[Heard 14*th March*, 1843. Judgment, 4*th September*, 1844.]

MESSRS. JOHN AND ANDREW R. DRUMMOND, Bankers, London, *Appellants.*

MRS. CATHERINE ROSS OF CROMARTY, AND HUGH ROSS, Esq., her Husband, *Respondents.*

Tailzie.—Where an open account is subsisting between parties and an heir of entail in possession under an entail which is not put upon record until at an advanced period of the account, the right of these parties to attach the entailed lands for payment of the balance upon the account is limited to the amount of the balance upon the day on which the entail was put upon record.

Compensation and Retention.—Crown Debt.—The balance upon an open running account between an heir in possession under an entail, and third parties appearing as on the day upon which the entail was put upon record:—*held*, to extinguish a separate and distinct debt, to the effect of barring the third parties from affecting the entailed lands for an ulterior balance subsequent to the recording of the entail, and this although the balance on the particular day was composed of money received on behalf of the Crown.

IN 1783 George Ross executed an entail of his lands of Cromarty, under which his nephew, Alexander Ross, was the first heir who took. This entail did not contain any obligation upon the heirs to record it, and it remained unrecorded throughout the life of the maker.

In 1786 George Ross died, leaving a will providing for payment of his debts, and specially directing his trustees and executors to pay off a large debt secured on the lands of Cromarty and to record the entail. Upon his death, Alexander Ross made up titles, and entered into possession under the entail.

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On 27th May, 1803, and not till then, the entail was put upon record, on the application of a remote substitute.

Alexander Ross was partner in the house of Ross and Ogilvie, extensive Army Agents in London. In the course of their business, the firm had dealings with Messrs. Drummond, as their bankers upon an open account. Drummonds from time to time made Ross and Ogilvie considerable advances of money. In particular on the 26th January, 1796, they lent them 9000*l.*, and obtained from them the following document:—"Borrowed and "received of Messrs. Robert and Andrew Drummond the sum of "9000*l.*, which we hereby promise to repay them or their order "upon demand, with interest; and as a collateral security for "the repayment of the same, we have already deposited in their "hands 93 commercial Exchequer bills of 100*l.* each, dated the "11th day of August, 1795, which they are at liberty to dis-"pose of and repay themselves, the principal and interest of this "note, in case of our failure to do so when required by them."

On the 20th day of August, 1796, upon which day the balance upon the general account was in favour of Ross and Ogilvie, to the extent of 43,936*l.*, that firm paid Drummonds 6000*l.* to account of the note, and the payment was marked upon the back of the note, and the securities to that extent were delivered up.

On the 25th June, 1796, Drummonds also advanced 5000*l.*, and received the joint and several bond of the individual partners of Ross and Ogilvie, and the deposit of a bond by Lord Dundas for 5000*l.* And on 26th March, 1798, they made a still further advance of 10,000*l.*, and received Ross and Ogilvie's promissory note, payable two months after date, with interest, and the deposit as a collateral security of bonds by third parties, for 10,559*l.*

These advances were made by their respective amounts being placed to the credit of Ross and Ogilvie in the general account, giving them thereby the power of operating upon the account to

that extent, as their occasions might require. No entry was made on the opposite or debit side of the account of the promissory notes and bonds; these were kept by Drummonds among their securities, and dealt with accordingly; interest on the amounts was however from time to time charged in the general account, and allowed. Until December, 1803, these charges were made, altogether irrespective of the state of the balance, on the general account, whether as being in favour of Messrs. Drummond or against them.

In the course of their business, Ross and Ogilvie were in the habit of receiving cheques from the War Office upon the Bank of England, for the pay of the different regiments for which they were agents. These cheques they usually handed over to Drummonds, who drew the money from the bank, and then placed the amount to the credit of Ross and Ogilvie in the general account.

