[8*th May*, 1846.]

MESSRS. FINDLAY, BANNATYNE and Co., Merchants in London, and partners, and MARTIN T. SMITH, Banker, and ROBERT DEWAR, Merchant in London, *Appellants.*

MRS. DOROTHY DONALDSON, and Others, *Respondents.*

Consignation.—Payment into Court.—It is not a proper exercise of discretion, in regard to ordering payment of money into Court, to make such an order, after decree has been made for payment upon production of a title to receive payment, merely on an allegation of obstructions having been thrown in the way of obtaining that title, by the party ordered to pay.

IN the year 1827, the respondent, Mrs. Donaldson and her husband, and the trustees of a variety of deeds in relation to her estate, brought an action against the representatives of her father, the deceased Robert Finlay, John Bannatyne, her factor, *loco tutoris*, during pupillarity, Findlay, Bannatyne and Co., and their partners, merchants in London, and the appellants Smith and Dewar, and other parties, since deceased, trustees under a deed for payment of the creditors of Findlay, Bannatyne and Co. The narrative of the summons in this action was, that Robert Findlay, the father of Mrs. Donaldson, had died in the year 1802, possessed of very considerable property, leaving a son and three daughters; that tutors and curators had been appointed to the other children who had never made up curatorial inventories; that John Bannatyne, as factor, *loco tutoris*, to the respondent, Mrs. Donaldson, had neglected his duties as such, and never had lodged any inventory, nor invested her estate; that a considerable part exceeding 25,000*l.* of the funds of her father, were invested with or due

from the Company of Findlay, Bannatyne and Co., at the time of his death; that the respondent's brother, Robert Findlay, became a partner in that company; that the company had never paid to her father's estate what was owing to it, nor settled any accounts with his executors; that in the year 1826, her brother Robert's estate was sequestrated under the Bankrupt Act, and the firm of Findlay, Bannatyne and Co., and the partners, became insolvent, and conveyed their estates, as a company, and as individuals, to Smith, Leathley, Lynan, Tate, and Dewar, as trustees for payment of their debts. The summons then continued thus: "The pursuer, Mrs. Donaldson, "and the other pursuers acting for her behoof, have the most "direct and material interest to have her claims immediately "constituted against the various parties before specified." That the pursuer, Mrs. Donaldson's share of her father's estate, improperly intromitted with and wasted by the defenders, amounted to 8000*l.* less or more with interest since his death; that Findlay, Bannatyne and Co., and their trustees and assignees, had debts owing to them by parties in Scotland, upon which jurisdiction had been founded by arrestment. Upon this narrative the summons contained conclusions for count, reckoning and payment against the tutors and curators of her brother and sisters and their representatives, and against John Bannatyne, her own factor, *loco tutoris;* and then, as to the other parties, continued thus: "*Tertio*, the said Company o "Findlay, Bannatyne and Company, and John Bannatyne, "Robert Findlay, and Robert Buchanan Dunlop, the individual "partners of that company; and the said Martin Tucker Smith, "William Leathley, Henry Lynan, William Tate, and Robert "Dewar, as the disponees or assignees in trust, of the said com-"pany, ought and should be decerned and ordained, by decree "foresaid, to hold count and reckoning with the pursuers for the "whole sums due and indebted by the said company to the said "deceased Robert Findlay at the period of his death, and to make

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" payment to the pursuers of the sum of 10,000*l.*, less or more, " as the share of the said debts pertaining to and claimable by " the pursuer, Mrs. Donaldson, as one of the children and exe- " cutors of her deceased father."

