to be given in, &c.

The case was taken by a reclaiming note before the Second Division; and their Lordships, having advised

June 9, 1831.

the cause, refused the desire of the reclaiming note, and adhered "to the interlocutor submitted to review, "with this explanation as to the pictures, that these are "actually to be restored as offered by the defenders, "and, when that condition shall be fulfilled, adhere to

" the interlocutor in omnibus; find the defenders en- No. 14.
" titled to expences since the date of that interlocutor, 11*th August*
" and decern; appoint an account to be given in," &c.* 1832.
And these expences were afterwards modified and de- HUNTER
cerned for. *v.*
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Hunter appealed. and others.
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Appellant. — The bond is a regular and a probative document of debt; and it is not instructed by, and does not appear from, any writings or admissions in process, that the interest on the bond, prior to the death of Major Duff, was paid, or the claim for the same extinguished by payments made in each year by Major Duff to the appellant. The debt constituted by Duff's acceptance for 478*l.* is an English debt, and therefore does not fall within the operation of the sexennial prescription of bills of the law of Scotland. — Delvalle, 9th March 1786, and York Buildings Co., 14th February 1792 (Mor. 4,525 and 4,528). Holding the debt to be English, the statute of limitations is excluded by certain legal procedures taken in England; and even were it to be held that the debt is liable to be affected by the Scotch law of prescription, the respondents, in the particular circumstances of the case, are barred, personali exceptione, from stating any such plea. At Duff's death the prescription had not run, and the trustees by their conduct misled and put the appellant off his guard. — Douglas, Heron, and Co., 1st March 1793 (Mor. 11,045). As to the bill for 200*l.*, it is a regular probative document in favour of the appellant, which the respondents are legally bound to pay, unless they

* 9 Shaw and Dun. 703.

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prove habili modo that it has been already paid; but it is not proved by the letters in process, or otherwise, that it was retired with money remitted by Major Duff for that purpose. The pictures were in 1822 sold to Duff at the prices stated, and duly delivered to him: at any rate, if the evidence already in process of the amount of the price were to be held not sufficient to instruct that fact, further evidence of it has been offered. It is quite plain, that, after the pictures have been kept and used, first by Duff for a number of years, and, since his death, by the respondents, mere restoration of the pictures is not, in any view, what the appellant is bound to accept. The judgments on the merits of the cause, in respect of which the judgments for expences were pronounced, being erroneous, on the former being reversed, the latter, as an accessory thereto, ought also to be reversed. At all events, the expences ought to have been less, inasmuch as the respondents, till the action was raised, denied the appellant's claim in toto, which denial rendered an action necessary; and since, even in their defences to the action, they maintained that part of the principal sum in the bond had been paid, which plea they afterwards abandoned, though not till after expence had been incurred.

Respondents.—Annual payments, proved to have been made by Duff to the appellant, must be held to have extinguished the accruing interest on the bond; and it is the principal only of the bond, with interest since Major Duff's decease, that remains due to the appellant, and this the respondents do not dispute. The acceptance for 478*l.* is prescribed by the law of Scotland — the law of the country applicable to the case;

and the appellant had never reason to expect that the respondents would pay it; and the bill for 200*l.*, being proved to have been retired by Duff's funds, is paid and extinguished. The claim for the price of the pictures is groundless. There was no complete sale. If there had been, the quinquennial prescription had run. The appellant will get ample justice if the pictures are restored to him. The respondents are merely trustees, and had no personal knowledge of these matters. The moment they were satisfied that there had been no partial payment, they gave up that defence. Having stated it at all, put the appellant to no additional costs.

LORD CHANCELLOR:—My Lords, I have taken time to look into this case, and I am satisfied that, except as to the matter of costs, there is no ground for altering in any respect the interlocutors appealed from. But with respect to the costs, there has undoubtedly been a slight mistake: the costs have been given generally. Up to a certain point it was clear that the pursuer was correct in his demand, because the present respondents gave in upon that point, and put a stop to any further litigation; but the costs ought not to have been allowed to the defender beyond that point, but, on the contrary, to the pursuer; and though that would not of itself have been a ground of appeal, yet there was substantial matter, independently of the question of costs, that has brought the whole case before your Lordships really and not colourably; and it is perfectly competent to your Lordships to alter the interlocutor complained of in respect of costs, although in no other respect is it necessary it should undergo alteration. I

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am anxious to guard against being supposed to assent to any proposition like that of it being competent to appeal upon a question of costs. If there is an appeal merely upon costs, it cannot be entertained for a moment; if the appeal from the body of the decree were colourable, and prosecuted, not for its own sake, but for the purpose of ushering in an incompetent appeal upon costs,—in that case, too, your Lordships would reject it as an incompetent appeal; but where there is a bonâ fide ground of appeal upon the merits, then, it being a competent appeal upon the merits, it may be made the ground of reversal or alteration of the interlocutor in the other respect of costs. The judgment I should advise your Lordships to pronounce would be, to affirm the interlocutor complained of, but, in respect of the costs given, to reverse such part as relates to the costs up to the admission respecting the bond, and to give the costs to the pursuer, the present appellant, up to that point. This will make it necessary there should be a remit, as your Lordships have no means of taxing the costs below; but in order to avoid that expence, the parties may try to agree on the sum, and, before we order a remit, suggest a sum that may be inserted in the order. I do not move to affirm this judgment, with costs, for other reasons; therefore the judgment will be to affirm the interlocutor, but alter that part relating to the costs, and to allow to the appellant a certain sum that the parties may agree upon for costs which up to that point may have been incurred; that will save the parties the expence of going back to the Court of Session. If they cannot agree upon a sum, there must be a remit, with an instruction, and the Court will then tax the costs.

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Parties not having agreed, the House of Lords ordered and adjudged, "That the interlocutors complained of be, "and the same are hereby affirmed, except in so far as "they, or either of them, find the expences of process "herein-after specified due from the pursuer to the de- "fenders: And with respect to such expences, it is further "found and declared, that the pursuer ought not to have "been charged with any expences of process up to the "date when the revised answer for the defenders to the "revised condescendence for the pursuer was put in, as "the same appears in page fourth of the appellant's printed "case; but, on the contrary, expences ought to have been "allowed to the pursuer of the proceedings up to that "date: And it is further ordered, that the cause be re- "mitted back to the Second Division of the Court of "Session, to vary the interlocutors in this respect, and to "do further what shall be just thereupon."

CALDWELL and SON — MONCRIEFF and WEBSTER, — Solicitors.