Ross and Ogilvie continued their business until March, 1804, in which month a commission of bankruptcy was issued against them. Drummonds made a claim under the commission for a debt of 32,158*l.*, but without proving for the amount. While the commission was under prosecution, Drummonds took steps for attaching Ross's real estate of Cromarty as a means for their payment. For this purpose they brought into play the promissory notes and bond for the three several sums of 9000*l.*, 5000*l.*, and 10,000*l.*, which they had obtained in 1796 and 1798; and ultimately, on the 17th February, 1808, they succeeded in obtaining a decree of constitution in absence against Alexander Ross, against whom alone the action was directed, and finally a decree of adjudication of the lands of Cromarty, for payment of the above three sums, minus the 6000*l.*, which had been paid to account of the 9000*l.*, upon the ground that as the debts had been contracted prior to the entail of Cromarty having been put upon record, the lands were liable for them in the same way as for an entailer's debts.

Alexander Ross died in 1820, and the respondent Mrs. Ross

then became the substitute heir entitled to take under the entail. Between her and Messrs. Drummonds a variety of legal proceedings took place, which, for the purposes of this report, it is not necessary to particularise.

At length, in June, 1836, the respondent, Mrs. Ross, brought a reduction of the decree of adjudication, which had been obtained by Messrs. Drummond, and of its warrants, upon a variety of grounds, and among others upon the following:—"*Decimo*, The "entail of the said estate of Cromarty having been duly recorded "in the register of tailzies in terms of law, on the 27th day of "May, 1803, the said estate was from that day withdrawn from "all liability for the personal debts of the said Alexander Ross, "and no debt subsequently contracted by him could henceforth "be legally or competently made a ground for adjudging the "said estate; but, in point of fact, no debt whatever was due by "the said Alexander Ross, or the Company of Ross and Ogilvie, "to the said Robert and Andrew Berkeley Drummond, or their "successors or representatives, under the said bond and promis-"sory-notes, or otherwise, on the said 27th May, 1803; and, on "the contrary, the said Robert and Andrew Berkeley Drum-"mond were largely indebted to the said Company of Ross and "Ogilvie, on the said day; and therefore, the said pretended "decrees are illegal, incompetent, unfounded, and null and void.

"*Undecimo*, Any debt that may have been due by the said "Company of Ross and Ogilvie, or the said Alexander Ross, to "the said Robert and Andrew Berkeley Drummond, or to their "representatives, under, or by virtue of the said bond and pro-"missory-notes, or otherwise, has been fully paid, extinguished, "and discharged by payments, intromissions, transactions, com-"pensation, and otherwise, to be more fully condescended on in "the course of the process to follow hereon, and upon a just and "true accounting between the said parties, no sum whatever is "due by the said Company, or the said Alexander Ross, to the "said Robert and Andrew Berkeley Drummond, or their repre-

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" sentatives, under the said bond and promissory-notes, or " otherwise."

Messrs. Drummond, who were subsequently represented by the appellants, pleaded a variety of pleas to this action, only two of which, from the course the decision of the case took, it seems necessary to mention. These were in these terms:—

" 2nd. As the bond and promissory notes were not entered " to the debit of Messrs. Ross and Ogilvie's account, but were " kept as separate and distinct obligations for money instantly " advanced, the Messrs. Drummonds were not bound to impute " the balances on the current account, to payment of them, but " were entitled to keep them as separate vouchers of debt.

" 3rd. Under any circumstances, the objections now raised " by the pursuers, are incompetent, seeing that Messrs. Ross and " Ogilvie settled their accounts for many years with the Messrs. " Drummond, and that in all of them the interest charged on " those advances was entered, and that the balance, when in " favour of Ross and Ogilvie, was never imputed to the payment " of these separate obligations."

From the evidence adduced in this action, it appeared that in the course of the dealings between Ross and Ogilvie, and Drummonds, the balance upon the general account in the books of the latter firm was constantly varying in its character; sometimes being in favour of Ross and Ogilvie, and sometimes against them; but in most instances the balance, though in favour of Ross and Ogilvie, was greatly under the amount of the loans made to them in 1796 and 1798, and which, as already mentioned, had never been passed to their debit in the general account. On the morning of the 27th day of May, 1803, the day on which the entail was put upon record, the balance was in favour of Ross and Ogilvie, to the amount of 17,994*l.* 14*s.* 3*d.*, and at the close of that day it was 15,549 11*s.* 2*d.* This was altogether exclusive of the sums advanced in 1796 and 1798, which, together, amounted to 18,584*l.*, after giving credit for the 6000*l.* paid to

account of the 9000*l.* loan, but it included a sum of 19,958*l.*, 4*s.* 10*d.*, which Drummonds had drawn two days before upon cheques from the War Office, sent to Ross and Ogilvie, and delivered by them to Drummonds. Between which time and the 27th, no money had been paid in by Ross and Ogilvie to the credit of their account.