Findlay, Bannatyne and Co., and the trustees for their creditors, put in a joint defence, in which they made the following admission:—" It is denied that any part of the funds of the " late Mr. Findlay were at his death invested in or due by the " copartnery of Findlay, Bannatyne and Company, against " which the present action is brought. That company was " created in the year 1813. It is true that the funds recovered " by Mr. Bannatyne acting for behoof of the late Mr. Findlay's " three daughters, his executors, were placed in the hands of " the company, and that, at their stoppage in 1826, there was " owing to those executors, of whom the pursuer is one, the sum " of 4,149*l.* 12*s.* 1*d.* For the pursuer's share of that sum, she, or " the parties producing a proper title, will of course rank on " the estate of the company and of the individual partners. " The defender, Robert Buchanan Dunlop, is also concluded " against, as having been a curator to the three minor children " of the late Mr. Robert Findlay. This was not the case." And in a subsequent statement of facts, that admission was repeated in this form:—" *Stat.* 3. Mr. Bannatyne, one of the " respondents' partners, recovered and intromitted with certain " funds, the property of the late Mr. Findlay's executors, and " by him the funds so recovered were placed in the respondents' " hands, and the respondents were on this account indebted, " at their stoppage in 1826, in a balance of 4,149*l.* 12*s.* 1*d.* " *Ans.* 3. Admitted that the defenders owe to the pursuers " 4,149*l.* 12*s.* 1*d.*, with interest since Whitsunday, 1826. Denied " that that sum is nearly equal to the amount of the debt owing " by the former to the latter.—*Stat.* 4. Beyond this balance, " the respondents owe nothing, either directly or indirectly, to " Mr. Findlay's executors." These admissions were followed

up by a plea in law, in these terms:—" In no view are the pur-" suer's creditors entitled to rank on the respondents' estate " for more than one-third of the above balance of 4,149*l.* 12*s.* 1*d.*, " or on the estates of their individual partners for more than " the residue of that third, after deducting what they may have " received from the company estate."

After the record had been completed, but while as yet the pleas upon it for the parties were undisposed of, and no proceeding had been taken for that purpose, the respondents, on the 9th of July, 1831, moved the Court, and, without objection on the part of the appellants, obtained a decree in these terms: —" Having heard counsel for the parties, on the motion for the " pursuers for an interim decree, decerns in favour of the pur-" suers against Findlay, Bannatyne and Company, as a company, " and John Bannatyne, Robert Buchanan Dunlop, and Robert " Findlay, all individual partners thereof, and against Martin " Tucker Smith, William Leathley, Henry Lynan, William " Tate, and Robert Dewar, trustees of the said company, for " the sum of 1383*l.* 4*s.* sterling; and allows said decree to go " out and be extracted *ad interim*, the pursuers always producing " before extract a competent title."

The cause was then remitted to an accountant, who in the year 1834 reported that one-third of 4,149*l.* 12*s.* 1*d.*, or 1383*l.* 4*s.* 0¼*d.*, and a third of other sums, amounting to 45*l.* 14*s.* 9*d.*, making an aggregate of 1428*l.* 18*s.* 9¼*d.*, was owing from Findlay, Bannatyne and Company to the respondents. Various proceedings took place upon this report, the last of which was an order by the Court for letters of incident diligence, at the instance of the respondents, for recovery of documents.

While the cause was in this state, the respondents presented the following note:—" In this process the accountant reported " that a balance of 1428*l.* 18*s.* 9*d.* of principal was due to the " pursuer, Mrs. Donaldson, as at the 26th day of December,

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" 1826, exclusive of interest, as therein stated. No objections " have been stated to that report on the part of the defenders, " and the pursuer's right to the above balance has been " admitted. In these circumstances it is proper that the said " sum and interest thereon should be consigned to abide the " orders of the Court. May it therefore please your Lordship " to move the Lords of the Second Division of the Court to " pronounce an order upon the defenders to consign the said " sum of 1428*l.* 18*s.* 9*d.*, with interest thereon, to remain " subject to the orders of the Court in this process."

The Court expressed the following opinions upon the hearing of this note:—

" *Lord Medwyn.*—Since the interim-decree was obtained in " 1831, for the balance admitted in the defences, an accountant " has given in a report, which ascertains a somewhat larger " balance to be due by Findlay, Bannatyne and Company. " This report is acquiesced in by them. They admit that this " sum is due. The interim-decree was properly qualified by a " condition that Mrs. Donaldson should produce a title. Her " proceedings to obtain that title have been obstructed, not by " any party pretending a preferable right to the sum, or dis- " puting her propinquity, but declining, right or wrong I " inquire not, to concur in the proceedings, which it has been " held must, in the circumstances, be joint by all the sisters. " This obstruction to the acquiring a formal title, when unques- " tionably the right is in Mrs. Donaldson, gives her an interest " not to allow her money to remain in her debtor's hands; and " the question is, whether the interim-decree affords any defence " against the motion now made for consignation. I think it " does not. If consignation were made, this would afford a " most sufficient defence against following out the interim- " decree; but I can see no ground for holding that the decree " affords any defence against the order for consignation of an " admitted balance larger even than that contained in the

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" interim-decree. This is a sufficient reason for preferring fol-
" lowing out the latter rather, than the former; and provided
" both are not insisted in, the defenders have no right to resist
" the latter rather than the other. The object is to resist both.
" It does not make the admission under the report less availing
" that a decree has been given for very nearly the same amount,
" which circumstances prevent the party from enforcing at
" present. It is said that the party against whom the order is
" craved is an insolvent company, and therefore that it should
" not be pronounced, because it cannot be obeyed. This
" reason would be equally sound to prevent decree being pro-
" nounced. But I never heard of this allegation being held
" sufficient in such a case. Here we have no commission of
" bankruptcy: in that case of divestiture of their property, we
" would call upon the assignee to appear, and failing his doing
" so, decree would be given against the bankrupts' estate, and
" the bankrupts individually; and they would obtain such pro-
" tection as law gave them. But though the company may
" have been insolvent in 1826, and their estate managed under
" a private trust-deed, that does not import that the parties
" may not have recovered their *status* since; they cannot have
" been living idle all this time. They have never paid this
" debt. It is still due; and I see nothing in their case why
" they should be treated differently from any defenders in
" Court, admitting that a sum due to the pursuer has been in
" their hands, as it appears, very ill, if at all secured, since the
" year 1826, and having no protection from the Bankrupt Acts.
" It is high time to have it placed in *manibus curiæ* when we
" are just commencing a new course of litigation."

" *Lord Cockburn.*—I am of opinion that this application
" ought not to be granted, and that an order for consignation
" should be refused. The application is one addressed to the
" discretionary powers of the Court. I am not satisfied, in the

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" first place, that the pursuer is in a position which entitles her " to make this motion. I have great doubts of that. But " farther, even if she were, I am of opinion that there are not " sufficient grounds to support it.

" This pursuer, years ago, got a decree *in causa* for the sum in " question. She endeavoured to put in force this decree, and in " doing so, she says she was obstructed by the present defenders. " So she was in one sense,—that is to say, that certain legal " objections were taken to her proceedings, and these legal " objections were sustained, and, I am bound to hold, rightly " sustained by the Commissary of Lanarkshire. His judgment " must be held as law while it remains unaltered. So that the " amount of the obstruction complained of is just this, that " she was prevented from proceeding contrary to law. Then " she delays taking any steps to bring that judgment under " review for nine years. In the meantime the amount with " interest is growing, and now amounts to a large sum (some " thousand pounds). After all this delay, she still fails to " enforce, or to endeavour to enforce her decree, but makes the " present application for consignation of the amount, for which " that decree was pronounced. I apprehend a party is not " entitled to enforce both these remedies at once. A decree " is the strongest remedy the law can give, excepting perhaps " consignation. But I do not think that where a party has got " decree *in causa* on the merits of his action, he is entitled to " the other remedy of consignation, merely on the ground that " the case happens to remain in Court on some incidental point. " Suppose a party gets decree on the merits to-day—the decree " becomes final, and the case comes before us next session, " perhaps on the question of expenses—could the party holding " the decree say, that no doubt he had got decree, that is, all " he could get under his action, but that the party would not " pay, and therefore he must have consignation also. I think " not. I do not think consignation applicable to such a case.