It further appeared, that Drummonds, after bringing their action of constitution and adjudication for the full amount of the advances upon the bond and notes, obtained payment under the collateral securities of a sum of 3036*l.* 3*s.*, that they handed over some of those securities to the assignees of Ross and Ogilvie's estate, under an agreement between them, and that others of the securities had been unavailable from disputed causes, whether through the inability of the debtors, or the *laches* of Drummonds, did not appear.

Upon the 3rd of March, 1841, the Court (*First Division*) pronounced the following interlocutor:—"The Lords having "advised the revised cases for the parties and whole cause, find "that the estate of Cromarty was held by the late Alexander "Ross, under a settlement of strict entail, which was duly "recorded in the register of tailzies on the 27th day of May, "1803, and that thereafter the said estate was not legally liable "to, or adjudgeable by, creditors of the said Alexander Ross for "any subsequent debts of his. Find it sufficiently established "by the evidence in process, that according to the true state of "the accounts and mutual claims and transactions between the "defenders and the Company of Ross and Ogilvie, on the said "27th day of May, 1803, and taking into view the collateral secu-"rities pledged with, and held and used by the defenders in pay-"ment of their claims, there did not exist on that day, under the "bond and promissory-notes libelled on in the actions of con-"stitution and adjudication, any debt or claim on the part of the "defenders, which could by the law of Scotland, be the ground "of any judgment either against the said Alexander Ross, or the

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" said entailed estate. And, therefore, to the above effect sus-
" tains the tenth and the eleventh reasons of reduction stated in
" the summons of reduction dated and signeted the 29th June,
" 1836, and reduce, decern, and declare, in terms of the con-
" clusions of the said summons. Find it unnecessary, *in hoc statu*,
" to determine any of the other points at issue between the
" parties, and decern."

The appeal was against this Interlocutor.

Sir C. Wetherel, *Mr. Swanson*, and *Mr. Anderson*, for Appellants.—The entry of the several sums advanced by Drummonds to Ross and Ogilvie, in 1796 and 1798, to the credit of their general account, was equivalent to an actual payment of so much money, and the nature of the securities given for the repayment of these advances, and the dealings of the parties in regard to them, show that they were in fact, and were treated by the parties as a debt, separate and distinct from the general account, and independent of the state of the balance upon it. Each of the three instruments constituted an independent debt, and their nature was altogether unaffected by the mode in which the advances were made, for which they were given as a security. The balance, which was in favour of Ross and Ogilvie, on the 27th of May, 1803, was in no respect a payment of this separate and distinct debt, otherwise it would have been long previously extinguished on any of the many days in which the balance was in favour of Ross and Ogilvie, to an amount exceeding this debt. The only way in which the debt can be extinguished, is by setting off against it the balance upon the general account, but this operation was not made on the 27th May, 1803. The debt was not brought into the account on that date, nor was the account balanced in any way whatever; and set-off does not operate *ipso facto*, or *ipso jure*, it must be proponed and allowed, in order to operate; and here the balance, which on the close of the 27th May, 1803, was 15,549*l*., was in the subsequent month gradually

reduced, until at length it was turned the other way, the account being actually overdrawn. Carmichael *v.* Carmichael, *Mor.* 2677; Bailie *v.* M'Intosh, *Mor.* 2680; M'Culloch *v.* Maxwell, *Mor.* 2550; Haldane *v.* Douglas, *Mor.* 2690; *Ersk.* iii. 4, 12. Nay, more, Ross and Ogilvie, after the 27th May, 1803, paid interest upon the loan debt as still subsisting and uncompensated. To hold that there was a constructive set-off as with the heirs of entail, would be to place them in a better situation than the debtor here, for which there is not any authority.