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"The following is the doctrine of *Mr. Erskine* on the subject "of consignation. 'Consignation of money,' he says, 'is a "'species of sequestration, by which a sum which is claimed "'by different competitors is consigned or deposited in the "'hands of a neutral person, to be delivered up by him to that "'claimant to whom it shall be adjudged by decree.' This "always implies that there is a dispute about the right to the "fund, and that the consignation is to be prior to decree. "After decree, I do not see that payment can be enforced by "an order for consignation. Now here there is no dispute "about the right to the fund, and decree has been given for it. "No doubt it is an interim decree, but it is a decree on the "merits, and final, as far as that balance is concerned. As to it, "she has got all the remedy we can give her; she got that "remedy thirteen years ago, and I do not think that she can "now be heard, after all that interval, to demand consignation. "I therefore think, in the first place, that the pursuer is not in "a position to make the demand at all, and that even if she "were, the circumstances are not such as to make an order for "consignation proper. But I farther think that we must look "to the probable consequences of this motion. This is an "application to our discretionary power. I admit we are not "to speculate on uncertain contingencies which may follow our "judgments. But, on the other hand, we are not to shut our "eyes to their plain and obvious consequences. Now, this "application is made against parties who this pursuer herself "states to be insolvent in her own summons:—'That in the "'year 1826 the said *Robert Findlay's* estate was sequestrated, "'under the authority of our said Lords, and the said company "'of Findlay, Bannatyne and Company, and the said Robert "'Buchanan Dunlop, Robert Findlay, and John Bannatyne, as "'partners of that company, became insolvent, and conveyed "'their estates, both as a company and as individuals, to Mr. "'Martin Tucker Smith, banker, in London, Mr. William

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"'Leathley, Mr. Henry Lynan, Mr. William Tate, and Mr. "'Robert Dewar, merchants in London, as trustees for the "'payment of their debts.' The parties are thus alleged to be "insolvent before the institution of this action. That is the "averment of the party herself who makes this motion. Now, "this being the case, it is impossible for us to shut our eyes to "the necessary result of this motion. An order for consigna- "tion is a much more stringent remedy than an interim-decree. "The interim-decree may simply be carried out by the ordinary "executorials of the law, but an order for consignation pending "the cause has this effect, that it necessarily stops the party "from proceeding farther in the suit till the order is complied "with, and if it is not obtempered, the result is just that which "follows the failure to fulfil any other order of Court, namely, "decree against the party for default. Now, the order here "proposed is one which the party cannot, and is not entitled to "comply with. In case of a sequestration, it would be perfectly "clear; a trustee on a sequestrated estate could not be "ordered to consign the amount of the debt due by the "bankrupt, because he would say, I have no funds to pay all in "full, and I must divide rateably among all the creditors. I do "not see that this case is at all different; one of the parties has "been sequestrated,—the others are averred to be insolvent, "and their trustees are called as defenders. They can only pay "a dividend. If this motion were for consignation of a divi- "dend on the sum in the interim-decree, it would be different, "but we are asked for an order for consignation of the whole "amount from insolvent parties who cannot pay, and from their "trustees who are not entitled to pay in full. What is the "result? This pursuer will return to us and move for decree, "in respect of non-fulfilment of this order; and for myself, if "such a motion were made, I should hold myself imperatively "bound to grant it.

"I therefore think the motion must be refused.

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"*Lord Justice Clerk.*—In this case an interim decree was "pronounced for 1383*l.*, in 1831, against Findlay, Bannatyne "and Co., and the partners of that company, and the trustees "or assignees who have intromitted with their funds, but "which was admitted to be only against the latter *qua* trustees. "As against the others it was an ordinary personal decree. "The company has not been rendered bankrupt—insolvency of "*all* the partners has never been averred. If there had not "been the obstructions mentioned to us, thrown in the way of "the completion of the title of Mrs. Donaldson, the sum must "have been paid in full. I mention this, because there can be "no distinction between the right to enforce payment in "full, and consignation of the whole sum. Indeed, when "parties are not legally bankrupt, but carrying on expensive "litigations, whether they may be under trust or not, to which "those prosecuting them have not acceded, they must be taken "and treated as able and bound to pay in full, until their funds "shall be shown to be exhausted, or not paid to others after "full notice of this demand.

"Then it turns out that the pursuer is not able, and not "from her fault, to complete a title. I shall assume the opposi-"tion to be by a party over whom the defenders have no controul. "I shall assume the opposition of Mrs. Bannatyne does not "originate with her husband, and that the interest to prevent "and delay payment has no influence in these proceedings. I "am willing to lay aside the terms of the inventory proposed "by Mrs. Donaldson, which turned out to be perfectly harmless, "and to which the usual oath might have been given.

"Still, what sort of defence can these difficulties afford to "the debtors against consignation of that sum admitted to be "due, and for which interim-decree went out in 1831. If "legal difficulties occur, not as to the pursuer being the party "in right of the money, but to the completion of her title, "owing to the proceedings of others who have no claim to the

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" sum due to her, but appear as co-executors, only after that " decree is pronounced, in order to prevent her confirmation, " this is just the kind of case in which consignation is, by the " practice of Court, and the reason of the thing, usual and " proper. The debtor ought not to hold the funds—ought not " to be trusted with the funds—for which interim-decreet went " out, seeing that he has no sort of interest in this unexpected " and strange litigation between the pursuer and those entitled " to join in but thwarting the completion of confirmation. " Pending that dispute, the party liable to pay ought to consign. " I think the case is exactly within the principle of *Mr. Erskine.* " *He* has no right to hold the money, and is the last to be " trusted with it. I think this is a plain and simple matter, " admitting of no doubt. Then the parties told us they could " not consign. Before that excuse can be taken against con- " signation, we must be satisfied on proof that they have not " funds sufficient for that purpose. The averment I cannot " take. That they have funds for carrying on, and have carried " on this most expensive litigation since 1831, is quite sufficient " to prevent me listening to any such excuse. At present the " demand is for confirmation, that is, that they are not to hold, " perhaps, as a means of carrying on this very litigation, the " sum which belongs to the pursuer, and for which there is an " interim-decree.

" It was said that this may be followed up by a demand for " payment. Whether that is to be made or not can be decided " at another stage, and is not now the question.

" When the decree was pronounced it was for the full sum. " The trustees, if they aver that they have not funds to pay in " full, must shew their intromissions, the dates and amount of " payments to other creditors, and the partners who are not " insolvent must find some legal ground for payment not being " made. In the mean time it would be quite ludicrous to allow " these parties who have carried on, and are carrying on most

" obstinately this litigation, to pretend to say that they cannot " produce the sum in question.

" By the accountant's report, the sum is shown to have been " 1428*l.* in 1826, and for that sum an order for consignation " should be pronounced against all the parties named in the " interim-decree.

" If this had been a sequestration, the law limits the mode " of recovery to ranking, if the party is a creditor. If it is an " action against the sequestrated estate, the trustee must have " funds, else he should not resist. The discussion as to the " obstructions to Mrs. Donaldson completing her title as " executrix, taking entirely and exclusively the account of it by " the defenders themselves, has tended to confirm me in the " result which I formerly stated, that the Court ought not, on " the merits, to relieve Mr. John Bannatyne of his obligation to " make a separate account under the act of sederunt, as factor " *loco tutoris*, and ought to leave him to settle with Findlay, " Bannatyne and Company, for the moneys which, I stated that, " in my opinion, he ought never to have lent to them. And " when the cause returns to us, I trust that point will be " reconsidered."

The following interlocutor was then pronounced, which is the one appealed from:—" Ordain the defenders, Findlay, " Bannatyne and Company, as a company, and John Banna- " tyne, Robert Buchanan Dunlop, and Robert Findlay, the " individual partners thereof, and Martin Tucker Smith, Wil- " liam Leathley, Henry Lynan, William Tate, and Robert " Dewar, trustees of the said company, to consign in the Royal " Bank of Scotland, or in the Bank of Scotland, the principal " sum of 1428*l.* 18*s.* 9*d.* sterling, therein to remain subject to " the orders of the Court, and that on or before the second " box-day in the ensuing vacation.

Mr. Bethel and *Mr. Moncreiff* appeared for the Appellants.

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Mr. Bethel had just concluded his statement of the facts and was about to argue the question appealed, when he was interrupted by the House, which called upon the respondents to support the interlocutor appealed from.

The Lord Advocate and *Mr. J. Russell* for the Respondents.—The decree of 1831 ascertained that 133*l.* 4*s.* was due from the defenders.