If Ross and Ogilvie could not have pleaded compensation, as little can the respondents upon any supposed *jus crediti*, as heirs of entail. Alexander Ross was liable, as holding the lands in fee simple; and any interest which the respondents can have in defending the lands against this liability, can only be as his representatives and successors: they have none under the entail. The lands in his hands were liable as for entailer's debts, and the creditors in such debts cannot be affected by any subsequent registration of the entail. If the adjudication of the lands was well led in the lifetime of Alexander Ross, it cannot be affected by his subsequent death.

But if compensation were pleadable at all, it could only have been pleaded in defence to the action of constitution on which the adjudication was founded. Not having been then brought forward, it cannot be pleaded, after decree in that action, either by Alexander Ross, or by any one in his right,—1592, cap. 141. Rae *v.* Clerk, *Mor.* 2571.

Moreover, compensation or set-off could not have taken place upon the balance, on the general account at 27th May, 1803, inasmuch as that balance was composed of Crown money appropriated for particular payments, which had come into the hands of Drummonds, with the knowledge that it had that character: compensation or set-off, therefore, could not have taken place without the assent of the Crown. If Ross and Ogilvie had become bankrupts on the 27th May, 1803, the Crown

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could, by writ of extent, have attached the whole balance in Drummonds' hands, and that by an extent *in chief*, and not *in aid*, for Drummonds, with the notice they had of the character of the money, would have been direct debtors to the Crown, the money being easily identifiable from the other monies of Ross and Ogilvie, from the circumstance that no money had been paid by them to the credit of their account between the day on which this Crown money had been received by Drummonds for them, and the 27th May; and if the question is to be taken as if the pure result of the accounts had been ascertained as on a particular day, the 27th of May, the right of the Crown as on that day cannot be thrown out of view. If, in another view, Ross and Ogilvie had, on the 27th May, 1803, required Drummonds to write off the sums owing upon the bond and notes, there was nothing with which they could have done so, as the balance on the general account in favour of Ross and Ogilvie was composed, not of their money, but of Crown money liable to the claims of the Crown, and which continued in that state until after the 27th of May.

The effect of the judgment below is in truth, that because the account went on after the 27th of May, 1803, the debt which was due before, and at, and after that date, was not due before.

Mr. Solicitor-General, *Mr. Pemberton Leigh*, and *Mr. Gordon*, for Respondents.

LORD CHANCELLOR.—The first question for consideration in this case is, as to the state of the account between the parties at the registration of the entail, viz., on the 27th of May, 1803. The defendants, the Messrs. Drummond, held a bond and two promissory notes of Ross and Ogilvie, amounting in the whole to 24,000*l.*, bearing interest at five per cent. For this sum Messrs. Ross and Ogilvie had credit in their banker's account with Messrs. Drummond, and the amount was afterwards drawn out

by them in the usual course of their business. The securities thus given were therefore for money advanced by Messrs. Drummond to Ross and Ogilvie, for that was the substance of the transaction,—a debt was thus constituted to the amount of the securities. The interest was from time to time charged in the banking account, but the principal was not included in that account, nor was it the intention of the parties that it should be included. It was obviously meant as a loan to be repaid when Messrs. Drummond should require the repayment. Although large sums of money were from time to time paid into the banking account by Ross and Ogilvie far exceeding this advance, such payments cannot be considered as liquidating this debt. It was not in the view of either of the parties that they should be so applied. This debt, after deducting a sum of 6000*l*., paid specifically on one of the securities, continued therefore to be a subsisting debt up to the date of the registration, viz., the 27th May, 1803.

On the other hand, there was on that day a balance due upon the banking account to Messrs. Ross and Ogilvie, amounting to 15,549*l*. 11*s*. This arose from a sum received by Messrs. Drummond in respect of a cheque upon the Bank of England drawn by the Paymaster of the Forces in favour of Ross and Company, payable to them or bearer, and which they had delivered in the usual course to Messrs. Drummond to obtain payment on their account. For this sum so received Ross and Ogilvie had credit as for so much cash in their banking account.