[*Lord Cottenham.*—But not the fund from which it was to be paid?]

The parties not only did not object but consented to this interlocutor. They were bound, therefore, either to pay or consign in obedience to it, or, as regards the trustees, to show that they had no funds in their hands. Then came the accountant's report, which confirmed the interlocutor in regard to the amount which was due. That report was not objected to, nor quarrelled with, in any way. The parties held the report, on the contrary, to be good for them.

[*Lord Cottenham.*—The sum in the interlocutor of 1831 is not the sum in the accountant's report, it is the latter that is ordered to be brought in.]

But no objection was taken to the report; this, therefore, was equivalent to an admission by the parties, of the correctness of the sum reported to be due from them.

[*Lord Cottenham.*—No account was taken against the trustees of the trust monies, but the order is made upon them.]

The decree of 1831 made them liable to pay, unless they could satisfy the Court that they had properly applied the funds come to their hands, and had none remaining. When the order for consignation was asked they should have shown this; the *onus* lay upon them to do so. The truth is, that the trustees had received funds greatly exceeding the sum in the decree. The action was founded upon arrestments of funds exceeding 8000*l.*, all of which have been drawn by the trustees.

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[*Lord Brougham.*—Very well, you may ultimately get decree upon that.]

When the Courts in Scotland are satisfied, from admission of the party or the evidence in the cause, that a certain sum will ultimately be due, they are in use, either to give interim-decree for immediate payment, or to order the money to be consigned subject to the orders of the Court.

[*Lord Brougham.*—The rule observed in the Courts of this country is to be found in Richardson *v.* Bank of England, 4 *My. & Cr.* 145. They will not order money to be brought into Court upon anything short of a distinct admission of the party that the money is owing from him: and the reason of the rule is very obvious; for, were it otherwise, the Court might have to hear the whole cause twice over, upon the motion for bringing in the money, and again upon the final hearing. So strongly did *Lord Eldon* feel the propriety of adhering to the rule in one case, Quarrel *v.* Beckford, 14 *Ves.* 177, that although, from the schedule to the defendant's answer, (which is part of the answer,) if a column of figures had been summed up it would at once have appeared what was owing from the defendant, and the plaintiff had done this by an accountant, upon oath, yet his Lordship refused to make the order asked, because it did not appear that the defendant had admitted any specific sum.]

No such rule is propounded in Scotland. If the Court is satisfied, *quovis modo*, that a sum will ultimately be payable, it makes the order which it judges will best secure the fund for the party to whom it is payable. Here the party consented to the decree of 1831, and all that was requisite to enable his opponents to compel payment under that decree was the title of Mrs. Donaldson, as executrix, which the appellants have used every means to obstruct her in obtaining.

[*Lord Cottenham.*—If the trustees had administered their trust, were they to pay this money over again out of their own pockets? How were they to have an opportunity of showing

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that they had no funds in their possession; no account had been taken as against them when the decree of 1831 was made.]

That decree did not prevent them showing this: they could have done so at the time the decree was asked, or at any time afterwards.

[*Lord Cottenham.*—It is difficult to see how upon principle you could go against the insolvent, and in the same suit also sue the trustee for payment of his debts.]

We repudiated the trust.

[*Lord Cottenham.*—Your summons does not repudiate the trust; it seeks a remedy against the trust fund.]

Though in England it would not be competent to sue the trustees without going in under the trust, it is otherwise in Scotland. We were entitled to sue the trustees along with the insolvent, as intromitters with the funds of our debtor. No exception was ever taken upon the ground that they were improperly made parties. If the decree of 1831 was right, and it must be assumed to be so, as it was never complained of, then the order for consignation merely follows up the decree, and is precisely in the same terms with the decree. The decree does not create a personal liability; neither does the order for consignation as against the trustees, for they are merely sued as trustees, and they can at any time relieve themselves by suspension, showing that they have administered all the funds come to their hands. But even if the decree did involve a personal liability, it has never been complained of. The order is in identical terms with it, and therefore cannot either be complained of.

Mr. Bethel in reply.—The decree of 1831 was neither in form nor intention more than one of constitution. That was all, indeed, that the respondents asked by their summons. The decree was not made upon a hearing of the cause, but upon motion, and it did not dispose of any one of the defences set up by the parties, which, if it had been a decree for payment, it

would have done; these were left to have their full effect upon the record. The trustees did not undoubtedly object to the decree in the form in which it was made, because they had no interest to do so. They admitted their liability to account, but only for the trust estate, and the decree only ascertained the amount for which the respondents were entitled to inforce that liability; but the order for consignation imposes a personal liability upon the trustees without regard to whether they may, or may not be in possession of trust funds. There is nothing upon the record showing either the amount of funds come to their hands, or how they have been administered, or the sum for which the trustees are bound to account. But if the decree be viewed as one for payment, as contended for by the respondents, it exhausted the summons so far as regarded the sum contained in it. Any further proceeding in Court in regard to it was incompetent. It then lay with the party to extract the decree, and enforce it by the ordinary diligence of the law. But even if further proceeding in Court were competent, the decree and the order are, in truth, conflicting. By the decree the money is to be paid to the party, and by the order, which does not recal the decree, it is to be paid to the Clerk of the Court.

LORD BROUGHAM.—My Lords, I really should be sorry to occupy your Lordships' time by going at any length into this case, in moving the judgment of your Lordships that you should reverse this order, because we have so often in the course of the argument referred to the grounds upon which that reversal must proceed, and to the total inadequacy of the grounds stated for the decision of the Court below, both as regards the want of any specific ground for ordering the money to be paid into Court, and as regards the position of the parties chiefly implicated in this order, namely, the trustees of the sequestrated estate, or under the insolvency, (if there was no insolvency, I care not—I

care not which it be,) who were only in a representative capacity as representing the fund, and who have not admitted that fund to be in their hands, or that they are liable to pay if the debt was constituted against the party. We have so often adverted to those grounds, and they appear to me to be so clear, that I think it unnecessary to say more than that I entirely concur in the opinion of those who think that this interlocutory order cannot possibly stand.

I am anxious, however, to guard myself against its being supposed that I desire to lay down any general rule respecting the payment of money into Court, or as to the force and effect of decrees of consignation, or the force and effect of an interim decree. I do not at all proceed upon that, but upon the general principle, that if there was a discretion here, which all such orders assume, it was not properly exercised in the present case. We lay down no English rule for the government of the Scotch Courts in this matter, but proceed upon this simple ground, that this being a matter in the discretion of the Court, and the Court having a right to exercise that discretion to the effect of ordering payment of money, there was not a sufficient medium *concludendi* whereupon they ought to have proceeded in the exercise of that discretion, especially with regard to persons filling these peculiar situations. I mention this that, it may not be supposed that we are interpolating the English practice into the Scotch Courts.

LORD COTTENHAM.—My Lords, I am entirely of the same opinion. If it were necessary to give any opinion as to the rules which regulate consignation in Scotland, I should have felt great difficulty in coming to any conclusion in the present case adverse to the opinions expressed by a majority of the Court below; for in the first place our information upon that subject has been very scanty with reference to any authorities on which to rely; but I find so much of principle involved in

this interlocutor, applicable to a case of pure discretion in the Court, that without at all adverting to the points of practice which have been discussed, or to the construction to be put upon the interlocutor of 1831, or to the effect in point of practice of the order 1844. But looking at it merely as an exercise of the discretion of the Court, I am so satisfied that that discretion was not properly exercised, that I quite concur in the opinion which has been expressed by the noble and learned Lord, that the interlocutor in this case ought not to stand.

Whatever may be the true character of the interlocutor of 1831, it at least declares certain rights of parties as creditors against those who are their debtors, and against certain other persons who are alleged to have trust-funds in their hands, under a deed of trust, the object of which was to make payment among the creditors of that trust. That interlocutor, from the want of the title of the pursuer being completed, from 1831, when the interlocutor was pronounced, to 1844, could not be carried into effect. There was a defect in the title which prevented the party from having the benefit of that interlocutor. Pending that defect of title, the same infirmity remaining in 1844, as existed in 1831, an order was made to pay the money into Court.