The balance thus admitted to be due, and so composed, constituted a debt from Messrs. Drummond to Ross and Ogilvie, and for such debt they might have maintained an action. It is said that the money received on the cheque was money belonging to the Crown, to be applied to a particular purpose by Ross and Ogilvie, as army agents. But that does not affect the question as between these parties. The money was to be applied by Ross and Ogilvie, or by their order. It was received on their

account by Messrs. Drummond, and unless the Crown had intervened, they were bound to pay it to them. It follows, therefore, from this view of the facts, that upon the day in question (27th May, 1803), there were mutual debts between these parties,—a debt due on the securities to Messrs. Drummond; a debt due on the balance of account to Messrs. Ross and Ogilvie. The parties might each of them have maintained a suit for the amount of their claim. In like manner they might each of them have set off that amount in a suit brought by the other.

The question to be considered is, as to the effect of this state of things upon the entail. If the debt due on the 27th of May, 1803, upon the banking account, could in point of law be considered as payment, or a discharge of the debt due in respect of the securities, it is clear, supposing the amounts to be equal, that the adjudication could not be sustained, for there would have been no debt to support it. Here, however, the debt was a subsisting debt, and the whole question turns upon the cross demand, the subject of set-off, or, as it is called in the law of Scotland, compensation.

From the moment the entail was registered, the right of the parties became fixed. They could not be changed by any subsequent act to the prejudice of the heirs of entail. At that period there were mutual claims. Upon taking the account, the balance would be the sum due; that is all that the creditor could properly demand in payment—all for which he could reasonably require security.

The form of a decree of adjudication, founded on the Act "Anent adjudications, 1672," is, "that so much of the lands "ought to be adjudged as shall be worth, and will pay and "satisfy the debt." And this is accompanied with the averment, that "the pursuers can get no payment of the said debt, "nor security for the same." How can it properly be said that the pursuer cannot get payment of his debt, nor security for the

same, where it is balanced by a debt due from himself to his debtor? It is obvious, therefore, that a plea of set-off, or compensation, would, if advanced at the proper period of the proceeding for such purpose, viz., in the suit of constitution, prevent the adjudication. But if this be so, then how, after the rights of the parties are fixed, can any neglect or omission on the part of the defendants in such a proceeding to take the necessary steps to ascertain the sum really due to the pursuer, be suffered to prejudice the heirs of entail? How can a decree in absence, in which the claim on one side only is brought forward, as in the present case, be allowed to have this effect?

The set-off, in this case, would reduce the sum due on the 27th May, 1803, to a sum less than 3000*l.* The sum due on the securities, including interest, amounted to 18,382*l.* 10*s.* The sum due on the balance of the banking account was 15,549*l.* 11*s.*

A sum much larger than this balance has been received from the collateral securities deposited with the bankers when the money was advanced, and the produce of which is primarily applicable to the liquidation of this debt. The defendants admit that they have received 1467*l.* on their securities, in respect of the promissory note for 3000*l.*, and 1569*l.* in respect of the promissory note for 10,000*l.* But it is unnecessary to go into detail upon this part of the case, for they have disposed of the securities for their own benefit, and have thereby much more than liquidated the balance due on the 27th May, 1803. It is clear, therefore, that the adjudication cannot be continued.

As to the promissory note for 7000*l.* of the 4th December, 1801, upon which some argument has been founded, it will not affect the result of this case. It appears by the paper entitled "Messrs. Ross and Ogilvie's debt account with Messrs. Drum-"mond," that this debt was paid out of the collateral securities forming a part of that transaction, as far back as the years 1804 and 1805, and in fact the payment is admitted in the statement of the defendant's reasons of appeal. Admitting that this was

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a part of the debt due on the 27th May, 1803, this, as well as the balance remaining of the 18,000*l.*, after deducting the sum due on the banking account, has been paid out of funds specifically appropriated for that purpose.

Nothing, therefore, remains payable in respect of the debt that was due on the day in question, and it follows, therefore, that the adjudication cannot now be sustained, and the judgment must therefore be affirmed.

LORD CAMPBELL.—My Lords, I heard this case with my noble and learned friend, and I entirely concur with him in the opinion he has expressed.

LORD BROUGHAM.—I entirely agree, also, with my noble and learned friends.

Interlocutor affirmed with costs.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the Interlocutor therein complained of be affirmed, with costs.

EDWARD WHITE—HOOPER and WATKINS, Agents.