Now according to the usual course of proceeding in Scotland, as in any other country, there is a certain process known by which the orders of the Court are to be enforced. That process could not be resorted to under the circumstances of the parties in whose favour the interlocutor of 1831 was pronounced. But this could not constitute a ground for departing from the usual course, and for that reason, and that reason alone, doing that which to the defenders is equally prejudicial, namely, compelling them to pay money into Court, in order to take the money out of their hands.

It would be strange that because you cannot have the benefit by a regular interlocutor, you are to have recourse to an irre-

gular or discretionary proceeding of the Court, to compel the party to pay money into Court. That appears to be one of the grounds in the minds of those who pronounced this interlocutor, and it is rather assumed that proceedings have taken place, which continue the impediment to the pursuer's completing his title.—That was *dehors* the cause. Whatever may have been the history of that proceeding, or whether the defenders were connected with those difficulties, is a matter which it was impossible for the Court in which the interlocutor was pronounced to enter into the discussion of. If that be not a ground to support this interlocutor there is nothing else, for the matter remains as it was in 1831, in every other respect.

Then we must look to the practical effect of this order. Whether the parties could or not have the means of protecting themselves against it by applying to the Court by suspension is argued by Mr. Bethel very properly. They could only do so by transferring their trust account from the country, in which it was constituted into another country, merely because the pursuer has there made them parties to this cause, and if it is to operate indirectly as a compulsory means of making them do that, this would be of itself a strong objection to the order which has been pronounced. We do not know whom we might be injuring by such a course. Many other persons are interested in this trust fund, and the effect of this would be to transfer all the administration of the trust here to the jurisdiction of the Court of Session, which may or may not have the means of doing justice between the parties in the administration of the trust fund. If it is to operate as a compulsory process to make the parties pay in all events, it would be obviously unjust, for nothing passed in the cause to show their liability or the right of the pursuers to take out of their hands that which remains in their hands for the purpose of being administered under the deed which constitutes the trust.

These are the great difficulties which occur in coming to a

conclusion upon the question, whether the discretion vested in the Court below, has been properly exercised or not? These proceedings are quite adverse to our notions of the manner in which the jurisdiction of Courts is regulated in this country as to paying money into Court. Looking only to what we are told by the Judges, this is a matter of pure discretion, the exercise of which is supposed to be justified by the extraordinary circumstances existing in the present case. I am clearly of opinion that the circumstances stated do not justify it.

LORD CAMPBELL.—My Lords, I am very glad that my noble and learned friend, who first addressed your Lordships in moving this judgment, cautiously stated, that this House lays down no rule whatever with regard to consignation. It is a rule, and a very salutary rule in the Courts in England, that they will not order money to be paid into Court unless there be a clear admission of the money being in the hands of the party, because, otherwise, they would be trying the cause twice over. They could not safely, if there be any contest, make such an order without hearing the opposite side, and hearing a reply, and coming to a conclusion upon the whole matter before them. But though such is the law and practice in England, we do not, by any means, say that that law and that practice shall be adopted in Scotland, though we have great reason to regret that no rule of the kind does prevail there, and that it is a mere matter of discretion in each particular case, but, such it being, such we of course allow it to remain.

But, my Lords, looking to what has been done in this case as an exercise of discretion, it seems to me clearly, after all we have heard upon the subject, that the discretion has not in this case been soundly exercised, because as it appears to me, if the law of consignation is at all applicable, I know of no instance to which the law of consignation was ever so applied; for it resolves itself into this, that consignation is

made supplementary to process of execution. You cannot have process of execution *rebus sic stantibus*, and you then resort to consignation. It seems to me that that was never done before—that it would lead to very inconvenient consequences in this case, and that it would be a very bad precedent to establish.

For these reasons I agree with the opinion already expressed by your Lordships, that the order should be reversed.

[*Lord Brougham.*—This decision only removes this interim order out of the way, and then the cause will go on just as before. We say nothing upon the merits in any respect.]

Ordered and adjudged, That the interlocutor complained of in the appeal be reversed.

OLIVERSON, DENBY, and LAVIE—LAW and ANTON, Agents.